

[Redacted]

From:

[Redacted]

Sent:

31 July 2017 14:45

To:

[Redacted]

Subject:

BSB consultation on standard of proof in disciplinary cases

Attachments:

Response [Redacted] to the Bar Standards Board Consultation on the Standard of Proof in Disciplinary Proceedings.docx

[Redacted]

I am grateful to the BSB for granting extra time for submitting responses to the consultation. Attached is my personal response, which is not the same as and does not represent that of the Criminal Bar Association.

With best wishes

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]



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This email has been scanned for viruses and malware.

**Response [REDACTED] to the Bar Standards Board
Consultation on the Standard of Proof in Disciplinary Proceedings**

1. This is my personal response to the Consultation. The Criminal Bar Association has given its corporate response separately.
2. The profession should ensure that the public have confidence in its ability to identify and sanction lawyers who are guilty of malpractice. This is a matter of preeminent importance in maintaining public confidence in the rule of law.
3. There need be no conflict between the protection of the public and the protection of lawyers from malicious or unfounded complaints.
4. 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.
5. Many disciplinary offences have no equivalent criminal offences. In cases where they are in common (e.g. complaints of dishonesty or sexual offences), disciplinary proceedings normally come after criminal proceedings, so that matters will already have been proved to the criminal standard. I do not see that (in contested cases) it is necessary to prove them again to the same standard. The analogy is with civil actions against convicted criminals by their victims.
6. Where a barrister has not been charged with or has been acquitted of a criminal offence, the profession should not be prevented from taking action against him in an appropriate case, if sufficient evidence of misconduct is available.
7. It is hard to justify the dismissal of a complaint which the Bar disciplinary tribunal finds more likely than not to be proved, even if it cannot be sure. The lower standard of proof does not equate with a lower level of scrutiny of the evidence.
8. If the disciplinary process is not robust enough to detect and weed out false complaints long before the final decision is made, then the process is at fault.

Consultation questions

Q1: 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?

Q2: 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?

Q3: 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?

Response

Q1: **YES**

Q2: **NO**

Q3: **NO**

[REDACTED]

[REDACTED]

31 July 2017

[Redacted]

From:

[Redacted]

Sent:

21 July 2017 19:29

To:

[Redacted]

Subject:

Review of the Standard of Proof Applied in Professional Misconduct Proceedings Consultation

I strongly believe that the BSB should not change its regulatory arrangements to allow for the civil standard to be applied to allegations of professional misconduct. These are serious allegations against professional individuals which could lead to the end of careers. It will be quite wrong for this to be the case when the tribunal are not sure that a case is proved, especially in matters where dishonesty or matters akin to criminal offences are alleged. There is no empirical evidence to support the assertion that the public interest is better protected with a civil standard of proof. Furthermore, it will be quite wrong if the two branches of the profession were to apply different standards in their disciplinary proceedings.

Many thanks.

[Redacted]

[Redacted]

[Redacted]

[REDACTED]

From:
Sent:
To:
Subject:

[REDACTED]
21 July 2017 15:59
[REDACTED]

Response to consultation re: standard of proof in disciplinary proceedings

[REDACTED]

I am a barrister (Called 1999) at the independent Bar practising from [REDACTED]
[REDACTED] I have a criminal practise and I both prosecute and defend. I write this e-mail as my response to the above consultation.

The consultation paper uses a number of phrases that cause me to have concerns that conclusions are being reached based on unsupported declarations describing a mood in favour of change. For example, the opening sentence of paragraph 10 talks about the 'prevailing view amongst both the non-legal and legal professions'. The remainder of the paragraph, however, seems to suggest what the wording of the opening sentence ought to have been is precisely what is later used in paragraph 23, i.e. it is actually 'received wisdom within the professional regulatory sphere'.

It simply does not follow, however, that a standard of proof that, in historical terms, has only recently become more frequently-used by other regulatory bodies is to be taken as universally appropriate in all regulatory spheres. To do so ignores the fact that public interest factors vary from profession to profession.

It is conceded in paragraph 23 that there are no clear empirical studies to support the proposition that the change is in the public interest. What concerns me is the bald assertion that the public will not accept different standards of proof for different regulatees. This would, once again, ignore the particular public interest factors peculiar to barristers and, in particular, criminal defence barristers.

The proposal that the standard of proof be lowered essentially amounts to a complainer's charter in an area of law where lay clients are often belligerent and dishonest. Also, it may have an adverse impact on long-term recruitment to the criminal bar. I suggest neither would be in the public interest.

As you will no doubt have already gathered, my response to Question 1 of the consultation is a resounding 'NO'. However, in the event the BSB decides the change is, in principle, appropriate, I would answer Question 2 in the affirmative, particularly in an age where there is an increasing trend towards instructing barristers by direct access. Moreover, it would be intolerable and grossly unfair if a situation could arise where a complaint is made about the overall conduct of proceedings by a legal 'team' involving one or more of both barristers and solicitors with each being judged by different standards of proof.

For completeness, I do not feel in a position to opine on Question 3.

Yours faithfully,

[REDACTED]

[REDACTED]

From: [REDACTED]
Sent: 21 July 2017 14:38
To: [REDACTED]
Subject: Standard of Proof in Professional Misconduct proceedings

I am a criminal practitioner and a tenant at [REDACTED]

Question 1
No.

Question 2
Even if the BSB was minded, in principle, to lower the standard of proof it would be unfair for the two halves of the legal profession to be judged to a different standard.

Question 3
I have no reason to think so.

[REDACTED]

[REDACTED]

From:
Sent:
To:
Subject:

[REDACTED]
21 July 2017 14:47
[REDACTED]
Consultation response

Please find below my response to the BSB's consultation.

Consultation questions

1. Q1: 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?

I was for some years on the BSB's panel of prosecuting advocates. Had the civil burden of proof applied, I have no doubt that more appropriate decisions would have been made in some cases where the panel simply couldn't be satisfied, on the evidence, so that they were sure that the complaints were proved. In at least two cases the lower standard would probably have led to conviction on the more serious charges on the Indictment and more severe sanctions, such as suspension from practice or disbarring, being applied for the particular misconduct alleged. I consider that this move would be in the public interest, despite the potentially life-changing effect of denying a barrister his/her ability to practise.

2. Q2: 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?

Yes. It makes no sense for the higher standard to continue to be applied in the sister profession.

3. Q3: 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?

I cannot see what adverse impacts might result in these circumstances, other than the increased likelihood of a case being proved against any advocate, whether with protected characteristics under the Equality Act or not. In any event, representation in serious cases is provided under the Bar Mutual scheme which every member of the Bar has to subscribe to as a qualification for a practising certificate.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

From:
Sent:
To:
Subject:

[REDACTED]
21 July 2017, 13:30
[REDACTED]

Consultation on Standard of Proof

Dear [REDACTED]

Re: Response to consultation on the standard of proof for professional misconduct.

I write to express my instinctive disquiet that such a change is contemplated. I apologise in advance that the points made below are not as fully developed as I would like, for reason of only shortly becoming aware of this consultation. I feel it is so important to be considered carefully that it should not, however go by without remark and I outline my initially concerns below.

One of the reasons for the proposed change as expressed in your consultation document is to consider what is in the public interest, to protect the public and provide them with the highest standards of service.

It is my view that the BSB must balance the public interest with the interests of its individual member practitioners.

I suggest that the BSB has a duty to support and protect its members from spurious litigation that could do significant damage to members of the Bar. Please note, we do not have a union as such and rely upon the goodwill and general integrity of the Bar to assist with issues arising.

Above and beyond the simple fact that no professional person should face ruin, if a complaint involves an allegation of dishonesty, without full testing to the criminal standard, there are reasons unique to our profession as to why our profession must retain the highest standard.

In contemplating such a change practical experience as opposed to the theoretical or academic view on the issue must be taken into account. This is particularly important to recognise when assessing the issues that face the criminal barrister as opposed to civil practitioner. The reality of experience and risk is in many cases are very different and expose a criminal barrister to very high levels of risk on a daily basis.

For example, in the current climate, we, as the norm, no longer have the support of solicitors at court, nor noting clerks for example to keep additional and full notes of conferences and matters in hearings. Instructions may not be fully fleshed out and have to be taken on the hoof at court.

By comparison, a Doctor has to have every aspect document before making any action.

This is all the more acute for the junior bar who experience the modern Magistrates' Court, where speed often seems to supplant every other consideration and appeal for sufficient time to take full endorsement.

This is a vital consideration when so much decision making, on one's feet, in terms of tactical considerations, for example whether to ask a particular question or take a point, might lead a disgruntled client.

The lay client, in the world of crime is of course, frequently found to be dishonest. The barrister is ever alert for the problems this may cause. However, might the lowering of the standard of proof, potentially

give rise to more complaints, given the greater likelihood of success at the lower standard, with the end objective of having the case appealed. Therefore this could lead to a rise in the number of misconduct complaints brought and appeals of conviction sought.

Many thanks for your consideration and work on the issue.

Kind regards,

A large area of the document is redacted with black bars, obscuring the signature and any text that might have followed. The redaction consists of several horizontal bars of varying lengths, with the longest one extending across most of the width of the page.

[REDACTED]

From:
Sent:
To:
Subject:

[REDACTED]
21 July 2017 13:19
[REDACTED]

Fwd: Response to Consultation re: Standard of Proof

[REDACTED]

I forgot to mention in support of my argument that when I first started as a Criminal Barrister I would be accompanied by a solicitor's clerk whenever I had contact with the lay client. The clerk would note down my conference and any advice given to the lay client. These clerks were funded by the Legal Aid Board and ensured that counsel had a degree of protection in relation to complaints coming from the lay client. The Legal Services Commission no longer funds a clerk and this leaves the barrister in a very difficult position. It is not possible to write down everything that is said and done contemporaneously, particularly whilst dealing with matters at court, which leaves a Barrister in a very vulnerable position in a disciplinary hearing if the burden of proof were to become to the balance of probabilities because it would essentially come down to one person's word against another's.

[REDACTED]

Begin forwarded message:

From: [REDACTED]
Subject: Response to Consultation re: Standard of Proof
Date: 21 July 2017 at 13:15:26 BST
To: [REDACTED]

Dear [REDACTED]

Please forgive this brief response.

I practice exclusively in the area of Criminal Law. We frequently work for or against those who are dishonest. We do so in an underfunded, toxic and often shambolic environment.

It is for this reason that I invite the BSB to retain the criminal standard of proof in disciplinary hearings.

With best wishes,

[REDACTED]

[REDACTED]

From:
Sent:
To:
Subject:

[REDACTED]
21 July 2017 13:08
[REDACTED]

Standard of proof

Dear Sir

I respond as follows;

Q1: 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?

I strongly object to this change. When an individual stands to lose their livelihood the upmost care should be exercised and highest standards applied.

Q2: 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?

Even if the SDT changes we should make our own decision on this matter

Q3: 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?

Yes through exposure to stress

[REDACTED]
Barrister
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

[Redacted]

From: [Redacted]
Sent: 21 July 2017 09:49
To: [Redacted]
Subject: Opposing change to standard of proof

Dear [Redacted]

I am writing to voice my concern to the change of the standard of proof in disciplinary proceedings against barrister.

Firstly, I wonder what has led to any suggestion that there is any need for change. I am concerned that this may have serious consequences on the way barristers practice. Our duty is promote fearlessly our client's best interests, and of course if there is a proper complaint, it should be taken seriously. However, this may lead to increased complaints, and unlike other professions, we often have no witness of our conferences with clients, or discussions with opponents, particular those acting in person who may be most likely to bring a complaint. I would be extremely concerned that in those situations, if the balance of probabilities was adopted as the appropriate standard, barristers would have no other professionals to support their case, and could easily fall victim to malicious complaints that are not well-founded.

For those reasons, and others I'm sure I haven't thought of, I strongly oppose any suggestion to change the standard.

Yours sincerely,

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

From: [Redacted]
Sent: 20 July 2017 17:40
To: [Redacted]
Subject: Standard of proof consultation response
Attachments: BSB standard of proof consultation response -~~Oliver Mitchell.pdf~~

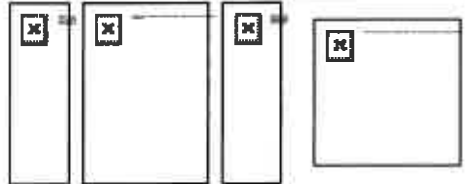
[Redacted]

Please find attached my response to the above consultation. For the avoidance of any doubt, is my own response, and not a response on behalf of my chambers.

Kind regards
[Redacted]

[Redacted]

[Redacted]



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Consultation response: standard of proof in professional misconduct proceedings involving barristers

[REDACTED]

I am grateful for the opportunity to respond to the above BSB consultation, which relates to a question of principle and practical importance. I respond below to the first and second questions posed by the consultation paper.

I am a practising member of the independent Bar. My practice centres upon commercial and property law, in which the civil standard of proof is applied.

Q1: 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?

On balance, no.

Balance with public protection

Disciplinary proceedings are, or can be, quasi-criminal. They impose potentially severe, possibly life-altering sanctions.

It would unreasonably compromise fairness to a respondent in disciplinary proceedings to permit potential disbarment based on a 51 percent possibility, when even the most minor criminal conviction would not be permitted on that basis. Apparent public perception ought no more to justify this than a revision of the standard of proof in criminal trials.

The civil standard of proof works well when applied to a dispute between two equally-interested parties. A disciplinary complainant is not, however, a party to disciplinary proceedings. Disciplinary proceedings focus upon the defendant, and as such the criminal standard of proof is appropriate.

Consistency with other professions

I agree that regulatory consistency is desirable. I do not, however, agree that this end justifies a change in regulatory approach in itself.

It is also worth noting that not all regulatory contexts are necessarily alike. It might be thought (without minimising professional misconduct by a lawyer) that the pressing need to prevent an unfit medical practitioner from practising, and from making errors which are particularly incapable of adequate remedy by way of appeal or civil claim for damages, is, for example, particularly striking.

In my view, the BSB should take an independent decision as to what is correct for the regulation of barristers. I consider that it should take into account consistency with other regulators as desirable, but not as a factor outweighing the importance of striking the correct balance for regulating the Bar.

Direction of travel

I would query whether the BSB is right to identify a 'direction of travel' based upon *The Solicitors Regulation Authority v Solicitors Disciplinary Tribunal* [2016] EWHC 2862 (Admin). It is clear from this case that the court considered that there was more to be said regarding the standard of proof, at least as applied to the SDT. It is equally clear, however, that there was an express refusal to decide the point on an *obiter* basis. To determine regulatory policy on the basis of the perceived view of judges on a point which they expressly declined to determine cannot be correct.

A middle ground?

I recognise that it is unfortunate from the viewpoint of public confidence for a barrister to avoid a misconduct finding despite likely guilt. This is particularly acute should there be repeated instances in respect of the same practitioner. I would, however, also question whether there is an established track record of significant damage to public confidence as a result of barristers escaping disciplinary sanctions and, if so, to what extent this arises out of cases where the civil standard of proof would have made a difference.

Given the above, I would, in principle, support a system in which a tribunal could be asked to apply the criminal standard in some circumstances and the civil standard in others. Most obviously, the distinction could be between a finding of misconduct and a sanction, on the one hand, and the imposition of some additional administrative/oversight/restrictive requirements for the protection of the public, on the other. This concept might be unworkable. It would contain the anomaly of the imposition of corrective action without a finding of misconduct. It might, however, achieve some form of compromise in combining fairness to practitioners with a focus on protecting the public in a proportionate manner.

O2: 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?

My answer to question 1 is not "yes", but I do consider that any change decided upon should indeed only be introduced at the same time as a change (if any) by the SDT. To do otherwise would maintain regulatory inconsistency within the legal profession.


19 July 2017

[REDACTED]

From:

Sent:

[REDACTED]
20 July 2017 14:21

To:

Subject:

[REDACTED]
Consultation on standard of proof in misconduct proceedings

Attachments:

[REDACTED] BSB consultation on standard of proof.pdf

[REDACTED]

I attach my personal response to the consultation.

Kind regards

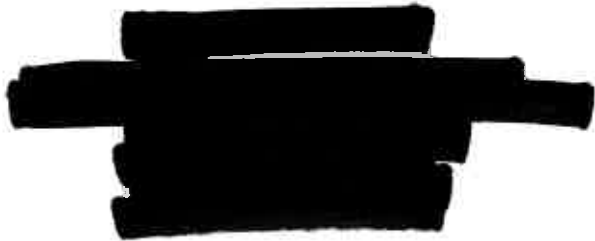
[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]



July 2017

BAR STANDARDS BOARD CONSULTATION STANDARD OF PROOF IN PROFESSIONAL MISCONDUCT PROCEEDINGS



1. Introduction

This is a personal response¹ to the BSB's consultation paper, and no views expressed in it should be attributed to any organisation with which I am connected.

2. The consultation questions

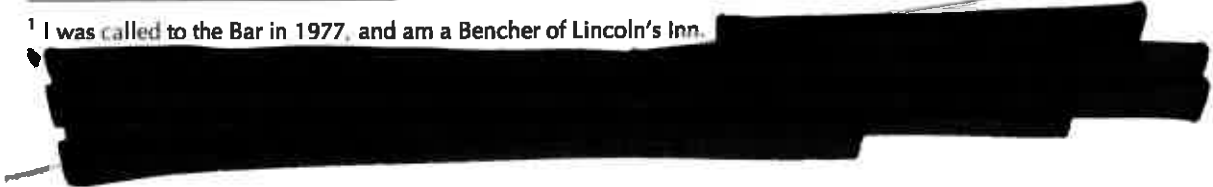
My responses to the consultation questions are as follows:

Question 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?

Yes. Time has very clearly moved on both in terms of regulatory practice and views among regulators. I have a degree of reservation about lowering the standard of proof when a disciplinary decision might deprive an individual of his or her living. However, on balance, I think the public and the profession's interests on this issue outweigh an individual practitioner's interests.

In particular, the Bar should not allow an individual to continue in practice only because of the operation of a higher standard of proof than that applied in other professions – especially when the very nature of an advocate's role requires that he or she retains the trust of the courts. It is also odd that a court in a civil action against a barrister could find against him or her, but the profession cannot take any disciplinary action if the higher standard of proof cannot be met in misconduct proceedings.

¹ I was called to the Bar in 1977, and am a Bencher of Lincoln's Inn.



Question 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?

No. If (as I believe) the lower standard of proof is the right approach to take, the BSB should adopt it irrespective of the SDT's position. As the consultation paper points out, the BSB is now 'out of line' compared to the other front-line legal regulators.

If the BSB does lower the standard, then unless and until the SDT does likewise, there would of course be an uncomfortable disparity of treatment as between barristers and those solicitors who hold higher rights of audience. However, I think this should prove to be a short-lived difference: public and political pressure then on the SDT should place it in an isolated position as well as very clearly reflect a perception that the SDT was 'looking after its own'.

Question 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?

I do not foresee any adverse impacts.

[REDACTED]

From:

Sent:

[REDACTED]
20 July 2017 13:32

To:

Subject:

[REDACTED]
BSB Consultation on the Standard of Proof in Professional Misconduct Proceedings

Attachments:

170720_BSB_Prof-misconduct-Standard-of-Proof.pdf

Dear [REDACTED]

Please find attached my response to the above consultation.

Regards
[REDACTED]

Altering the Standard of Proof in BSB Professional Misconduct Proceedings

Consultation Response of [REDACTED]

- 1 Might I begin by registering my utmost disquiet at this proposal and my strong opposition to such a change. I do so from the position of a practitioner of 33 years call, who has practised in General Common Law during that time, though now mostly in the Criminal Courts. I have represented clients from all backgrounds on both a private and publicly funded basis, and at times *pro-bono*. I have served as Head of Chambers, have instructed pupils, new practitioners, and established practitioners in Advocacy skills including professional ethics for nearly a quarter of a century.
- 2 The proposed change relates to Professional Misconduct. It should not be confused with competence, capability or negligence. Those are areas in which the public interest can be served by utilising a 'civil' standard of proof. Indeed this would be the applicable standard should an aggrieved party with a complaint under those heads could seek redress in the civil courts.
- 3 I suggest that there are good strong arguments against the change from the perspective of the barrister, the profession, and the public interest point of view. I would like to take each in turn, in that order.
- 4 The Barrister's Perspective
- 5 Clients come to a barrister because they have a problem. It is invariably a serious problem which might have life changing consequences flowing from the result of a case. No result can be guaranteed. Though perhaps somewhat trite, there is a grain of truth in the observation that if the case is won it is because the client had a good case all along, but if the case is lost the client still had a good case but the lawyer lost it. The point to be made is that the advocate is a clear target if, sometimes unrealistic, expectations are not met, which means that the barrister ought to be viewed as being in a vulnerable position.
- 6 Historically this would not have been as significant as there would always have been a professional client involved, to witness events, to manage expectations, to provide oversight and to protect the lay client's interests, but in so doing also adding a degree of protection of the advocate's interests too.
- 7 The current nature of practice means that the advocate is invariably alone with client. Very often the clients themselves can be vulnerable, stressed, emotional, frustrated, aggressive, threatening. Direct Access is now also a feature of practice, with no intermediary input at all. Disappointed, angry, frustrated people can and do 'strike out' at the nearest target, sometimes unfairly and without foundation.
- 8 The consequences of an allegation for the barrister in terms of livelihood and career can be catastrophic. It is not right, I suggest, that these should rest on the lesser standard of proof.
- 9 Furthermore, the stress of facing such an allegation can of itself be oppressive and injurious to health, even if adjudged to be unfounded in due course. Retaining the higher standard may go some way to discouraging the submission of pernicious, vindictive, unfounded and marginal complaints. At a time when the profession is doing much to address the well being

of its members, it would be a retrograde step to open up a novel stressor into the working life of the advocate.

10 The Profession's perspective

11 Morale at the publicly funded Bar is suffering greatly. The pressures on the advocate have grown exponentially in the last decade. Further pressures can only have an increasing detrimental effect on morale. This will have a real effect on recruitment and retention.

12 Lowering the standards of proof has the potential of affecting, even subconsciously, the way the barrister approaches the case and his client. A barrister who has more than half an eye on demonstrably on a balance of probabilities, acting in such a way as would be found proper, is not necessarily acting with the full resources of courage, commitment and excellence for which our profession has hitherto been known. If you will forgive the expression, a "behind covering exercise" always takes up resources that could be better utilised elsewhere.

13 The Public Perspective

14 The public expects, deserves, and is entitled to a profession of advocates which employs and demonstrates the highest standards of excellence, courage, integrity and behaviour. Any proposed change which might affect that should only be imposed on the clearest evidence that the change will lead to improvement upon the existing situation.

15 For the reasons set out above there are real prospects of trained talented people leaving or not coming into the profession as a result of yet another added pressure. There is the real prospect of the unintended consequence that advocates at the Bar will not fight as fearlessly, or give appropriate robust and proper advice, if complaints are feared. This cannot be in the public interest.

16 A disinterested member of the public, though I recognise the oxymoron involved here, who is aware of the background might well ask to see evidence that the current system is not protecting the public or is unfair to the public or the barrister. The public are generally fully aware of the concept of the highest standard of proof for the most serious allegations, and in my view generally regard that as a fair and proper thing.

17 Conclusion

18 I have tried to examine this proposal from a number of sides, and to set aside or at least recognise any element of my own self interest and try and balance that with other viewpoints.

19 I suggest that the proposed change should be rejected. I include these additional reasons in summary

- there appears to be no evidence that the current system operates counter to the public interest
- there appears to be no evidence that public confidence in the profession is diminished by reason of the current system
- a lessening of the standard of proof risks undermining the public's notion of the seriousness of professional misconduct allegations and proceedings

- the consequences for the career, livelihood, reputation, health and well being, and quite conceivably the home and family life of a barrister on the receiving end of an untrue, unfounded, malicious or speculative complaint should require the highest standard of proof
- to introduce a lesser standard of proof should not only require that it will demonstrably promote the public interest, but also that it would be fair to do so in circumstances where the lone advocate has no other support in the face of a false allegation. A system that is not fair to all cannot itself be described as being in the public interest.

20 Please, I invite you, do not impose this change. I fear that little good will come of it, and there is a real risk of unintended negative consequences for all concerned.


20th July 2017

[REDACTED]

From:
Sent:
To:
Subject:

[REDACTED]
20 July 2017 00:27
[REDACTED]

Lowering standard of proof in disciplinary proceedings

[REDACTED]

RE: Lowering standard of proof in disciplinary proceedings.

I am a newly qualified barrister having been on my feet just shy of 18 months. My practice generally consists of 70% crime and 30% civil proceedings, with the odd immigration case thrown in for good measure.

I have read the proposals and am deeply concerned with the possibility that the standard of proof has been presently suggested to be 'too high'. Frankly, the lengths we have to go to and the standards that have to be met to reach this professional position should be enough to show that the likelihood of a Barrister being guilty of misconduct is very rare indeed and I find it rather insulting that a member of the Bar would be found Guilty of professional misconduct without near certainty of Guilt.

To compare our profession to that of Doctor's is equally wrong:

- Most Doctors are salaried. Most Barristers are not.
- The public perception of the two professions is vastly different - I would be surprised if people receiving bad news about their health would blame their Doctor for their illness. Whereas the strength of the evidence never seems to be a factor when judging our performance.
- Doctor's get to explore other avenues if treatments fail. We generally have one attempt at a trial where no-one can observe and assist if you need help.

Whilst a Doctor has many of the same risks in dealing with vulnerable members of the public, the GMC have safeguards to protect their profession from such risks in the form of asking colleagues to chaperone their dealings with patients. This this isn't something we are able to do - and the public funding cuts mean that legal staffing is getting thinner and thinner and there is just not the ability to put any such safeguarding in place.

On a personal level, I am currently wishing to undertake the direct access course as I have had a number of clients ask whether they could come to me directly and so I believe it could expand my range of practice somewhat.

The obvious downside to taking on work under the direct access scheme is the potential of not having the benefit or protection of an Instructing Solicitor to act as a 'middle man'. This invariably increases Counsel's risk of having to undertake conferences with clients on a one to one basis, thereby increasing the risk of opportunity for Counsel to be exposed to a situation whereby there will be no independent witness, or worse, the possibility that client will have brought their significant other/friend who will in turn become a witness against you in any proceedings.

Surely the point of bringing direct access to the Bar was to allow the lay person more access to justice and legal advice by cutting out the 'middle man' and thereby some of the cost? Frankly, I'd rather have the protection of the middle man because the costs and risks of direct access now mean that I would rather not put myself in a situation where I am increasing my exposure to such an obvious risk.

One of the reasons I was so keen to undertake Direct access work was because I am regularly instructed to defend driving offences. Often clients will literally pay the earth to firms of solicitors who advertise that they have the best reputation for keeping licences and that they will do everything in their power to ensure they keep theirs. Very, very often, I find that clients have not been given the correct advice and come to court with hugely unrealistic expectations that their mitigation will amount to special reasons or exceptional circumstances in the eyes of the court.

Whilst they may not be the most glamorous of cases - I have had the most problems with these matters in particular. Often, clients have professed that to lose their licence would have such a drastic effect on their lives that they would do almost anything to try and keep it. Time and time again I am faced with having to be the bearer of the worst news possible to them - that despite paying their solicitors thousands of pounds that they often do not have - drink driving results in an automatic 12 month ban... and that regardless of how much they have paid for what they believe is the fee for my services - I cannot come up with a legal argument that will change the law. I often then face a barrage of abuse for the promises made by solicitors and the costs they have racked up by trusting them. They have met me for

all of an hour in some cases. The solicitor is who they go to, have contact with and follow up discussions with, and in a situation where the solicitor doesn't want to tell the client the difficult truth about their case, yet still needs to ensure they get paid - the obvious scape goat is Counsel.

The irony is that the main reason I wanted to undertake Direct Access work was to stop this type of thing from happening - because I know that if a client came directly to me - I would be able to take one look at their case and give them the realistic prospects of whether their case will succeed without them paying the equivalent of two months wages for the privilege. The main problem is that firms are creating unrealistic expectations to lure the client in. At least using direct access - if someone does not accept my advice - they are free to try elsewhere and still have money to be able to do so. I was happy to risk someone making a complaint and choosing not to take my advice because I knew it would be the correct advice to give. Why on earth would you want to discourage Counsel from doing this?

I have had some of the most ludicrous complaints against me ranging from

... 'She was reading from a book in court' [Archbold]

to ... 'she didn't tell them that my wife has just found out she is pregnant' [the news of the pregnancy was known a week AFTER the matter had been heard].

The range of excuse and complaint borders on complete desperation at times - and this is all WITH the buffer of an Instructing Solicitor! We have some of the most decent and upstanding members of society freely admitting that they would do almost anything to try and keep hold of just their driving licence.

'Normal', 'educated', 'well-to-do', 'upstanding', 'decent', 'hard-working' people... trying anything they can think of to retain their *driving licence*... not their liberty... not their money... their driving licence.

You may think this view is rather extreme. But these complaints came from my OWN clients. Normal. Friendly. Appreciative clients. Who changed not straight after the verdict, or even in the conference afterwards... but days, weeks and months later. Leaving me needing to trawl through pages of notes, frantically check and double check every word of advice and write arduously long emails scrutinising each and every movement and word I could remember being said - just to prove myself to my Instructing Solicitor. And the worst that could happen with them is they stop instructing me. I can't even begin to imagine the stress and strain that disciplinary proceedings would cause, let alone the financial impact and impact to professional reputation. It could quite literally bankrupt and force a person out of the profession in just trying to defend themselves.

We already don't have the backing of insurers, employers or a trade union. We deal with some of the most vulnerable people in society daily and often on a one-to-one basis. Our profession only becomes necessary to the public at some of the most desperate and difficult times in their lives, when emotions are running high and the levels of pressure are at their utmost. Our clients can be ill, nonsensical, abusive, dishonest...and we often meet them for the briefest of periods.

Hence the worry about the lengths some people would be prepared to go to. Do you honestly think that some of them would think twice about us if they thought it might alter, help or eradicate their situation?

In our job, there is always a winner and a loser. And we have to deal with the consequences in the immediate aftermath of decisions that change people's lives. We are the first people they rant to and the first people they can blame. If we win - they had a good case. If we lose - we haven't done enough. And if it all goes wrong we are left on our own with only our legal expertise to defend ourselves. Why would you lower our protection?

To them... we are the reason they have lost everything. We are the scape goat, the bad guy, and the easy target. Please don't make us the sitting duck as well...



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[REDACTED]

From: [REDACTED]

Sent:

18 July 2017 21:17

To: [REDACTED]

Subject:

Consultation on standard of proof.

Dear Sir,

I email in order to oppose the proposed change in the standard of proof to be applied in Bar Professional Misconduct Proceedings to that of the balance of probability.

My practice is largely one of publically funded criminal law. My works involves multiple conferences with multiple clients on a daily basis and these are, more often than not, conducted on a 1:1 basis. It is becoming less and less likely that I get any support from solicitors (or associates) whilst conducting my conferences due to the recent cuts and staff shortages. This means that I am left dealing with clients on my own who can often be difficult, under the influence of drink and/or drugs and/or dishonest in nature. I would always take a note of conferences and, in particular, detail any changes of plea but that does not prevent a client from claiming that there has been an element of misconduct.

Any such allegations would have a very serious impact on my practice, my reputation and my mental/physical well-being. At the moment, the only saving grace in such a scenario is that professionals such as myself are protected in professional misconduct proceedings by the very standard of proof that we work towards each and every day. Yet there is a proposition to change this.

I strongly disagree that professionals should be forced to partake in misconduct proceedings where the standard of proof is lower than the very standards that we prosecute/defend to each and every day.

This profession does not allow us recourse to a trade union or to an employer in the event of any such accusation being made and the sanctions are potentially devastating to livelihood. That point must not be underestimated.

Given that information, the higher standard of proof should be applied in order to reduce the risks in cases involving innocent practitioners. The innocent ones who should not be made to suffer for the abhorrent behaviour of the few.

Additionally, the lowering of the standard of proof may have an increasingly negative effect on the risks that an advocate is prepared to take. I can foresee a situation where conferences just do not take place because the relevant witnesses (solicitors) are not available to attend or where the conferences take three times as long because the advocate is forced to take painstakingly thorough notes in order to avoid any repercussions. This will put even more pressure on an incredibly strained profession. Morale is already low, it does not need to be any lower.

We, at the Criminal Bar, would not take away someone's liberty on the basis of "the balance of probabilities", so why should we take away someone's livelihood, reputation and/or well-being on that same lower standard?. Of course, we should not.

There is no evidence that change is required and I also note that the Solicitors Disciplinary Tribunal (SDT) currently applies the criminal standard and the two professions should be in sync in this respect.

I really hope that my views are taken into consideration.

Best wishes,

[REDACTED]
[REDACTED]
[REDACTED]

[REDACTED]

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[REDACTED]

[REDACTED]

From:
Sent:
To:
Subject:

[REDACTED]
17 July 2017 19:25
[REDACTED]

Consultation on Standard of Proof.

[REDACTED]

Please accept the following as stating my position as being against change to the civil standard of proof in disciplinary proceedings against a Barrister :

Criminal standard of proof

Arguments in favour of the criminal standard of proof

- The sanctions that can be imposed by the Tribunal can be devastating to the individual's livelihood and reputation and a higher standard of proof should apply for this reason.
- A move to the civil standard of proof undermines the seriousness of professional misconduct proceedings; if the outcome is decided on a balance of probabilities, this may undermine the public sense of its seriousness.
- The decisions in *Re A Solicitor [1993] QB 69* and *Campbell v Hamlet [2005] 3 All ER 1116* are precedent for the proposition that the standard of proof applicable in professional disciplinary proceedings is the criminal standard.
- A move to the civil standard may increase the number of marginal cases that are brought to Tribunal.
- The BSB has not provided any evidence to demonstrate that there are concerns with the way in which the current standard of proof operates.
- Lowering the standard of proof may have a chilling effect on the risks that an advocate is prepared to take in a case. Barristers will be expected to conduct themselves at all times in a way that, on a balance of probabilities, they will be found to have behaved correctly. This may create a need for the Bar to put in place systems to prove it, which could have a cost implication.
- The Solicitors Disciplinary Tribunal (SDT) currently applies the criminal standard and we should be aligned in our approach.

[REDACTED]

[REDACTED]

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From:
Sent:
To:
Cc:
Subject:

[REDACTED]

17 July 2017 15:57

[REDACTED]

Re: CONSULTATION on The Standard of Proof Applied in Bar Professional Misconduct Proceedings

Dear Sir

I have been a member of the bar for over 40 years.

I am concerned to read of the proposal to change the standard of proof to be applied in Bar Professional Misconduct Proceedings.

For the last 20 years I have practised in family work. I have seen at first hand how the attitude towards the making of complaints has changed. This is a reflection of the general mood of society - namely that if things do not go your way then someone else is to blame. Unfortunately, the willingness to make complaints which are without any real foundation is not limited to one's own clients but also extends to the opposing party.

Allegations are just invented. In part this is the consequence of the increased numbers of litigants in person. Moreover, as parties seek to reduce costs and barristers are not accompanied by solicitors there is a greater vulnerability and it is one person's word against the other. A finding of misconduct based upon the balance of probability will not give members of the bar sufficient protection against this and is more likely to encourage even obviously spurious allegations.

Yours faithfully

[REDACTED]

[REDACTED]

From:
Sent:
To:
Subject:

[REDACTED]
17 July 2017 11:51
[REDACTED]

Re: Consultation on the Standard of Proof Applied in Bar Professional Misconduct Proceedings

[REDACTED]

As a junior practising in crime and other areas, my view is that the current criminal standard should remain in place. Thankfully I have no direct knowledge of disciplinary proceedings, but it strikes me that in dealing with lots of day-to-day ethical and practical dilemmas, there is a range of reasonable responses. I quite often have cause to seek advice from more senior members of chambers when I'm unsure how to deal with an issue relating to eg. disclosure, privilege or PII. I often get different advice from different people, including those of similar levels of seniority.

In a professional which is already so heavily regulated and very mutually supportive, one would hope that disciplinary proceedings should be reserved for very serious misconduct. Lowering the burden of proof to the civil standard runs the risk of barristers having disciplinary sanctions taken against them when the panel feel that they would all have dealt with a particular situation differently, but the barrister in question had in fact acted on advice and tried to do the right thing.

I would be grateful if my name were not used if this view is quoted or referred to in any BSB materials produced in relation to this consultation.

Kind regards,

[REDACTED]

[REDACTED]

[REDACTED]

[Redacted]

From: [Redacted]
Sent: 14 July 2017 11:42
To: [Redacted]
Subject: Consultation re standard of proof in professional misconduct proceedings

I have met with [Redacted] to discuss my views upon this Consultation who has made the appropriate note.

I specialise in disciplinary & regulatory law particularly re proceedings in the Solicitors Disciplinary Tribunal. I have prosecuted there for about 30 years & frequently defend.

I strongly believe that the criminal standard of proof should continue to apply.

It has never caused me any difficulties in proving proper allegations.

Acquittals at SDT are in any event rare. There are likely to be less if the standard is reduced but that should not be a reason for change.

The consequences for solicitors if struck off are very serious. In particular if found dishonest an effective life sentence will follow. I am not aware of a single case where such a solicitor has ever been restored to the Roll. It is not too much to ask for the prosecutor to prove his case so that the Tribunal is sure before it imposes sanction. Neither branch of the legal profession should be concerned that our test differs from other bodies. Being in a minority does not make us wrong. We are supported by high level authorities. Despite several attempts by SRA the Court has not been persuaded to reduce the standard.

I am unaware of any pressure from the public to make a change & can see no evidence to suggest any lack of confidence in the disciplinary process as it stands.

I see no justification to adopt a different standard for the Bar to that which applies to solicitors.

I see no equality implications either way.

Please acknowledge safe receipt.

Kind regards

[Redacted]

[Redacted]

[Redacted]

[Redacted]

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[REDACTED]

From: [REDACTED]

Sent:

13 July 2017 14:29

To: [REDACTED]

Subject:

change to standard of proof

[REDACTED]

I write to express my views against change.

I think that regardless of the standard of proof in other professions the Bar is unique and requires the special protection of a higher standard of proof.

It is a fact that based on previous convictions as evidence, criminal barristers spend many days with some of the most dishonest, vindictive, desperate, without moral compass, practised liars in society.

There is rarely an employer for the barrister to be safeguarded by. The code of conduct does not prevent barristers being alone and taking instructions from clients alone. Barristers can not record conversations digitally. Nor insist, realistically, on having witnessed what conversation passes between client and barrister.

A person convicted who denies his guilt is often absolutely desperate to say or do anything that will help in a potential appeal and often has a huge amount of time on their hands to make a false claim.

It is therefore my view that the Bar needs some protection against false claims - the standard of proof is this.

I do of course appreciate that the standard of proof as it currently stands has the potential to prevent findings of true allegations but in the absence of evidence to support this. May I ask, has there been any concerns or cases where this has been the case or where there has been repeated behaviour following an unsubstantiated allegation ?

Kind Regards →

[REDACTED]

[REDACTED]

[REDACTED]

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[REDACTED]

From:
Sent:
To:
Cc:
Subject:

[REDACTED]
13 July 2017 08:28

Jake Armes

[REDACTED]
CONSULTATION on The Standard of Proof Applied in Bar Professional Misconduct Proceedings

[REDACTED]

I have become aware of a proposal to change the standard of proof in disciplinary matters to the civil standard.

I am a civil practitioner. I am against the proposed change.

I fear that a reduction in the standard of proof will only assist those lay client's who are litigious, wrong headed, mentally unstable and those seeking to shift all blame away from themselves. I believe that members of the profession need the protection afforded by the criminal standard of proof in disciplinary matters, and that a lessening of that standard will inculcate something akin to "the compensation" culture amongst a small, but vociferous, proportion of those we represent . Some lay client's cases have little or no prospect of success. After the case fails they tend to "lash out" at the most recent point of contact- usually their barrister. Often that barrister has been instructed at "the 11th hour" with out any previous involvement.

If it is made easier to complain successfully, some members of the profession may feel inclined to take less heed of the cab rank principle. For example seeking to shun "difficult" clients for fear of reprisal.

Having been subject to a completely spurious and serious complaint some years ago I speak from experience.

[REDACTED]

[REDACTED]

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[REDACTED]

From: [REDACTED]
Sent: 12 July 2017 17:02
To: [REDACTED]
Subject: CONSULTATION on The Standard of Proof Applied in Bar Professional Misconduct Proceedings
Attachments: PastedGraphic-1.pdf

[REDACTED]

I am a Commercial / Insolvency practitioner, and am strongly AGAINST any change in the standard of proof applied in Misconduct proceedings being changed. Whilst I would ordinarily have been quite ambivalent about such an issue I would like to briefly set out why I do feel so strongly on this issue.

I practised for 19 years as a member of the [REDACTED] before transferring to England and Wales at the end of 2015. The Bar in South Africa is structured along similar lines to the profession here, and I have personally been appointed to chair misconduct enquiries by [REDACTED]. In South Africa, litigants in person are exceedingly rare, and almost non-existent in commercial litigation, all of my opponents in court were either Counsel of attorneys with Higher Rights of audience, and all my clients were generally corporate.

Since commencing practice in the UK, I have been taken aback by not only the number of litigants in person in commercial matters, but also by the extreme difficulties posed by having LIPs as opponents. It is no exaggeration to state that on most occasions, my encounters with LIPs have been marked by extreme contempt in the face of the court, rambling and long-winded pleadings and addresses, incoherent claims and disproportionate time taken over trivial matters. In several cases, LIPs have exhibited behaviour that possibly borders on the schizophrenic and psychotic, and accompanied by threats against me as Counsel to report me to the Legal Ombudsman or the BSB, merely because they are uncomfortable with the arguments advanced against them. Thankfully, there have been no such reports (of which I am aware) but I now see it is a distinct possibility that, somewhere along the line, a disgruntled LIP will take the step of reporting me and spend hundreds of hours in building up a case built on nothing other than a personal vendetta created in the courtroom. Even if such complaint is ultimately dismissed, it will put me to extreme stress, not to mention expense, in having to clear my name and persuade the BSB (on a balance of probabilities) that he/she is wrong and I am right.

The arguments in favour of change are misconceived: our profession is unlike the medical profession, and there is simply no evidence to support a change in the standard of proof. The Bar has always held its members to the highest standards of professional conduct and there is no reason to suppose that this has been compromised in recent years. There would have to be far stronger reasons to change what does not, on the face of it, require any changing. To be sure, such a change would almost certainly result in an increase in ill-founded complaints, a heavier caseload for the BSB to administer. In my experience, when a colleague is indeed guilty of professional misconduct, such a finding will inevitably be made, irrespective of the fact that the standard of proof is on the (higher) criminal standard.

I sincerely hope that the BSB will take my views (and that of other practitioners) into account and be dissuaded from effecting such a drastic change to our professional governance. There is no need for this, and I respectfully suggest that the BSB's focus should be on far more pressing issues of regulating our profession.

Yours sincerely,

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

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[REDACTED] is an international and international commercial dispute resolution team of [REDACTED] barristers chambers which consists of independent and autonomous entities providing legal services. Our structure is explained in more detail [REDACTED]

[REDACTED]

[REDACTED]

From:
Sent:
To:
Subject:

[REDACTED]
12 July 2017 17:03
[REDACTED]

Review of burden of proof in professional conduct cases

Dear Sirs

I am a barrister of 1999 call practising in civil and employment law. I believe that it is important that our profession (and its regulators) have the confidence of the public and that bad practice is brought to book.

However, I am against the alteration in the burden of proof for one simple reason.

The vast majority of the time I deal with cases at court and tribunal with no solicitor or note taker present. This includes when giving advice before and during the hearing.

At such times I am naturally dealing with clients who are themselves in the midst of a stressful situation. Some but of course not all of those clients may have already had findings of dishonest conduct against them or are subsequently found to have been dishonest.

Such individuals often tend, in the event of losing the litigation, to start to raise issues with the advice and representation they received from their lawyers.

In that context, in the event of a complaint alleging unprofessional conduct, I feel it is unfair for a subsequent misconduct tribunal to simply ask 'what is more likely than not'.

Given that the barrister is unlikely to have had any opportunity to request an independent person to take a note of his or her advice (unlike most other professions), I suggest it is wrong that they be judged against the lesser standard of the balance of probabilities.

Many thanks

[REDACTED]

Sent from my iPhone

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[REDACTED]

From:
Sent:
To:
Cc:
Subject:

[REDACTED]
12 July 2017 11:49
[REDACTED]
[REDACTED]
~~Consultation~~

Dear Sir,

I respond to the consultation on the standard of proof in disciplinary proceedings. I represent Barristers and solicitors before their professional bodies. I was a member of the Conduct Committee for 6 years.

I understand the siren call of 'public confidence' and the superficial attraction of claiming that the public is protected by being able to discipline barristers if they probably did something wrong.

In my view, on analysis, that position is barren.

First, there is no evidence that the public's confidence in our profession is flagging or that we are distrusted. Loud voices in newspapers or social media are not evidence. Otherwise we would all be enemies of the people and public confidence could only be restored by abolition of the professions.

Secondly, the argument that "everyone else is doing it" is not one that appeals to the profession. That is not because we are old-fashioned. It is because most of us make our living from resisting those arguments on behalf of people who need a voice to speak up for a different view. Those voices are important. The urge to fall into line is precisely what the BSB should be resisting.

Thirdly, and this point flows from the point above, for a profession that regularly argues unpopular and, even, wicked, causes, public protection actually mandates the current system. Most complaints are made by disgruntled clients. An unsettlingly high proportion are made by disgruntled Judges (and I personally dealt with unfounded complaints by very senior members of the higher judiciary). To adopt a system that convicts people because they probably offended someone in respect of whom the duties owed to that person and the duties to be independent conflict, is a wholly retrograde step. It would encourage a perception that whilst the Bar is not for sale, it is for pressurising.

Fourthly, it is disappointing that the obiter comments of the judiciary should be the impetus for this process. Not only is that an example of what I have outlined above (and it would be interesting to see whether any Judge would declare himself conflicted if he were to be a disappointed complainant), but it suggests that insufficient attention is being paid to a PC decision that is only 12 years old.

Fifthly, I expect the BSB to understand that the criminal standard of proof is not certainty (see Consultation §24). The Law Commission made an error. We do not need to repeat it.

Sixthly, I cannot see an argument for the change in the Consultation. Other than fear of some obiter comments, and a misunderstanding of the public interest, nothing is advanced. That begs the question, to what am I replying? I would expect my Regulator to produce a consultation that actually set out the competing arguments and invited contributions to a debate. Instead, I see at decision that appears to be already made (Consultation §12), the basis for which is not properly set out, the arguments against which are not properly acknowledged, and a bland call for contributions. I authored my Circuit's response to every MoJ legal aid consultation between 2005 and 2013 and I know a stacked deck when I see it. I am ashamed that my own Regulator - which I have consistently defended in a way that has been acknowledged by BSB members - should borrow this approach. We are better than that as a profession, both intellectually and ethically.

Seventhly, the difference between the vast majority of the Bar, and the other professions has not been acknowledged although it must, surely, be obvious. For both medics and solicitors, the reality of being disciplined does not mean a stop to their professional careers unless they are struck off. For many barristers, any disciplinary finding - even if the penalty is a fine or a reprimand - has a quite disproportionate effect, because they are self-employed. They may lose work. Their Chambers might not stand by them. For doctors who are fit to practice, the NHS is crying out for them. For solicitors who are fined, even if their own firm is embarrassed by them, there are a myriad of further employers who may (perhaps with a drop in seniority or payment or both) be prepared to utilise their experience. For barristers, the effect of any finding - regardless of outcome - is disproportionate to both these comparators.

That, of course, is the public protection. The argument that the public are not currently protected ignores this point entirely. To place self-employed people at the risk of those consequences if someone thought they probably did it is to adjust the pendulum away from any mid-position.

Eighthly, the publicly funded bar attracts the largest number of complaints. That is because - as the consultation paper should have acknowledged - the majority of complaints are motivated by a criminal's desire to have adjudged as incompetent or dishonest the person who attempted to keep them out of trouble, so that the Court of Appeal can be told that this is the reason why the complainant is in jail. A large proportion of other complaints are motivated by a desire to undo custody decisions in families on the same basis. The publicly funded bar also has the largest numbers of women and ethnic minority barristers. That is because it is not wedded to the confirmation biases that appear to bedevil the commercial bar (at which I practice as well). I am therefore surprised that there is no EIA issue. Perhaps an assessment of complaints against the publicly funded Bar would produce a different outcome?

Finally, the LSB is not fit for purpose. That it should be in favour of this, should cause the BSB promptly to revisit its own conclusions. The LSB neither understands the profession nor has made the slightest effort to do so. Its stance on paid Mackenzie friends - who in my considerable experience as a Recorder of 16 years standing is almost entirely malign - demonstrates (on the balance of probabilities of which the LSB is so fond) that it has no interest in public protection at all. Rather, it is wedded to a political ideology of a free for all which drives down costs (except of course it does not, as the charges made by unqualified 'friends' amply demonstrate) at the expense of any concept of professionalism.

Yours,

A large black rectangular redaction box covering the signature and name of the author.

[REDACTED]

From:

Sent:

[REDACTED]
12 July 2017 11:29

To:

Subject:

[REDACTED]
CONSULTATION on The Standard of Proof Applied in Bar Professional Misconduct Proceedings

[REDACTED]

I have been made aware of the consultation regarding the proposed alteration of the standard of proof in BSB disciplinary proceedings. For what it is worth may I please take this opportunity to register my strong opposition to such a move.

Whilst I understand the motivation behind the proposal, it fails to recognise that barristers are uniquely vulnerable to baseless, unfounded or misconceived complaints for a number of reasons:

1. The nature of the work means that the barrister will routinely be exposed to angry, emotional, frustrated individuals whether their own client, or their opponent (frequently litigants in person), who are dissatisfied with the outcome of proceedings and have a limited understanding of the law or the bases on which decisions are taken. A complaint against one's own barrister or the barrister acting for the other party can often be a way of venting that frustration. Laypeople frequently (and perhaps understandably) misinterpret the inevitable consequences of misconceived litigation as being the results of poor or incompetent advocacy.
2. The way in which barristers practise makes it difficult to keep a comprehensive record of every conversation or interaction with clients or opponents, there are inevitably frequent interactions with lay clients or opponents where only the barrister and the other party are present, again, leaving the barrister uniquely vulnerable to complaint. Barristers are expected, when they appear against a litigant in person, to interact with that individual to ensure that they are able to present their case. This already causes considerable anxiety because of the obvious risks of complaint. If changes were made which made them more vulnerable to complaint, barristers might well (understandably) refuse to interact with an opponent appearing in person in any way whatsoever outside of a court room.
3. Barristers are more vulnerable to complaint because they are self employed and the impact of defending oneself against a baseless complaint is borne by the barrister themselves, both in terms of the financial and time costs. The process is already onerous and oppressive. They do not, like doctors or police officers, have the luxury of a union who will fund and aggressively litigate their defence. Whilst I have never had to endure the process personally, I know others who have. In each instance, the complaint was utterly unfounded, and was based upon a demonstrable misrepresentation of facts by the complainant. Despite this, the anxiety produced in the barristers dealing with these complaints was significant, as was the disruption to their practice and (already limited) free time.

I have seen no evidence of any need for the proposed changes. In several years' practice I have not come across a single opponent or fellow practitioner whose integrity or competence I would have cause to question. There is nothing that I have seen to support the contention that genuine and well founded complaints are being dismissed or discouraged because of the standard of proof applied to them. If such evidence exists, it should be set out to and circulated amongst the profession so that it can be scrutinised. Absent such evidence, this is change for changes' sake and amounts to nothing more than virtue signalling.

The argument apparently raised at the ~~Bar Council on 8th July 2017~~ that we do not want 'barristers who are probably guilty of misconduct' is trite and easily met. Not one of us would want to see a colleague's professional life destroyed on the basis that they 'probably' did something wrong.

Kind regards,

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

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[REDACTED]

From:
Sent:
To:
Cc:
Subject:

[REDACTED]
12 July 2017 11:06
[REDACTED]
[REDACTED]
Re: Consultation

Dear Sir

I read with dismay the proposal to reduce the standard of proof in disciplinary proceedings.

As a practitioner who routinely represents solicitors accountants and other professionals before various disciplinary bodies, I think that this proposal is ill conceived and unnecessary.

Practitioners are aware of the tendency of regulators to 'push the envelope' of their powers, cynics say that is so that they can demonstrate to others how successful they have been when it comes to justifying their existence. Solicitors have always had the protection of the criminal standard of proof, but are resisting the same pressure to 'reduce the bar'. Recent high profile cases show that there is widespread concern in the profession that the regulators are facing outside pressure. This must not be allowed to develop at the Bar.

It is essential that tribunals are independent and fair. The current regime has balance built into the scheme and should not be altered without clear evidence that it is working unfairly. Barristers facing disciplinary proceedings are subject to great pressure - financial and otherwise. Introducing this proposal would merely serve to ramp up the pressure for no good reason.

Regards

[REDACTED]

--

[REDACTED]

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[REDACTED]

From: [REDACTED]

Sent:

12 July 2017 09:38

To: [REDACTED]

Subject:

BSB Consultation regarding the change in standard of proof applied in Bar Professional Misconduct Proceedings

[REDACTED]

I have read with some concern about this consultation and the potential it has to change the standard of proof in misconduct proceedings. I have never myself had the misfortune to be faced with either a complaint or proceedings of this kind. However, I have a number of concerns regarding the profession as a whole as well as my own perspective. Therefore, I am taking this opportunity to register my strong opposition to any change.

Apparently, the BSB has not provided any evidence to demonstrate that there are concerns with the way in which the current standard of proof operates. Why then has this consultation been launched? Are there not enough other areas where there is evidence for a need for change or which requires the BSB's attention? This is a point to which I will return below.

There is an increased emphasis to allow and encourage barristers to work direct with the public in order to increase access to justice. I have long been a direct or public access barrister and before that direct professional access back in the 90's. This involves often working alone with a client with very strong feelings of injustice and grievance at the Court process or through previous representation. It is very easy for those individuals to turn the focus of their aggression or cause upon those who represent them. Many conferences are done face to face with no other individual within the meeting. Phone calls are regularly made and though notes are obviously taken a dispute would be the complainer's word against the barrister.

We often dealing with the most challenging of individuals some of whom are seriously dishonest and difficult individuals. The lowering of the standard of proof would encourage complaints and leave those in the profession vulnerable. It is only natural sometimes for people with a strong sense of injustice to look to blame their professional adviser when the case has not gone the way they believe it should have done or they disagree with the correct but unpalatable advice they have been given. The lowering of the standard of proof would I believe lead to an increase in the number of complaints which ultimately prove to be dismissed and at what cost?

The process of the complaint and the stress would cause individuals needless harm and would probably damage their careers forever. I note that the BMIF does not cover representation for these proceedings. The caseload of the prosecutors and the tribunal would increase with a corresponding cost increase. I note that at the last meeting pm 8th July 2017, a barrister who currently prosecutes these misconduct cases argued strenuously against the lowering of the standard of proof. Surely he/she should be listened to? That is "coal face" information. The current standard of proof is sufficient and should not be changed.

It is said that a reason is that the medical profession has the civil standard. I believe that it like comparing apples with pears. The service they give is a physical service which is the diagnosis of illness and the prescription of medicine or treatment. Issue of truth and justice do not appear.

The point which arises is whether the regulatory body wishes to increase or decrease access to justice. Perhaps most importantly if the change was introduced I doubt that I would take on any very very difficult direct access client with a the most challenging case. Thus the change has a very real chance of affecting the fearlessness of barristers in taking on the good fight.

Quite apart from my own specific experience and situation, there are many other barristers who work in the criminal and family courts often alone. All the points I have made about my practice apply to a greater degree in their fields. They are often dealing with people with serious issues, often with mental health problems. I would very

much fear for the future of those already beleaguered branches of the profession. They, like me, when acting for direct access clients are really acting as if they were a solicitor advocate, taking on both roles.

On this point, I note that the SDT conducts these proceedings with the criminal standard of proof when dealing with alleged misconduct by solicitors. Why then, would the BSB impose a much lower standard of proof for barristers? This would be grossly unfair and also illogical. It might be worth seeking their input as to why they believe that it is not appropriate to change the standard. They have many many years of dealing with complaints where the client is deal directly with the lawyer. As the BSB seeks to increase direct access it should perhaps draw on this wealth of experience and not press on merely change for changes sake. It has very little experience of its own to draw upon. This proposed change has the tone of a crowd pleasing headline which actually delivers a detriment to the public and the profession rather than a real benefit.

Further, I am very concerned by the lack of evidence and study on the topic. Surely, as the professional body of barristers you should be examining the evidence and commissioning a study of say the last 15 years of professional misconduct hearing to see whether there is any evidence of cases in the past which have led to injustice to complainants. A similar study could be undertaken of cases before the SDT. If there is none, or very little, this surely should be the end of the matter. If you don't do this, it would appear that you are seeking to make change for change's sake. You would appear to be inventing a problem for the sake of changing the solution.

As it is, it appears that you are simply seeking views and not examining the evidence.

Please do not alter the standard of proof.

Yours,

[Redacted signature]

- The BSB has not provided any evidence to demonstrate that there are concerns with the way in which the current standard of proof operates.

[Redacted text]

[Redacted text]

[Large redacted block of text]

[REDACTED]

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[REDACTED]

From:

Sent:

[REDACTED]
12 July 2017 10:04

To:

Subject:

[REDACTED]
Proposed change to burden of proof

As a former Recorder and with 61 years' experience at the Bar, whilst I can see the strength of the arguments in favour of change, in my opinion the balance falls in favour of retaining the present rule. The crucial factor seems to me that members of the Bar are uniquely vulnerable, particularly these days when so rarely are solicitors present at conferences with clients - and because we are so much concentrating on the issues in conferences or speaking by telephone that we rarely make a note (quite apart from the factor that advice is frequently given in circumstances of great haste).

[REDACTED]

From:

Sent:

12 July 2017 09:41

To:

Subject:

Barrister disciplinary matters - standard of proof

Sir,

I favour a change to the civil standard.

However, I would welcome an even more robust filter process to weed out meritless complaints at the earliest opportunity.

Also, where adverse findings are made, these should be less stigmatising than has been the case to date.

Yours sincerely,

[REDACTED]

Sent from my iPad

[REDACTED]

From: [REDACTED]

Sent:

12 July 2017 09:29

To: [REDACTED]

Subject:

Standard of proof in disciplinary proceedings

[REDACTED]

Please take this as my contribution to the above consultation.

I am firmly in FAVOUR of switching to the civil standard.

I am a legal assessor sitting on FTP tribunals for the general dental council and health and care professions council.

In my of the firm view the criminal standard is no longer appropriate for the bar (or indeed for solicitors who I understand are also considering this issue). We and the solicitors are the only regulator that retains the criminal standard. We are wholly out of line with all other regulators and this is liable to undermine public confidence in the profession and the regulator. Simply put it may give the impression of the profession 'protecting its back' by making it much more difficult to bring disciplinary proceedings against lawyers. It is in no ones interest that dishonest or incompetent lawyers remain in the profession or at least remain without disciplinary sanction.

I am wholly unconvinced by the contrary arguments. Changing the standard of proof should be seen as a modernising measure whose time as come.

Having said the above it may be that certain other consequential changes will have to take place. Most obviously that indemnity cover extends to advice and representation at BSB hearings or at least for some BSB hearings. Further there must be a clear triage system to weed out frivolous complaints and/or where the complaint is motivated by bad faith in some way.

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From:
Sent:
To:
Subject:

[REDACTED]
12 July 2017 09:24
[REDACTED]

Consultation on the standard of proof

[REDACTED]

I write in relation to the consultation regarding the proposed alteration of the standard of proof in BSB disciplinary proceedings. May I please take this opportunity to register my strong opposition to such a proposed move.

I practise predominately at the Commercial Bar and I have a significant Direct Access practice. Often the individuals that I represent are individuals with very strong feelings of injustice and grievance at the Court process or through previous representation. It is very easy for those individuals to turn the focus of their aggression or cause upon those who represent them. Many conferences are conducted face-to-face with no other individual at the meeting. Phone calls are regularly made. Though notes are obviously taken, a dispute would be the complainant's word against the barrister's.

In this profession we are often dealing with the most challenging of individuals, sometimes seriously dishonest and difficult individuals. The lowering of the standard of proof would encourage complaints and leave those in the profession vulnerable.

Further, the process of the complaint, the stress it most certainly does bring to individuals and the damage to carefully forged careers is manifest. The current standard of proof is sufficient and should not be changed.

I have seen no evidence of the need for change.

In addition, I would probably not take on a difficult Direct Access client with a challenging case knowing that the standard of proof had changed. Thus the change has a very real chance of affecting the fearlessness of barristers in pursuing the good fight.

Please do not alter the standard of proof. The case for change is not made out.

Kind regards,

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[Redacted]

[Redacted]

[Redacted]

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[REDACTED]

From:
Sent:
To:
Cc:
Subject:

[REDACTED]
12 July 2017 09:23
[REDACTED]
[REDACTED]

~~Re: Consultation~~

Dear Sir

Regarding the consultation on the issue of lowering the standard of proof in professional misconduct proceedings I would wish to have it considered that self-regulation is not self-deprecation. I am firmly of the view that this proposed change does little to reassure a public that aren't calling for change in any event. It draws attention to an issue that isn't there on the false premise that the BSB are in tune with the times. The reality is, if adopted, the reduction to the civil standard would announce very clearly that the BSB is not in tune with the times.

Times are financially hard. Any opportunity to make it easier for some dishonest individuals (and this profession has to rub shoulders with a disproportionate number of these individuals) to attempt to whittle out of fees, pass the buck, fail to recognise their own failings (and invariably the topics we aid them with are highly emotive) is, recognising the realities of the times, likely to be rather appealing.

Equally, given the catastrophic effects that a finding of misconduct could have on the individual and the family of the individual (absolutely life changing) it really cannot be justified without a full risk and effects analysis.

I would also like the need for an effects analysis regarding recruitment to the bar by disadvantaged and under privileged persons, to be considered, in view of the additional, and one would expect very large increase, in the professional indemnity insurance premiums.

I am saddened, with the difficulties that we already face, that the BSB would even raise it.

Yours faithfully

[REDACTED]

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[REDACTED]

From:

Sent:

[REDACTED]
12 July 2017 08:40

To:

Subject:

[REDACTED]
Change to standard of proof

I am against the proposed change to lower the standard of proof for complaints against barristers for the reasons that have been advanced by those who spoke out at the committee meeting to argue against the proposed change.

[REDACTED]

[REDACTED]

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[REDACTED]

From:
Sent:
To:
Subject:

[REDACTED]
12 July 2017 08:21
[REDACTED]

Response to consultation on standard of proof

[REDACTED]

With reference to the current consultation on standard of proof, I am writing to raise my objections to the change.

I practice exclusively in the field of family law and have done so for 18 years. I have a large direct access practice within this and am frequently against litigants in person. Very often there is no one else with me when I am with my client or the litigant in person on the other side. Whilst I am more computer literate than many at the bar it is simply not possible to keep a verbatim note of everything I say to the client or the other side as well as all that they say to me. We are not always in an environment where it is possible to take clear notes - conference rooms are not always available, conversations sometimes take place in a hurry on the way into court.

The cab rank rule rightly prevents us from picking and choosing our clients, most of whom are distressed or angry or depressed because of the proceedings and many of whom are vulnerable, as well as in an alien environment listening to unfamiliar language. There is a lot of information for them to take in, they rarely keep their own notes. None of this is a good basis for objective recollection of what took place. Frequently I represent clients who relate back to me their understanding of what was said by the judge or myself or someone else at an earlier hearing and they have completely got the wrong end of the stick. Usually I can see how that has happened and straighten things out, but clearly that is not going to be possible in a complaint scenario.

Our clients struggle to take responsibility for the circumstances they find themselves in because they are engaged in litigation, this makes them defensive. Making a complaint against their barrister may well be another way in which they seek to shift responsibility away from themselves.

There are myriad reasons why a client may make a complaint, which may well be tied up with the litigation itself and underlying issues, and very few ways in which we can protect ourselves from such complaints given we have little control over what cases we take and who is present with us when we see our clients, and no employer to offer support in defending a complaint. I would therefore urge the BSB not to make any changes to the standard of proof.

[REDACTED]

[REDACTED]

From:
Sent:
To:
Subject:

[REDACTED]

11 July 2017 22:19

[REDACTED]

standard of proof in BSB disciplinary hearings

[REDACTED]

I was alarmed to learn of the proposal to alter the standard of proof in Bar disciplinary complaints hearings from the criminal standard to the balance of probabilities.

This is an ill-advised course which exposes barristers to greater risk than other professionals for no apparent advantage.

A complaint can destroy a career. Before any adverse finding of gravity is made, the fact-finder/s should be sure the complaint is true, rather than merely content that it is more likely than not, true.

Why should barristers be in any different position to other professionals?

This change could become a complete own goal, bringing the Bar into disrepute by encouraging spurious complaints, where the complainant knows that a lower threshold can be crossed.

We at the criminal Bar deal with difficult customers, many of whom have nothing to lose and potentially much to gain, by blaming their counsel for any failure in their litigation.

It seems that the Bar Council is determined to make life yet more onerous for those it purports to represent, whilst providing ever-diminishing support. The proposed change will further weaken the Bar during already difficult times. Much more thought should be given to this foolish proposal.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

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[REDACTED] as soon as possible [REDACTED]

[REDACTED]

From: [REDACTED]

Sent:

11 July 2017 14:58

To: [REDACTED]

Subject:

Response to standard of proof consultation

[REDACTED]

Q1: No – I do not consider that in principle the BSB should change so as to provide the civil standard for allegations of professional misconduct.

- The criminal standard should be retained – at least for allegations of professional misconduct that are tantamount to crime and for which the sentence is likely to be withdrawal of the right to practise. As the paper describes, the limited relevant case law appears to support retention of the criminal standard in cases concerning quasi-criminal allegations.
- The public policy reasons that it seems prompted the change from the criminal to the civil standard in the case of doctors' fitness to practice cases, as described in the consultation paper, do not apply in the same way to barristers. Whereas doctors operate and administer medication to patients unsupervised, with potentially lethal consequences, barristers provide legal advice (unsupervised) and advocacy services in court-rooms supervised by judges; and they do not even hold client monies. The scope for professional misconduct endangering the public is therefore vastly reduced. The likely damage caused to a member of the public is in most cases financial and can be compensated by suits/complaints where the balance of probabilities standard applies.
- The application of the criminal standard reflects the gravity of the allegation and of the consequence of the sentence (which cannot be insured against). It is not acceptable (in the absence of any strong public policy consideration such as that applicable to medics) for a barrister to be sanctioned by withdrawal of practising certificate (and therefore livelihood) on the balance of probabilities in cases where the tribunal may feel there is a 49% possibility of that person having in fact been innocent of the charge. There is no logical justification why a professional acquitted of a criminal charge should be vulnerable to a professional misconduct charge arising from the same facts but applying a lesser burden of proof (the 'more likely than not' test).
- For offences of lesser gravity, the public has multiple avenues of redress that apply the civil standard and provide financial redress (civil claims for negligence and complaints to the Legal Ombudsman).
- The only reason for changing the standard identified in the consultation paper appears to be one of public perception. It is stating the obvious to say that reducing the standard favours a complainant in making proof of the allegation easier (it would likewise favour victims of crime if the criminal standard of proof were reduced to the balance of probabilities in criminal cases); it does not follow that this is the right course to take. The question is whether that rebalancing is appropriate in view of the gravity of the allegations and the gravity of the penal nature of the sentence. Nothing has changed that now requires a reduction of the criminal standard traditionally set for bar misconduct cases: there are not many professional misconduct cases against barristers and none that I can recall raising grave concerns as to public protection (in contrast to the medical profession, as described in the paper); and in the interim the opportunities for redress by those with complaints against barristers have been widened (eg the LeO). Professional standards remain high.
- If there are lesser types of offences caught within the definition of 'professional misconduct' that are not quasi-criminal in nature and which do not attract the sanction of disbarment it may be worth considering whether the standard of proof might be reduced to the balance of probabilities for these offences with the criminal standard being retained for those offences where the likely sanction is striking off.

Q2: Not applicable.

Q3: I have no view on this. I doubt there is an equalities angle. I assume it is not the case statistically that barristers with protected characteristics are any more likely to be on the receiving end of professional misconduct charges than barristers without protected characteristics.

B/rgds

[Redacted]

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[REDACTED]
From:
Sent:
To:
Subject:

[REDACTED]
11 July 2017 10:12

[REDACTED]
Proposed change in standard of proof

Dear Sir/Madam,

I wish to register my opposition to the proposed change. Gone are the days when barristers would inevitably have the presence of an instructing solicitor as a protection against false allegations.

Yours

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

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[REDACTED]

From: [REDACTED]

Sent:

11 July 2017 08:03

To: [REDACTED]

Subject:

[REDACTED] consultation on standard of proof in disciplinary proceedings

[REDACTED]

Below are some points I would ask that you take into consideration when considering changing the standard of proof in disciplinary hearings.

1. The concept that there is a higher standard of proof or a "gloss" on the balance of probabilities and that the more serious the allegation the more "cogent" the evidence must be was dismissed years ago by the House of Lords (as it was then). The balance of probabilities is the balance of probabilities. Full stop. Let's not be lulled into a false sense of security.

In *Re B (Care Proceedings: Standard of Proof)* [2008] UKHL 35, [2008] 2 FLR 141 Baroness Hale, while approving the general principles adumbrated by Lord Nicholls in *Re H and Others*, expressly disapproved the formula subsequently adopted by courts to the effect that 'the more serious the allegation, the more cogent the evidence needed to be to prove it'. She continued (at paragraphs 70, 71 and 72):

'My Lords, for that reason I would go further and announce loud and clear that the standard of proof in finding the facts necessary to establish the threshold under s 31(2) or the welfare considerations in s 1 of the 1989 Act is the simple balance of probabilities, neither more nor less. Neither the seriousness of the allegation nor the seriousness of the consequences should make any difference to the standard of proof to be applied in determining the facts. The inherent probabilities are simply something to be taken into account, where relevant, in deciding where the truth lies. As to the seriousness of the consequences, they are serious either way. ... As to the seriousness of the allegation, there is no logical or necessary connection between seriousness and probability.'

2. We are not in step with other professions – I would predict that the majority of a doctor's patients are relatively normal people. Of my parent clients in care cases 100% are vulnerable, probably delusional and certainly with personality disorders or mental health problems. As lawyers we all know that the delusional witnesses who believe their own version of the truth are the most dangerous. For example, Charlie Gard's mother appeared on television a couple of days ago saying that there was a chance that he might be a "completely normal boy". That is simply not the case and even the sympathetic journalist said that the parents needed to be realistic. Parents who are losing their children think with their hearts and their survival instincts not logic or fairness towards those they perceive as threatening them.
3. We rarely have clerks or someone with us to deal with our own clients, never mind the litigants in person. It would often come down to one person's word against another.

4. There are pressures for these clients that we don't always know about. Many clients in care cases have to keep their abusive partner or difficult family happy. How many clients have to make it their lawyer's fault that they have lost the children when they explain to their families that the children are not coming home? I am happy to protect my clients by taking that criticism on the chin, it's part of the job, but if I thought that they might complain and it be considered on the balance of probabilities I might be more circumspect. How does that protect the public?

5. It seems to me that this is a public relations exercise. There is no proof that the public needs to be protected from the Bar and that the current standard of proof is a problem. There is enough difficulty attracting the able students to the Criminal and Family Bar as it is.

No one wants rotten apples in the profession but I don't think we have to lower the standard of proof to prevent them being disciplined.

Regards

[Redacted signature block]

[Redacted signature block]

[REDACTED]

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[REDACTED]

[Redacted]

From:

[Redacted]

Sent:

10 July 2017 13:26

To:

[Redacted]

Subject:

Objection to change in standard

Dear Sir,

Please note my strong objection to making independent barristers more vulnerable to complaint and oppressive sanctions if the standard of proof is reduced. There is no foundation for it and puts barristers at risk of false complaints being held up on a basis where there is no certainty. The standard should remain as it is in order to protect the bar and members of the public.

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

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[REDACTED]

[REDACTED]

[Redacted]

From:

[Redacted]

Sent:

10 July 2017 11:56

To:

[Redacted]

Subject:

Response to the Consultation on the Standard of Proof in Professional Misconduct Proceedings

[Redacted]

I wish to respond to the above consultation. I am a self employed barrister in Chambers [Redacted]

My answer to Q1 is no. I therefore do not answer Q2. My answer to Q3 is no.

My view is that the standard should remain the criminal one for two main reasons. The first is the potentially devastating consequences to someone's career and therefore life in the event of an adverse finding. The second is the unique position barristers find themselves in and their susceptibility to a false complaint, especially at the criminal bar. We frequently represent the dishonest and the vulnerable. Our clients are often distressed and angry, even when a good job is done for them. They are often aggravated by the outcome of a case, however inevitable it may have been. We are rarely, now, assisted by a third party, such as a solicitor's clerk. We have gone paperless, so our contemporaneous notes can no longer be signed. We are all too open to a false complaint, in a way other professions are not.

Regards,

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

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[REDACTED]

[REDACTED]

From:
Sent:
To:
Cc:
Subject:

[REDACTED]
10 July 2017 11:35

[REDACTED]
«Standard of proof

[REDACTED]

I have been made aware of the consultation regarding the proposed alteration of the standard of proof in BSB disciplinary proceedings. For what it is worth may I please take this opportunity to register my strong opposition to such a move.

I practise predominately at the civil bar and I have a particularly large direct access practice. Often the individuals that I represent are individuals with very strong feelings of injustice and grievance at the Court process or through previous representation. It is very easy for those individuals to turn the focus of their aggression or cause upon those who represent them. Many conferences are done face to face with no other individual within the meeting. Phone calls are regularly made and though notes are obviously taken a dispute would be the complainer's word against the barrister.

In this profession we are often dealing with the most challenging of individuals. Sometimes seriously dishonest and difficult individuals. The lowering of the standard of proof would encourage complaints in my opinion and leave those in the profession vulnerable. Further the process of the complaint and the stress it would bring to individuals and damage to carefully forged careers is manifest. The current standard of proof is sufficient and should not be changed. I have seen no evidence of the need for change and perhaps most importantly would I take on that very very difficult direct access client with a the most challenging case - knowing that the standard of proof had changed - maybe I would not - thus the change has a very real chance of affecting the fearlessness of barristers in taking on the good fight.

Please do not alter the standard of proof it would be change for changes sake.

Regards

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

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[REDACTED]

[REDACTED]

From: [REDACTED]

10 July 2017 10:28

Sent:

To: [REDACTED]

Subject:

Consultation on the standard of proof

[REDACTED]

I am aware of the consultation on the proposed change of the standard of proof in disciplinary proceedings for misconduct to the civil standard. I would like to register my strong opposition to this proposal. I am aware that the civil standard is in use for other professionals, but respectfully suggest that this profession is different.

As a junior criminal barrister, I am almost never attended by an instructing solicitor. I therefore represent my clients on my own, often instructed at short notice and doing the best I can in difficult circumstances. I am forced to accept this commercial reality. This places me in a vulnerable position. Many of my clients behave irrationally, have difficulty controlling their emotions, or are dishonest. I cannot keep them all out of prison.

I understand my ~~BMF~~ insurance would not cover representation at any disciplinary proceedings and I have no employer to turn to for assistance. I would therefore probably have to represent myself in the event of a complaint as I certainly couldn't afford to pay privately for representation.

I always act in my client's best interests, and I have never been the subject of a complaint, but I am very aware of the potential for a false complaint from a dissatisfied client. That such a complaint would have to meet the criminal standard of proof before I lost my livelihood is an important safety check. Please do not remove it.

Best regards,

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

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[REDACTED]

[Redacted]

From:

[Redacted]

Sent:

10 July 2017 09:39

To:

[Redacted]

Subject:

Re change of SOP

Dear BSB,

I am not in favour of the standard of proof changing.

Best Wishes,

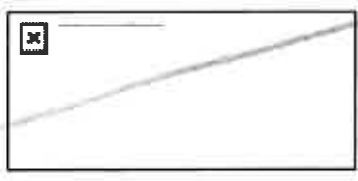
[Redacted]

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[Redacted]


[Redacted]

[Redacted]

[Redacted]

[Redacted]

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distribute, discuss or take any action in reliance on it. If you have received this information in error, please notify 

[REDACTED]

From: [REDACTED]

Sent:

10 July 2017 09:10

To: [REDACTED]

Subject:

Consultation on the standard of proof

[REDACTED]

I have been made aware of the consultation regarding the proposed alteration of the standard of proof in BSB disciplinary proceedings. For what it is worth may I please take this opportunity to register my strong opposition to such a move. I practise at the criminal bar and the vast majority of my conferences and dealings with clients are without any support from solicitors or any of their employees. There is no point lamenting that change in the way things are conducted, it simply reflects a commercial reality in an age of stagnated legal aid fees. However, it does leave members of the criminal bar in a very vulnerable position. I always get clients to sign a note if there is a change of plea etc. but there are any number of potential scenarios where a client might claim something was said in a conference, a promise made or a threat implied, which could have very serious consequences. Equally, it is often the case that I am talking to women, many of them very vulnerable, in a room on my own. It does not take a great author of fiction to imagine what accusations could be very easily levelled should someone be malicious enough to do so.

Retaining the criminal standard of proof affords a fair protection against this sort of threat. We do not have resource to a trade union or to an employer in the event of any such accusation being levelled. It is the nature of our job, far more than in any other profession, that we are frequently dealing with damaged, difficult and/or dishonest people. If we are not going to have any support at court then we need that last line of defence. Please do not remove it.

Kind regards,

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

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[REDACTED]

[Redacted]

From:
Sent:
To:
Subject:

[Redacted]

09 July 2017 15:02

[Redacted]

Professional misconduct standard of proof

[Redacted]

I wish to express my strong view against any change re: the above.

As a family practitioner, I am acutely aware of my vulnerability in regards to the possibility of false claims being made.

As is well known, family courts are dealing with an ever increasing number of litigants in person. In order to assist the court, Barrister's are expected to enter into negotiations with the parties. Such negotiations, are often fraught with hostility. This often leads to negotiations being abandoned or not even being attempted. Litigants often view you as "the enemy", this is often the attitude you encounter.

It's a rarity for a barrister to be assisted by a solicitor when at court. This adds to our vulnerability to false claims.

In brief, lowering the standard of proof is completely unnecessary, and would only lead to family Barrister's being further exposed to hostility when at court, and a likely increase in false claims.

Regards,

[Redacted signature block]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

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[REDACTED]

[REDACTED]

From:
Sent:
To:
Subject:

[REDACTED]
09 July 2017 12:00

[REDACTED]
Standard of Proof

[REDACTED]

I am against a change in the Standard of Proof in Disciplinary proceedings.

Regards,

[REDACTED]

~~(Practising Barrister 1074 call)~~

Sent from Mail for Windows 10

[REDACTED]

From:
Sent:
To:
Subject:

[REDACTED]

08 July 2017 17:43

[REDACTED]

Changing the standard of proof in complaints cases

[REDACTED]

I email to oppose the proposed change in the standard of proof to that of balance of probability.

I am a family barrister, regularly acting without a solicitor to support me and regularly against litigants in person. I think it would leave me more vulnerable to complaint in the first instance.

Morale at the Family Bar is at an all time low. Yet another increased risk to our selves in practise (beyond representing and being against personality disordered/ mentally ill / emotional / frustrated /sometimes threatening and violent people regularly AND without solicitors along with decreasing remuneration, longer hours, increasingly hostile judiciary - due to their pressure of work - and an expectation that we will work with PSU, drafting orders and case summaries when we are the respondents etc which all increase the chances of a complaint) is unjust and will not doubt cause many to once again consider our futures at the bar.

I do not understand why it is necessary to implement the change.

I do not want those with poor professional standards to tarnish my profession. Equally, we are exposed occasionally to aggressive, litigious people who pursue their perception of a reality to the nth degree in the family court, acting in person often, and who would not be deterred from making and pursuing a complaint if the burden of proof is the lower standard but who may if it is the higher.

Yours

[REDACTED]

Sent from my iPhone please excuse spelling errors

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

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[REDACTED]

[REDACTED]

From: [REDACTED]

Sent:

08 July 2017 16:38

To: [REDACTED]

[REDACTED]

As a family practitioner I do feel vulnerable to vexatious complaints by LIPs and to the occasional unreasonable client who does not achieve what they hoped for.

I recognise the need to maintain credibility in the profession and to keep pace with other professions in setting standards but I am swayed by the argument that doctors, for example, are often supported by other healthcare professionals in surgeries or hospitals whereas barristers are often inevitably acting alone in their work.

I am against raising the standard of proof to the criminal standard.

Kind Regards

[REDACTED]

Sent from my iPhone

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

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[REDACTED]

From:

Sent:

08 July 2017 14:58

To:

Subject:

Change to the evidential standard applied in relation to allegations of misconduct

Dear Sir,

Please note that I would wish my voice to be heard in this debate. I am against a change to the standard applied in these matters and support the criminal standard remaining as the appropriate evidential standard to apply.

As a family practitioner I am routinely put in a position of having to give unpalatable advice. Moreover, I am also increasingly within the private law arena, involved in dealing with litigants in person, sometimes when instructed to represent a child through their appointed guardian, I can have, as I had on the case recently, three litigants in person to deal with within the proceedings. I have no doubt that in that particular case two of the litigants would've been very motivated to make a complaint about me if they could find a reason, albeit unfounded, as they objected to my instructed support for the other party. It is unfair to place counsel in this position as we are unprotected, have no employer or union rep to assist and support in these situations.

Regards

[REDACTED]

Sent from my iPhone

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

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[REDACTED]

From: [REDACTED]

Sent:

06 July 2017 09:05

To: [REDACTED]

Subject:

Standard of proof in professional misconduct proceedings

[REDACTED]

Please take this email as my response to the BSB's consultation paper above.

My view is that the standard of proof should be changed, essentially for the reasons set out in the paper, but only in conjunction with a corresponding change by the SDT. I would however be concerned that a unilateral change would lead to inconsistent outcomes where (for example) both the solicitor and the barrister were accused of professional misconduct in connection with the same matter.

My responses to the consultation are therefore:

1. Yes
2. Yes
3. No

Kind regards

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

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[REDACTED]

From:

Sent:

[REDACTED]
02 July 2017 18:10

To:

Subject:

[REDACTED]
Consultation on Standard of Proof in Professional Misconduct Proceedings

1. Q1: 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?

No.

- a In McCarthy v BSB (No 1) [2015] (see below), the Court of Appeal approved an analogy between disciplinary proceedings and criminal proceedings [para 17], and acknowledged that they are at least capable of engaging Art 6 rights to a fair trial [para 23].

"Moses LJ drew an analogy between disciplinary proceedings of this nature and criminal proceedings. To my mind that is entirely apt, if not exact, and supports the suggestion that scrupulous standards are required of the BSB acting as prosecutor. This Tribunal was concerned with very serious allegations which had the potential to destroy a professional reputation and bring to an end a professional career, even though its decision could not result in a criminal conviction." [para 17]

- b In Smith v BSB [2016] [para 45], Collins J gave a similar reason for the rule:

"It is to be noted that a finding of serious professional misconduct is so damaging to a practising barrister that the criminal standard of proof must be applied in deciding on charges of serious professional misconduct. That is laid down in paragraph rE143 of the regulations."

- (i) Collins J also drew [para 46] the same analogy between criminal proceedings and the disciplinary proceedings as that earlier approved by the Court of Appeal in McCarthy.
- (ii) Both courts approved the criminal standard, gave reasons why it must apply, and did so within the last 3 years. It follows that the recent authority on this point is that the criminal standard is appropriate and necessary. The same is not necessarily true of other professions, who do not have, as barristers and solicitors both do, an overriding duty to the court over and above that which they owe to their clients. Other professions are less likely to find themselves wholly unable to practice if convicted of professional misconduct. That is the answer to the question posed at para 25 of the consultation.
- (iii) It is worrying that the consultation has not referred to the cases identified above and below. The comments above form part of the ratio of the cases, which directly concerned the regulation of barristers. The comments referred to in the Arslan case were, as the consultation notes, obiter dicta, a significant distinction. Arslan was also a case of a consultant to a solicitors firm, not a qualified solicitor. Barristers cannot use such personnel. It is, therefore, for the BSB to show sound evidence as well as reasons why such senior judicial

approval and opinion should not be respected. The BSB has advanced no such evidence.

- c **Claims against barristers remain lower than those against many other professionals. One concedes that this may change following the BSB's relaxation of the standards required to permit someone to describe himself as a barrister, to practice as a barrister, to accept direct access work, and to conduct litigation. Even so, should claims be shown, at some later date, to have increased in connection with those changes, it would still be more appropriate to re-visit the reasons for making those changes before watering down the standard of proof which, in regulatory law as in criminal law, exists to balance the risk of injustice to an innocent accused with the need to protect the victims of wrongdoing.**
- d **The Consultation has advanced no evidence that barristers who fall below the required standard of conduct are not properly sanctioned, nor that there is any lack of public confidence that they are. Indeed, in the case of McCarthy, identified below, notwithstanding trenchant judicial criticism of the BSB's flawed conduct of the proceedings, the findings of guilt were ultimately upheld.**
- e **In both cases identified above, senior judges acknowledged the serious consequences to a sole practitioner of infringing his professional duty. Depending admittedly on the nature of the professional misconduct, consequences are likely to be a more wide-reaching punishment than those suffered by an employed person or a partner in a solicitor's firm. In all the cases identified below, the finding in question, if sustained, was such that it was highly unlikely that the barrister convicted would not be invited to resign from chambers and equally unlikely that any other chambers would accept him thereafter.**
- f **Senior courts have criticized the BSB in several recent cases for failing to observe proper standards in disciplinary procedures. It is hard to see how the BSB's own compliance can be improved by watering down the standards it applies. In both McCarthy and Smith, the judges jettisoned their habitually muted mode of expression of judicial disapproval. That is significant. Most professional bodies so rebuked would have reflected on their failure to meet acceptable standards and announced steps to ensure future compliance. The BSB's response to its embarrassment is to suggest that it should lower the burden of proof it has to meet.**
- g **Judicial review is expensive and rare. There must be more cases where the BSB has failed to act fairly and/or apply the appropriate standard but where the person sanctioned did not or could not challenge the decision. The cases listed below should have led to a penitent organizational review of procedures, training, education, and other factors that led to them. Instead, this consultation prompts the suspicion that the BSB is lacking in the willingness improve its own performance.**
- h **The proposal is thus damaging for two reasons.**
 - (i) **It reduces a necessary legal safeguard for sole practitioners for whom the consequences of a professional sanction may be professional ruin. There are circumstances where professional ruin is just – dishonesty for instance. However, for that very reason, the criminal standard of proof is required.**
 - (ii) **It will cause lasting and possibly irreparable damage to the respect in which the BSB is held by the profession. Where a profession loses confidence in the integrity of a regulator, it is very difficult to recover it.**

The 4 cases below are essential reading for anyone involved in decision taking following this consultation. They bear directly on the position for the Bar and the BSB, unlike the Arslan Judgment.

1 McCarthy v BSB No 1 [2015] EWCA Civ 12 - A barrister was charged with forging client care letters (the charge ultimately succeeded). At the first trial, however, the BSB failed to disclose a draft witness statement made by its own witness, which materially differed from the final version of the witness statement.

The Court of Appeal found that the BSB had acted unfairly and in breach of its obligations under Regulation 7(1) (a) Disciplinary Tribunal Regulations 2009. In a rare departure from the usual delicate restraint of judicial expression, the court said [at para 17]]

"What happened was extraordinary. A conscious decision was taken by an official at the BSB which had the effect of subverting the rules which provide for disclosure and furthermore suggested that he was blind to any sense of fairness in the conduct of a disciplinary prosecution. To my mind, that was compounded by inviting a witness to assume the role of surrogate prosecutor by producing a statement of the sort I have described. Moses LJ drew an analogy between disciplinary proceedings of this nature and criminal proceedings. To my mind that is entirely apt, if not exact, and supports the suggestion that scrupulous standards are required of the BSB acting as prosecutor. This Tribunal was concerned with very serious allegations which had the potential to destroy a professional reputation and bring to an end a professional career, even though its decision could not result in a criminal conviction."

The BSB's attempt to justify its conduct was unreasonable and suggestive of a failure to acknowledge its own failing:

"Before the High Court the BSB sought to maintain that its failure to disclose the statement did not breach the procedural rules and did not amount to unfairness. Those arguments failed. They were maintained in the face of guidance issued by the BSB itself which required disclosure".
[Para 32]

The court left to one side the issue of whether the non-disclosure amounted to a breach of Mr McCarthy's Art 6 rights, because it was not taken below. However, it agreed that such rights were, in principle, engaged [para 23]

Comment: This was serious misconduct by the BSB. As the CA pointed out, conviction means loss of career. The Lords of Appeal expressly approved comparing this type of disciplinary proceeding to criminal proceedings. The BSB's non-disclosure demonstrates, putting it in the kindest light, a woeful ignorance or lack of training on the part of BSB staff. Watering down the criminal standard of proof would create the risk that more, not fewer, decisions would be taken upon similarly flawed, even prejudiced, evidence, by under-trained staff, which the accused would have no means of challenging in circumstances capable of ending his career. The BSB consultation fails to adduce any concrete reason why it disagrees with the Court of Appeal's approval of the characterization of BSB disciplinary proceedings as analogous to criminal proceedings or how this will provide adequate protection to Art 6 rights.

2 McCarthy v BSB [2017] EWHC 969 (Admin). Following that high level judicial rebuke, the BSB ordered a re-trial. This was announced in a press release in which the Director of Professional Conduct said

'Notwithstanding the history of the case, the BSB remains of the view that Mr McCarthy acted dishonestly and falsified the client care letters during our original investigation.' [para 13]

In another statement, the same officer described the BSB's failure as *"an error in the BSB's handling of the case"* [para 14].

The Court held that the BSB was entitled to issue a press release, and to say in it that there would be a re-trial. However,

"I agree that the BSB went somewhat further than was proper, in expressing its view that the Appellant had committed the offences with which he was charged. As Mr Counsell QC conceded, it would have been better if the press release had been expressed in more circumspect language, confining itself to commenting on the strength of the evidence against the Appellant." [para 59]

Comment: Public comment on the probable outcome of a re-trial leads to the inexorable conclusion that the BSB had not learned any lesson from the Court of Appeal's criticism.

Consider what press comment would follow were a trial judge to issue a public statement that, notwithstanding the overturning of his decision at appeal, he was nevertheless correct. The fact that the charges against this accused were eventually made out is neither here nor there. It is improper for the entity that is prosecutor, judge and jury and to comment on the anticipated outcome of any case.

3 BSB v Howd [2017] EWHC 210 (Admin). The High Court overturned a decision of the BSB over a barrister's behaviour at a chambers party. On this occasion, the BSB failed to interpret and apply its own guidance properly. The flaw lay in the BSB's own drafting.

"In my view, the Tribunal erred in applying the guidance as if it was a mandatory rule of conduct, and they lost sight of the need to be satisfied that the "seriously offensive or discreditable conduct" in this particular case amounted to a failure to "act with honesty and integrity" within the meaning of CD3. Their error may have resulted, at least in part, from the fact that the guidance is expressed in very broad terms, and does not distinguish between the requirements of CD3 and CD5."

4 Smith V BS [2016] EWHC 3015 (Admin): Mr A complained that a barrister had notified him that a consent order in a divorce settlement created a clean break, when it was not the case. The Legal Ombudsman rejected the complaint. The BSB nevertheless proceeded with a prosecution, which was brought by MR A's solicitors on his behalf, including the partner who was present when the consent order was agreed. The court noted that the BSB had failed to recognize a potential conflict of interest in that it was in the solicitors' interest to put any blame on Mr Smith rather than on themselves. The court held that *" the BSB were seriously at fault in permitting the solicitors to continue to act on Mr A's behalf in pursuing the case and, in particular, in producing Mr A's statement."* [paras 7-8]

The court also criticized the fact that the BSB did not engage with Mr A at all but left it to the Solicitors to produce his statements, characterizing this relaxed attitude as: *"a clear failure to act properly.... a serious error by the BSB."* [para 35] and *"in gross breach of [BSB's] duty"* [para 41] and *"serious dereliction of duty"*[para 42].

Further, having given a statement prepared by his conflicted solicitors, Mr A did not attend the trial. The BSB acceded to this, following a telephone call, the BSB's note of which read:

"Does not want to be involved, would not be able to give any useful evidence in any event as the lay client."

The court called this *"an extraordinary observation which led, when [the solicitor] was cross-examined at the tribunal, to thoroughly unsatisfactory answers being given by her. [The BSB file handler] did nothing; he took no steps to procure or seek to procure Mr A's attendances. At the very least he clearly should have written a letter because he had already been in gross breach of his duty in allowing statements to be taken by [] Solicitors and not by a representative of the BSB."* [para 41].

The BSB did not write or otherwise try to procure Mr A's attendance, yet the statement, which was hearsay, was admitted at the trial. It was suggested that the file handler informed the solicitors that it was not vital that Mr A should attend, the court said: *"If he did so inform [solicitor], that was equally a serious dereliction of duty by him."* [para 42]

In admitting the statement, the BSB *"ignores the overriding provision in paragraph rE144 that the rules of natural justice apply. And so the tribunal must be astute to ensure fairness. It is to be noted that a finding of serious professional misconduct is so damaging to a practising barrister that the criminal standard of proof must be applied in deciding on charges of serious professional misconduct. That is laid down in paragraph rE143 of the regulations."*[para 45]

At para 46, the judge again drew an analogy with criminal cases.

"46 It is in my view proper to draw an analogy with the admission of hearsay in criminal cases. The statute and the law makes clear that it is essential that reasonable steps are taken to ensure the attendance of the witness who is to give the evidence even if he is not the only witness who deals with the particular issue. It was all the more necessary in the interests of fairness that Mr A should attend since there were inevitably concerns that his statement may have been influenced by what [the solicitors] wanted him to say, and evidence from the complainant who was independent of his solicitors was essential."

Against that background, the tribunal's conclusion that the BSB had taken reasonable steps to procure the attendance of Mr A was described as *"truly extraordinary"* and *"clearly perverse"*. *"It had taken no steps. It is hardly possible to believe that to take no steps is to take reasonable steps. Further, to say that the weight of his evidence was in effect all that mattered was equally perverse in that it ignored the obvious unfairness which would result and equally ignored the fact that [the solicitors] had an interest in procuring a statement which exonerated them and blamed Mr Smith."*

The judge concluded *"I have no doubt that the appellant did not receive a fair hearing"*.

Comment: The case is an alarming one for any barrister who has been the subject of a professional complaint, especially if he feels it to be unjustified. He will go to the tribunal in real apprehension as to whether he will obtain a fair hearing. Removing the criminal standard of proof will do nothing to improve the profession's confidence in receiving a fair hearing.

2. **Q2: 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?**

See answer to Q1. The reasons given by the Court of Appeal and Collins J as underpinning the criminal standard of proof are sufficient in themselves. They apply with nearly as much force to solicitors as they do to the Bar.

The Bar has always prided itself on having the highest standards of conduct, a fact which is borne out by the still relatively low level of complaints against barristers. If there were evidence that it is too hard to sustain complaints against barristers who have clearly acted unprofessionally, that might be a reason to reconsider the standard of proof. The BSB adduces none.

Should the SDT move to the lower standard, the BSB should decline to follow suit. In any event, the approach of the SDT is not relevant to the BSB. The professions are substantially different. Quite apart from anything else barristers likely to be affected by a finding of professional misconduct are largely self-employed sole practitioners whose fellow members of chambers are likely to be less forgiving than the regulator. Most solicitors work in firms where colleagues can assist them. It is slightly more likely that a solicitor who retains his practising certificate after professional sanction will be allowed to remain in practice.

3. **Q3: 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? +**

It is obvious that it will. It is profoundly worrying that the "initial screening" mentioned at para 27 of the consultation did not identify it. Such practitioners are disproportionately more likely to be:

- a In smaller chambers, less well resourced chambers, or even in sole practice, such that dealing with complaints will occupy more of their resources and impact harder on their income than those in larger or more established sets.
- b Acting in the areas of practice which are more contentious, where feelings run higher (e.g., family), and where complaints are more likely;
- c Acting on direct access, where the client – and barrister - lack the support of a solicitor. Such clients are – with honourable exceptions – less likely to understand that a direct access barrister is not a substitute for a solicitor or to understand the burden they themselves carry as litigants in person. They are demanding and often do not understand the limitations of the service provided no matter how clearly it is spelt out in the client care letter.

- d Authorized to conduct litigation. This creates its own traps for the practitioner, and is immensely burdensome, in a way few barristers are geared up to manage. This is doubtless why barristers in chambers with plenty of work have not been queuing up to apply for this poisoned chalice.

It follows inexorably, that while many who have protected characteristics will be in good chambers, with excellent practices, and sound administrative support, a lower standard of proof than that approved by the Court of Appeal in McCarthy is likely to impact more heavily on such barristers.

[REDACTED]

From:

Sent:

[REDACTED]
30 June 2017 18:14

To:

Subject:

[REDACTED]
Standard of Proof consultation

Attachments:

Response to Standard of Proof Consultation.docx

Please find attached my response.

Response to Standard of Proof Consultation

30th June 2017

Q1

The BSB should not apply the civil standard of proof to allegations of professional misconduct. Where an individual is to be punished depending on the outcome of a hearing, the criminal standard is appropriate. This is a fundamental principle of the rule of law.

The argument for public protection does not detract from this principle. If it did, the more serious a crime, the lower would be the burden of proof. We do not apply the civil standard in murder trials to protect the public against probable murderers. The BSB should preserve the "golden thread" for as long as the criminal law does, and for the same reasons.

The argument that we should copy the rules used by other professions is not a good argument either for two reasons:

(1) The fact that other professions may have made an error of principle (probably deriving from a lack of experience of the criminal law) in deciding the burden of proof is no reason to follow them. Indeed they may in due course seek to follow the legal profession.

(2) It may be appropriate for different professions to follow different rules. If there is a 51 per cent chance that a barrister has breached the cab rank rule that is certainly not a reason to disbar him. He is unlikely to do it again in any event. If there is a 51 per cent chance that a doctor carries out an illegal and dangerous medical procedure, that is an entirely different matter and it may be understandable that some would say the GMC should be able to act.

Q2

Does not arise.

Q3

A change in the standard of proof would vastly increase the chances of unjust punishments. No doubt this would hit worst those in the weakest circumstances. It is not obvious that those with protected characteristics would otherwise be disproportionately affected.

From:
Sent:
To:
Subject:

[REDACTED]
24 June 2017 21:59

[REDACTED]
Response to Consultation Paper on the Review of the Standard of Proof Applied in Professional Misconduct Proceedings

Q1 No
Q2 N/A
Q3 No

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

[REDACTED]
[REDACTED]

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[REDACTED]

From: [REDACTED]

Sent:

22 June 2017 13:18

To: [REDACTED]

Subject:

Consultation response

[REDACTED]

In response to the consultation on standard of proof, please see my thoughts here :
[REDACTED]

I agree that the standard of proof should, on public interest grounds, be the lower civil standard.

On Equality impact - I would be concerned that the civil standard may render vulnerable those with mental health difficulties which disable them from active participation in the disciplinary process. I would expect that if the civil standard were adopted a review of the procedural rules would be undertaken to ensure that there was sufficient flexibility to cater appropriately for those with such a difficulty or disability.

[REDACTED]

From: [REDACTED]
Sent: 21 June 2017 15:15
To: [REDACTED]
Subject: Fw: CONSULTATION ON CHANGE IN STANDARD OF PROOF

[REDACTED]

Sent: 21 June 2017 14:03
[REDACTED]
Subject: CONSULTATION ON CHANGE IN STANDARD OF PROOF

Dear Sir

The standard of proof should not be changed to the civil standard.

I would only support a change in standard of proof if there were to be an accepted 'third' standard between the criminal and civil standard as is the case in the USA. I would support a change to that third standard.

[REDACTED]

From:
Sent:
To:
Subject:

[REDACTED]
20 June 2017 13:31

[REDACTED]
Review of the Standard of Proof Applied in Professional Misconduct Proceedings -
Consultation Paper

Consultation questions

1. **Q1: 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?**

NO

2. **Q2: 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?**

N/A

3. **Q3: 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?**

DON'T KNOW

[REDACTED]

From:

Sent:

[REDACTED]
11 June 2017 09:08

To:

Subject:

[REDACTED]
Consultation Response

[REDACTED]

.These are my responses to the standard of proof consultation (adopting the same numbering as the questions at the end).

(1) No. The fact that other regulators may have moved to a civil standard is a very weak argument to support the BSB doing so. It may simply show that those other regulators are wrong and that the SDT and BSB are correct in their application of the criminal standard. A right to practice in one's profession is enshrined by Article 1 of the First Protocol of the ECHR. No regulator should be entitled to deny that right unless satisfied to a very high standard that it is necessary to do so. The civil standard of proof is not enough. Arslan should not be taken as an encouragement to either the SDT or the BSB to lower the threshold of proof, in circumstances where a considerably more senior court (i.e. the PC) has said in terms in the recent past that there is no doubt that the criminal threshold remains appropriate. I do not agree that the "climate" has in any way changed in respect of the appropriate standard of proof as opposed to, for example, the importance of independent regulation and obligations to report misconduct.

(2) It would be inconsistent to have a different standard to that applied by the SDT.

(3) No.

[REDACTED]

[REDACTED]

[Redacted]

From: [Redacted]
Sent: 07 June 2017 14:27
To: [Redacted]
Subject: Review of the Standard of Proof Applied in Professional Misconduct Proceedings - response to consultation

[Redacted]

I support the amendment of the standard of proof to the ordinary civil standard. This would bring the Bar into line with other professional disciplinary bodies, and would enhance public and consumer confidence in the Bar's regulation.

I am writing in a personal capacity, not on behalf of my chambers.

Yours sincerely

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

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From:

Sent:

To:

Subject:

26 May 2017 23:52

~~re BSB consultation on altering the standard of proof in disciplinary proceedings.~~

Q1: No, I do not consider that the arrangements should be changed to abolish the criminal standard of proof.

First, the legal - and, I would argue, the medical - profession stands in a category apart from almost all others.

Misconduct proven against a lawyer tends to disgrace the guilty individual more than misconduct proven against individuals who are members of most other professions. Second, right is right and wrong is wrong, so I don't care how many other professions have been doing the wrong thing, thereby leaving us in a minority. I am therefore not impressed by the argument that most other professions have now caved in and adopted the civil standard.

Third, this movement to change the standard presents itself to me as more of a sop to public prejudice and ignorance, rather than as service of the public good, or public protection.

Fourth, disciplinary adjudication now involves lay tribunal members. The idea of being drummed out of the profession because people who, by definition, don't know what it is to be a lawyer, are 50.05% convinced that I have "done summat wrong" appealeth not.

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?

Q2: It is irrelevant to me what the disciplinary arrangements of other professions are. If the SDT does the wrong thing why ought we to follow?

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?

Q3: This question is base and irrelevant to me, even though I carry several protected characteristics. It should also

Do you consider that a change in the standard of proof could create any adverse impacts for any of those with

**be irrelevant to everybody else as well.
Ridiculous!**

**protected characteristics under the
Equality Act?**

[REDACTED]

[REDACTED]

[REDACTED]

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[REDACTED]

From:

Sent:

[REDACTED]
25 May 2017 11:13

To:

Subject:

[REDACTED]
Fwd: Review of Standard of Proof

----- Forwarded message -----

[REDACTED]
Date: 25 May 2017 at 10:58

Subject: Review of Standard of Proof
[REDACTED]

Further to the consultation paper, my view is that the current standard of proof is too harsh using the criminal standard, and the correct standard of proof should be that of the civil law - namely balance of probabilities, more likely than not.

This would bring the bar into line with other professional bodies.
[REDACTED]

[REDACTED]

From:

Sent:

[REDACTED]
22 May 2017 12:03

To:

Subject:

[REDACTED]
Disciplinary standard of proof

13

Consultation questions

Q1:

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?

No.

Such a finding carries significant implications for any counsel, therefore the present standard should continue apply.

Q2:

Furthermore, the presumption of innocence should apply and not be diluted in the manner suggested.

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?

No. The 2 issues are separate. They are distinct roles, and the Bar should make its own decision, not abrogate such to the SDT.

Q3:

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?

No. The same standard should apply to all. We should not progress in the direction of a two-tier benchmark standard, but should strive for excellence across the board.

Kind regards,

[REDACTED]

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[REDACTED]

From: [REDACTED]
Sent: 22 May 2017 10:51
To: [REDACTED]
Subject: BSB Consultation on SOP

Dear Sir,

here is my individual response to the consultation.

Q1: 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?

No. Disciplinary proceedings are a serious matter, with allegations akin to criminal charges, and sanctions available that can have a draconian and serious impact on a person's life by taking away their livelihood either temporarily or permanently, or making a finding that will be published and detrimental to their reputation and thus livelihood. Whilst there is a public interest in ensuring that professionals are held to account and, where appropriate, suspended or disbarred; the BSB has not demonstrated a case for changing the standard of proof, other than citing that other professions have a lesser SOP. Where is the evidence that the SOP is causing a real issue and/or damaging the public interest? The medical profession is cited, however the public interest in safeguarding the health and lives of the public from dangerous doctors is compelling and a strong reason for a lower standard of proof. You cannot reverse a death or a serious medical complication/error; however "victims" of lawyers can more easily be compensated financially for most transgressions, if appropriate.

The BSB appears to have an appropriately high conviction rate, which indicates that the SOP is working well.

There is a greater risk of miscarriages of justice were the SOP to be lowered. It is very hard to undo the harm caused by a wrongful "conviction" to a person's reputation and livelihood.

A lower SOP may also risk more unmeritorious cases being pursued or pursued further than present, to a great detriment to the individual concerned.

I am very concerned that our profession maintains the highest standards and that the BSB is able to ensure that those who fail to meet those standards are appropriately disciplined. However, where the BSB has not put forward any case for change, let alone a compelling one, I consider that this very serious step should not be taken due to the serious risk of harm to professionals.

Q2: 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?

Whilst my answer is not "yes", I would state that inconsistency with the SDT is a further reason for not making the change.

Q3: 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?

Some professionals subject to disciplinary action may have been brought into this situation by underlying mental health issues/depression and such like and therefore may be less able to properly defend themselves/engage in the process. In those circumstances, they may be considered disabled and the change in SOP is likely to adversely impact them as the evidence presented to the Tribunal will not need to be as

compelling to satisfy a lower SOP.

--

[REDACTED]

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[REDACTED]

From: [REDACTED]
Sent: 22 May 2017 10:25
To: [REDACTED]
Subject: Civil Standard for complaints

Brilliant! Yes - excellent idea.

Kick the Bar whilst its down why don't you?!

It will be lovely to know that what's left of our careers can be decided on by what's "probably" the case.

[REDACTED]

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[REDACTED]

[REDACTED]

From: [REDACTED]
Sent: 21 May 2017 14:15
To: [REDACTED]
Subject: Standard of proof consultation

The law typically requires allegations of professional misconduct to be proved to the criminal standard.

There is no reason for a change.

On the contrary, there is every reason to keep things the same.

First, an adverse finding can effectively end a barrister's practice in the same way that a criminal conviction will. It should be proved to the criminal standard.

Second, diluting the standard will encourage some clients to threaten frivolous complaints.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

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[REDACTED]

From: [REDACTED]
Sent: 21 May 2017 10:13
To: [REDACTED]
Cc: [REDACTED]
Subject: Standard of Proof Consultation

Dear Sir

Standard of Proof Consultation

Thank you for allowing me the opportunity to respond.

1. **Q1: 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?**

No.

There is no evidence that any change is required. There is no evidence that misconduct barristers are not properly regulated on the present standard.

There is no evidence that public confidence is undermined by applying the criminal standard.

There is no evidence that this change is reasonable or necessary, sought after, desirable or just.

There is evidence that the BSB is regularly criticised for the standards it applies in prosecuting cases. Unless and until the BSB consistently demonstrates fair procedures in all cases, investigations, and prosecutions (and not only those that are reported following judicial criticism) then the criminal standard is an important and essential safeguard for those accused.

2. **Q2: 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?**

The approach of the SDT is not relevant to the BSB. The professions are substantially different. Quite apart from anything else barristers likely to be affected are self-employed sole practitioners with no support. The majority of solicitors are employed within firms where colleagues can assist and support them.

3. **Q3: 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?**

Certainly. Defending a charge on the higher standard is onerous and difficult enough for those with diverse abilities. Any reduction will simply make life easier for the prosecution without any benefit for those with protected characteristics.

The BSB should accordingly leave this alone.

Yours

[REDACTED]

From:
Sent:
To:
Cc:
Subject:

[REDACTED]
21 May 2017 08:49
[REDACTED]

BSB Consultation on the standard of proof in Disciplinary Proceedings

Dear Sir,

In relation to Question 1:

The Privy Council's view in 2005 is quite right. The test to be applied by a disciplinary tribunal should not be changed.

The fact that there may be a supposed and untested 'mood swing' in society as regards other professionals should not be the sole justifying factor for such a significant change. Indeed, nothing whatever is put forward by the BSB other than this mood swing to justify a change to a lower standard of proof. Far more cogent reasons and some kind of compelling argument need to be put forward to justify such an important change in the way that a Bar disciplinary tribunal should operate.

Moreover, the current balance 'feels right' between (A) a preliminary stage where the BSB, as the Regulator, considers whether a sufficient case is made out to be put before the tribunal and applies a balance of probability test and also applies the same test for administrative sanctions and (B) the disciplinary tribunal stage where the standard of proof is that the Tribunal members must be sure.

Other professionals do not, I think, have quite such a sophisticated approach.

Further, the current proposal has the significant demerit that it would involve the BSB deciding, by the application of a standard which is the balance of probabilities, that a case should go forward to the Tribunal. And then the Tribunal itself would be required to apply the very self-same standard which has just been employed by the Regulator itself to justify the tribunal proceedings. The tribunal proceedings will inevitably have the air of a re-run of what has already been decided administratively (it will publicly look like a tribunal 'going through the motions') – and that cannot, I think, be a hallmark of a fair 'quasi-judicial' system.

In relation to Question 3:

I do not see any relevance of equality provisions to any such proposed change, were it to be brought in.

Yours faithfully,

[REDACTED]

[REDACTED]

From:

Sent:

[REDACTED]
20 May 2017 18:20

To:

Subject:

[REDACTED]
Consultation on Standard of proof

[REDACTED]

My responses to the three questions are:

1. Yes
2. No
3. No

Regards

[REDACTED]

[REDACTED]

From:

Sent:

[REDACTED]
20 May 2017 15:15

To:

Subject:

[REDACTED]
BSB Consultation

[REDACTED]

I sit on Bar disciplinary panels, usually as QC chair. I have read the consultation paper and I would favour a move to the civil standard, essentially for the reasons given in the paper. I very much doubt whether this will make a substantial difference to the outcome of the overwhelming majority of cases. I cannot think of any case which would have been decided differently if the civil standard applied. I would answer the various questions

1. Yes
2. No.
3. No.

Kind regards

[REDACTED]

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[REDACTED]

From: [REDACTED]

Sent: 20 May 2017 13:08

To: [REDACTED]

Subject: Consultation on Standard of proof in disciplinary proceedings

[REDACTED]

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?

No.

1. We should do the right thing, not the popular thing. Barristers are honourable members of the Inns of Court and enjoy a profession where there is an unwritten contract of trust in the integrity of the advocate by the Courts. The system would not work without this contract. It is proper therefore to accord the highest standard of proof, where the highest standards of integrity are presumed. We should not be embarrassed about this or feel that we must somehow be seen to be the same as everyone else, that this will show us to be elitist or applying different standards hypocritically.

2. What is the criminal standard: 'so that you are sure'. That this ought to be the standard, speaks for itself. If the issue is that Barrister A has been dishonest would we really want to be anything less than sure before so concluding? No considerations of the sort, 'other bodies have a lesser standard' should be given any credence; that is no argument at all. Let the standard speak for itself.

3. My experience chairing disciplinary hearings is that presenting advocates very often remind the panel that, '*the civil standard applies*', by which they mean *no* standard at all. It is no coincidence that they typically employ the old definition of the criminal standard in their argument, viz: '*you do not have to be sure beyond all reasonable doubt*', suggesting this is some unachievable ambition. They do not put it thus: '*You do not need to be sure*'. Why not?

4. The reality is that panels do not reason, 'I am not sure, have my doubts, but on balance it is more likely so will fall on one side rather than the other. Where a career is at stake panels, understandably in my view, always set the bar high. That is perfect common sense. The standard should reflect that.

5. We should maintain high standards by every definition of that word and have courage.

Kind regards,

[REDACTED]

[REDACTED]

From: [REDACTED]
Sent: 20 May 2017 12:46
To: [REDACTED]
Subject: Standard of Proof - my response

Dear Sir,

Standard of Proof Consultation

Thank you for the opportunity to respond.

- 1. Q1: 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?**

No.

There is no evidence that this is required. There is no evidence that miscreant barristers are not properly regulated on the present standard. There is no evidence that public confidence is undermined by applying the criminal standard. There is no evidence that this change is necessary, sought after, desirable, just, or reasonable.

There is evidence that the BSB is regularly criticised for the standards it applies in prosecuting cases. Unless and until the BSB continuously demonstrates fair procedures in all cases, investigations, and prosecutions (and not only those that are reported following judicial criticism) the criminal standard is an important safeguard for those accused.

- 2. Q2: 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?**

The approach of the SDT is not relevant to the BSB. The professions are substantially different. Quite apart from anything else barristers likely to be affected are self-employed sole practitioners with no support. Most solicitors work in firms where colleagues can assist them.

- 3. Q3: 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?**

Certainly. Defending a charge on the higher standard is hard enough for those with diverse abilities. A reduction will simply make life easier for the prosecution without any benefit for those with protected characteristics.

The BSB is accordingly requested to leave this alone.

Yours aye,



[REDACTED]

From: [REDACTED]
Sent: 20 May 2017 12:35
To: [REDACTED]
Subject: Professional Misconduct Proceedings

Consultation questions

Q1: 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?

Answer: Yes.

Q2: 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?

Answer: No; the Bar should if necessary take the lead.

Q3: 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?

Answer: This is a question of law in a field in which I have no expertise.

[REDACTED]

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[REDACTED]

From: [REDACTED]
Sent: 15 May 2017 09:32
To: [REDACTED]
Subject: BSB Regulatory Update May 2017: SOP consultation paper

My responses on this Monday morning with an assumption of no ransomware hit:

Q1: yes to the first limb of change; no to the second limb of the civil standard as too narrowly defined in an evidentiary straitjacket.

Better in my estimation would be 'a diligent-professional hybrid standard of proof' modelled on Lord Denning's controversial (unadopted) test - in one case - of a midpoint for alleged fraud on the civil/criminal cusp and as a compromise of somewhere between the civil and criminal standard.

The retention of the semi-criminal genus or classification would or could also let in a Scots law-type, third-alternative verdict of **not proven** against the respondent/defendant.

Q2: no, The Solicitors' Disciplinary Tribunal's (and Notary Public disciplinary/Incompetence) cases are often of a different variety, involving - other than perjury - conveyancing & mortgage scams and, under the Solicitors' Accounts Rules, failure to keep separate office and client accounts.

Q3; no, whilst the question is somewhat obscurely worded.

[REDACTED]

----- Ursprüngliche Nachricht -----
[REDACTED] The Bar Standards Board <contactus@barstandardsboard.org.uk>

Datum: 12. Mai 2017 um 08:01
Betreff: BSB Regulatory Update May 2017: Review of the role of the Inns of Court in the qualification of new barristers, rate our website and more...

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Monthly update from the Bar Standards Board May 2017

In this edition....

[Blog: Monthly message from our Chair Sir Andrew Burns KCMG](#)
[Review of the role of the Inns of Court in the qualification of new barristers](#)

Review of the role of the Inns of Court in the qualification of new barristers

[REDACTED]

From: [REDACTED]
Sent: 12 May 2017 17:13
To: [REDACTED]
Subject: Proposed change in standard of proof in professional disciplinary matters

Dear Sir

Here are my thoughts on the matter.

With best wishes

[REDACTED]

Consultation questions: standard of proof in misconduct hearings

Q1: 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?

I think the criminal standard should continue to apply if the disciplinary penalty is likely to result in the barrister being barred, but not otherwise.

There is a certain semantic fluidity to 'on the balance of probabilities', which is not inherent within the requirement of proof 'beyond reasonable doubt'.

The fact that other regulators are doing this is simply a reflection of an over-scrupulous concern for the consumer which is not healthy in the context of law. By totally orienting ourselves to the consumer we are in reality lowering professional standards because there is far more to practising the law than serving the interests of the consumer. Uniquely among the professions, the law requires its practitioners to uphold the rule of law. This is a higher duty than the interests of the consumer. No other profession has this burden. Moreover, serving the interests of the consumer to the extent of prioritising those interests above our duty to the court and the rule of law is merely serving our own interests – it is not serving the law. We serve the law or we serve Mammon.

There is also the fairness question: if you are going to take a man or woman's living from them, for example by disbarring them, would you not wish to have the greatest possible amount of certainty about the allegations against them before taking such a draconian step?

The burden must remain on the BSB to prove its case – that 'golden thread' – and it must remain a high burden in those situations where the person's living is at stake.

Q2: 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?

This is totally irrelevant. Even if the BSB were to take this step, what the Solicitors Disciplinary Tribunal does and when they do it should not concern us. We are barristers. We do not have to go around copying the SRA. It would be a false attempt at 'professional consistency', which would have a certain administrative elegance about it, but which would serve no useful purpose.

I begin to fear that regulators (of all professions) are simply becoming a kind of super-club, an association of associations where the concern is conformity to the herd rather than each minding its own business and doing its own thing. One size does not fit all.

Q3: 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?

Yes, it may do indirectly: for example women barristers might experience greater levels of stress than other groups, as might older barristers. Barristers are human beings, not machines.

Be aware that what those in the medical disciplinary panels do not tell you is of the number of suicides among doctors under investigation every year, and my understanding is that this has increased since the rules were changed to incorporate the lower standard of proof.

Let us not go down that terrible slippery path. Let us work harder to dispose of cases more quickly and efficiently, and thereby relieve stress to the parties, but let us continue to strive for the highest standards and hold ourselves as much to account as we do barristers themselves.

[REDACTED]

[REDACTED]

From: [REDACTED]
Sent: 12 May 2017 07:28
To: [REDACTED]
Subject: Re: BSB Regulatory Update May 2017 Chnaging the standard of proof in disciplinary proceedings

Dear Sirs

In respinse to this consultation I do not agree that the standard of proof should be changed to the civil standard. Your article speaks of being in line with "iother professions". being at the bar is not a fashion!!! The unique place that barristers play in the administration of justice is not llike any other profession and if a barrister is to be deprived or his or her livelyhood then it is right as it always has been that the complainant should prove to the criminal standard. Allegations by the public are easily made and most on the statistics turn out to be wrongly made. The civil standard is less onerous on the complainant which is not right in my view. Disciplinary proceedings can be far reaching and can be devastating to a barrister's reputation and it is only right that the tribunal should have the burden that they are satisfied until they are sure before imposing any form of sentence.

Kind regards

[REDACTED]

On 12 May 2017 at 07:01 The Bar Standards Board <contactus@barstandardsboard.org.uk> wrote:

[REDACTED]

Email not displaying correctly? [View it in your browser.](#)

[REDACTED]

[REDACTED]

Monthly update from the Bar Standards Board May 2017

In this edition....

- [Blog: Monthly message from our Chair Sir Andrew Burns KCMG](#)
- [Review of the role of the Inns of Court in the qualification of new barristers](#)
- [How do you rate our website?](#)
- [How are you getting on with your 2017 CPD?](#)
- [Understanding the new Handbook](#)

[REDACTED]

From: [REDACTED]
Sent: 10 May 2017 00:39
To: [REDACTED]
Subject: Consultation response: standard of proof

[REDACTED]

I am writing to respond to the consultation in relation to the standard of proof applied in professional misconduct proceedings. The answer to the questions I set out below;

yours sincerely

[REDACTED]

Question 1

I do not consider that a change to a standard of the balance of probabilities in cases of alleged professional misconduct would be appropriate or proper. Charges of serious professional misconduct against a member of the Bar are quasi-criminal in nature. They can, and, if proved, should, lead to a permanent loss of livelihood. The consequence for the individual concerned of a loss of livelihood is far, far more serious than of all but the most severe criminal sentences. By contrast, even criminal offences which carry only a fine as a punishment rightly require proof beyond reasonable doubt before a conviction is imposed.

So far as the public interest is concerned, the risk of harm posed by professional misconduct by members of the Bar is considerably less than the risk of harm posed to members of the public by the commission of serious crimes by other members of the public such as murder, rape, infliction of grievous bodily harm, robbery, occasioning actual bodily harm, burglary, sexual assault, fraud and myriad other such offences. All of those offences rightly require proof beyond reasonable doubt for a conviction.

The arguments put forward in support of a change to the civil standard are misconceived. That other professional regulators do something is logically incapable of being relevant to whether it is the right thing to do. There are only three possibilities in respect of other professional regulators: (1) they are right to impose such a standard for reasons which do apply to the Bar; (2) they are right to impose such a standard, but for reasons which do not apply to the Bar; or (3) they are wrong to impose such a standard. If (1) is correct, the fact that other regulators impose such a standard, in and of itself, would add nothing to the fact that there exists an independent reason to impose such a standard quite apart from whether other regulators impose it. For the reasons given above, it is quite clear that there is no such independent reason. If (2) is correct, then it would be irrational to take into account the decisions of other professional regulators that are, by definition given the premise, irrelevant to the Bar. If (3) is correct, then it would be perverse for the Board to take a wrong decision merely because other regulators have also made a wrong decision.

If either (2) or (3) are correct, the Board's decision to follow other such regulators would be *Wendesbury* unreasonable and therefore unlawful. If (1) is correct, then it would be possible to put forward a complete justification for the change that makes no reference whatsoever to the decisions of other regulators. For the reasons already given, this is clearly not possible.

In all the premises, there can be no possible justification for adopting the civil standard for quasi-criminal proceedings that can and often rightly do result in the loss of livelihood for members of the profession.

Question 2

Given that I have answered question 1 in the negative, this is not applicable.

Question 3

It is unclear what possible relevance that the duty not to discriminate on various grounds could have to this issue.

[REDACTED]

From: [REDACTED]
Sent: 09 May 2017 17:08
To: [REDACTED]
Subject: Review of the Standard of Proof Applied in Professional Misconduct Proceedings

[REDACTED]

Consultation questions

• Q1: 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?

No. At the very least, not for the most serious, quasi-criminal allegations. Besides anything else, it is crucial to take into account the different roles that barrister and solicitors carry out. There are far fewer means by which a barrister can do any form of damage to a member of the public than can a solicitor, given the much more limited scope of a barrister's activities. This at least must be true of barristers where they are not acting by direct access or in-house, so the answer might be that it is only in such cases (where the barrister is not instructed by a solicitor) that the burden of proof is lowered, for example.

• Q2: 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?

See above

• Q3: 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?

No

Thanks for the opportunity.

Kind regards

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

The terms on which [REDACTED] offers his services are, unless specifically agreed to the contrary in writing, the Standard Contractual Terms for the Supply of Legal Services by Barristers to Authorised Persons 2012 (Annex T to the Bar Code of Conduct).

[Redacted]

From: [Redacted]
Sent: 09 May 2017 16:55
To: [Redacted]
Subject: Standard of Proof - Consultation

[Redacted]

My response to the consultation on changing the burden of proof in disciplinary cases is as follows.

- Q1. No
- Q2. N/A
- Q3. Yes

Yours sincerely,

[Redacted signature block]

This e-mail is intended only for the person to whom it is addressed. As it may contain confidential or privileged information, you are requested, if you are not that person, to telephone [Redacted] or his clerk on [Redacted] immediately to report the fact that it has reached you. You are also requested to delete the e-mail from your computer system. The contents of this e-mail should not be disclosed to any other person, nor should copies be made.



From: [redacted]
Sent: 09 May 2017 12:01
To: [redacted]
Subject: Regulatory Changes Consultation

[redacted]

In response to the questions:

1. I do not believe a civil standard is appropriate to disputes of fact that may entail the loss of a barrister's livelihood and in particular, for instance, a finding of dishonesty. The equivalent to a criminal offence should carry an equivalent standard of proof. Unlike the medical profession, our misconduct does not usually result in physical harm to those affected.

2. and 3. I have no views.

Thank you.

Best wishes

[redacted signature block]

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[REDACTED]

From: [REDACTED]
Sent: 09 May 2017 11:31
To: [REDACTED]
Subject: Consultation

1. Sir,

Here are my responses to the Consultation Questions

Q1: 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?

No

2. **Q2: 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?**

N/A

3.

Q3: 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?

Yes. The current system is fair, just and allows for all matters to be considered. In addition, the Bar has a high test for a reason, as Barristers work by the Highest Standards and should be protected by them as well.

[REDACTED]

[REDACTED]

[REDACTED]

From: [REDACTED]

Sent:

09 May 2017 11:10

To: [REDACTED]

Dear Sir

My answer to question 1 is no. I strongly believe that just because something is popular does not make it right. I would hope the BSB, as purveyors of Justice, might be part of a campaign to encourage other regulators to increase their burden, in the best traditions of the Bar.

In any event, barristers, it seems to me, are less of a risk to the public than say a Doctor or solicitor. We do not hold people's lives in our hands, but also we cannot handle client money in the same way as solicitors. Should there be gross negligence we are insured. Moreover, direct access notwithstanding we do not come into contact with the public as much as other professions.

We also have to consider that we are in a very specialized profession and moving to another profession or job would not be altogether easy. So a barrister needs that extra protection given the grave consequences of being debarred.

I have no view on question 3.

Kind Regards

[REDACTED]

This message has been scanned by [REDACTED] Websense Email Security.

[Redacted]

From: [Redacted]
Sent: 08 May 2017 12:54
To: [Redacted]
Subject: Response to Consultation, Standard of Proof in Regulatory Proceedings

[Redacted]

Please find responses below:

Q1) - I do not believe the BSB should permit the use of the civil standard of proof.

I accept that other regulators may have adopted such practice, but it is apparent from the case law that such decisions are affected by trends changing over time. It can only be a matter of time before there is a high profile 'miscarriage of justice', and public opinion changes. As a profession, we must see ourselves as above such trends and not be swayed by them.

For those of us who practice on the front line of criminal litigation, the criminal standard of proof is one of the last great safeguards of justice that is held in high esteem. The mantra that 'it is better that 10 guilty men go free than one innocent man is convicted' holds true not only when determining the most serious allegations of public life, but also for professional life. There is clearly a statistical case for a civil standard, in that more practitioners will be subject to sanctions because a case is easier to prove. This does not however mean this is the right approach to take. We, more than any other profession, know and understand that in real life mistakes are made, the consequences of which cannot be undone. This is, for example, why the profession has so strongly resisted populist calls for lowering the standard of proof for certain types of offences. The criminal standard of proof, far from undermining the integrity of the system, is its cornerstone - if a finding is made to that standard then there can be extremely limited scope for doubting the result. Some may escape wrongdoing without punishment, but that is no justification for running the risk of ruining the career of somebody who is innocent, whose finding can be trotted out as a statistic to make a regulator appear 'better'.

The civil standard of proof is very useful in civil litigation, where (usually) there are insurance companies meeting liability, and the question is more of *who* is to pay rather than if anybody is. The situation concerning somebody's career, for which they will have invested years of their life and thousands of pounds, could not be more different.

Q2) N/A

Q3) None apparent.

[Redacted]

[Large redacted block with lines pointing to it]

Please note that [REDACTED] operate a complaints procedure in keeping with the Bar Standards Board's guidelines (please see the following link - [REDACTED]). Please can this be communicated to the lay client if required. Please see the following link to Chambers' standard contractual terms of business: [REDACTED]. Information contained in this e-mail is intended for the use of the addressee only, is confidential and may be the subject of legal professional privilege. Any dissemination, distribution, copying or use of this communication without the prior permission of the addressee is strictly prohibited. If you have received the e-mail in error please contact [REDACTED] by telephoning [REDACTED] and delete it from your system. The contents of any attachment(s) to this e-mail may contain software viruses that could damage your own computer system. The sender cannot accept liability for any damage which you sustain as a result of software viruses. You should carry out your own virus checks before opening the attachment(s).

[REDACTED]

From: [REDACTED]
Sent: 04 May 2017 16:12
To: [REDACTED]
Subject: Review of the Standard of Proof Applied in Professional Misconduct Proceedings

[REDACTED]

In connection with the current review, my responses are:

Q1: 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? **No**

2. Q2: 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? **N/A**
3. Q3: 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? **No**

Kind regards

[REDACTED]

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[REDACTED]

From: [REDACTED]
Sent: 02 May 2017 16:30
To: [REDACTED]
Subject: Consultation - Standard of Proof in disciplinary proceedings
Attachments: RESPONSE TO BSB CONSULTATION - Standard of Proof in Disciplinary proceedings.pdf

Herewith attached is a response to the consultation

Kind regards,

[REDACTED]

**RESPONSE TO BSB CONSULTATION: REVIEW OF THE STANDARD OF PROOF
APPLIED IN PROFESSIONAL MISCONDUCT PROCEEDINGS**

1. This is a personal response to the BSB consultation on amending the standard of proof in disciplinary hearings for professional misconduct from the criminal standard to the civil standard.

Q1: 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. I do not consider that the BSB should change the applicable standard in misconduct proceedings.
3. It is correct that other regulators, in other areas, have changed their approach and adopted a lower standard of proof in their disciplinary proceedings, largely driven by the example of the medical profession. However, it should be remembered that the rationale for the lowering of the standard in healthcare cases was, to a significant degree, driven by the fact that within that sector misconduct was far more likely to result in adverse consequences which were incapable of adequate recompense through a financial award and therefore more pro-active regulation was necessary.
4. It should be remembered that if misconduct by a barrister causes loss or damage, the affected party is able to seek recompense applying the civil standard (e.g. in civil proceedings for negligence, breach of contract etc). It will be a very rare case in relation to a barrister where the misconduct was such that damages would not offer a proper remedy for the consequences of the misconduct. As such, the balancing exercise between the need for public protection and the rights of the barrister should reflect the fact that the

imperative that applies in healthcare regulation is not so acute for barristers and, as such, there is a far stronger public policy justification for a lower standard of proof in disciplinary proceedings relating to the medical professions than exists in relation to legal regulation.

5. The consequences for a barrister of an adverse disciplinary finding will often be severe and result in a loss of the barrister's livelihood. Even if an adverse disciplinary finding does not lead directly to suspension or disbarment, the reputational damage can be long-lasting and career ruining. As such, there is a clear public interest in ensuring that such sanction is not imposed without the clearest possible evidence of misconduct. This is particularly the case where the allegations of misconduct involve allegations of dishonesty or other criminal conduct. In such circumstances, no adverse findings should be made by a disciplinary tribunal unless the allegations are proved to the highest standards.
6. It is for this reason that the binding and authoritative position at law (as per Lord Lane CJ in *Campbell v Hamlet (2005) UKPC 19*) is that the appropriate standard of proof for all disciplinary proceedings concerning the legal profession is the criminal standard. Whilst it is correct that other courts have expressed a view that the matter might be ripe for reconsideration, there has been no judicial reconsideration of the issue and so the law remains firmly in favour of the criminal standard.
7. The legitimate desire to protect the public must be set against the legitimate rights of the professionals concerned not to be incorrectly deprived of their livelihood or reputations. Given that the consultation acknowledges the lack of empirical evidence to show that the civil a change is necessary (or even that it is perceived to be necessary), it is difficult to see how the lowering of the standard is justified.

Q2: 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?

8. Not applicable. In any event, the principle stated in *Re a Solicitor [1993] QB 69* is evidently correct and it would be absurd for the BSB to change its standard of proof to a lower standard than applied in the SDT.

Q3: 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?

9. No.

A redacted signature consisting of two thick black horizontal bars.

2nd May 20017

[REDACTED]

From: [REDACTED]
Sent: 21 May 2017 07:23
To: [REDACTED]
Subject: STANDARD OF PROOF CONSULTATION

[REDACTED]

This is my response to the consultation:-

Q1: 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?

Yes. It should be recalled that there is a rule in the civil law of evidence which states that the more serious an allegation the more cogent the evidence which will be required in order to prove that it is probably true. The presumption of innocence continues. This is fair to the practitioner, but it must be remembered that the purpose of professional discipline is the protection of the public which, in this context, includes the protection of the proper functioning of the justice system in the public interest.

My perception (and I believe that of some colleagues) is that the BSB and the Tribunal sometimes struggles with the more serious complaints of misconduct arising from the way in which a practitioner has conducted professional work including in particular advocacy. Given the obligations imposed by the Civil Procedure Rules and Criminal Procedure Rules on participants in litigation, high standards are required in the public interest and where there is a serious departure from those standards effective action is required. If there is substance in this perception and if it is in any way related to the standard of proof, then action is required.

Q2: 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?

No. The SDT appears to be constrained by hard legal rules and to lack the power to reform itself. The BSB should change its own rules and the Bar Council should encourage the MoJ to introduce a short 1 clause bill to regularize the position with the SDT. The position of the SDT in resisting any such reform would be untenable.

Q3: 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?

No.

I can see that it is possible that the proportion of disciplinary proceedings brought in respect of lawyers from ethnic minorities and, perhaps, women may exceed the proportions of those groups in the profession generally and an increased number of adverse findings may fall therefore disproportionately on those groups also.

If this is true the reasons will be complex and unrelated to the burden of proof. The burden of proof protects those who are probably, but not quite certainly, guilty of misconduct. There is no reason to suppose that this group is disproportionately represented among minorities.

If there is such a disproportion (and I do not know if there is) it will be the circumstances of those under investigation which require consideration. Perhaps applicants from ethnic minorities have greater difficulty in securing the best training and the best places in Chambers where the best support and work is available. It is not hard to develop and maintain a top class practice in top class chambers. It is then easier to resist pressures to independence. It is also easier to become financially immune from pressure. Where the training has been poor, the subsequent professional standards are more likely to be poor.

In the case of women, these pressures no longer exist. However, a different pressure comes to some when they reach the stage when they are trying to balance child care, and care for elderly parents, with the demands of a busy practice. Many cope in ways which are heroic, and again it is easier for those in the Chambers where high incomes mean that help can be paid for, but some do struggle. This may lead to lack of preparation and less successful relationships with clients of the kind which can generate complaints. It can also lead to financial pressures which undermine morale. This can all lead to stress and alcohol abuse in a small number of cases which can be the precursor to falling professional standards.

These are real questions which may deserve investigation by the Bar Council and, perhaps, the BSB with the benefit of reliable data, but they are quite unrelated to the burden of proof.

[REDACTED]

From: [REDACTED]
Sent: 01 July 2017 09:29
To: [REDACTED]
Cc: [REDACTED]
Subject: Fwd: [New post] Balance of Proof in Bar Discipline

Consider this a consultation response and check out the blog link mentioned too. I

[REDACTED]
Sent from my iPhone

Begin forwarded message:

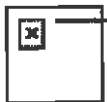
[REDACTED]
Date: 30 June 2017 at 11:33:40 BST

[REDACTED]
Subject: [New post] Balance of Proof in Bar Discipline

[REDACTED] posted: "The Bar Standards Board is inviting comments on its proposals to bring the standard of proof into line with solicitors. Lucy Reed has exceeded her own high standards with an exceptional blog post on this. I"

Respond to this post by replying above this line

New post on Lawyer Watch



Balance of Proof in Bar Discipline

by Richard Moorhead

The Bar Standards Board is inviting comments on its proposals to bring the standard of proof into line with all solicitors. Lucy Reed has exceeded her own high standards with an exceptional blog post on this.

In terms of the three questions the BSB asks, I agree that the standard of proof should be the civil standard, such a shift, and I do not perceive equality or other impact concerns that should stop them doing so. I don;t p document does that admirably and with concision.

I suspect one argument that may be made against the proposals is the risk of 'political' prosecutions of barris that faces other professionals, although it might be thought to be a greater risk for lawyers, who's work inevit; such risk is properly protected by the independence of the regulator and prosecutorial decisions, rather than

I hope also that a more public interest oriented standard of proof will also open the door to a wider range of e more disciplining of misconduct but a wider range of responses to such enforcement. Ethics is important but someone's career. In particular, it is to be hoped that practitioners are less likely to fight made out misconduct meaningful contrition and learning from their errors. This is not an approach likely to develop in scheme which the balance of proof is one significant element.

~~Richard W. Corbett~~ June 30, 2017 at 11:33 am | Categories: [Uncategorized](#) | URL: <http://wp.me/pSdm3-1ol>

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[REDACTED]

From:

Sent:

[REDACTED]
12 May 2017 17:05

To:

Subject:

[REDACTED]
Standard of proof consultation

I write simply to point out that none of the three questions addresses what for the person subjected to a disciplinary process is surely central. Applying the civil standard of proof must increase the likelihood of being found guilty.

[REDACTED]

From: [REDACTED]

Sent: 11 May 2017 23:27

To: [REDACTED]

Subject: Standard of proof consultation

Q1 Yes

Q2 No

Q3 No

My reasons are largely those given in your consultation paper.

[REDACTED]

From: [REDACTED]
Sent: 21 July 2017 16:41
To: [REDACTED]
Subject: BSB Consultation: standard of proof.
Attachments: BSB consultation standard of proof response [REDACTED]

[REDACTED]

Please find attached a response to the BSB consultation on behalf of [REDACTED]

Kind regards,

[REDACTED]

[REDACTED]

[REDACTED]

REVIEW OF THE STANDARD OF PROOF APPLIED IN PROFESSIONAL MISCONDUCT PROCEEDINGS - CONSULTATION PAPER

Q1: 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?

Q2: 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?

Q3: 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?

RESPONSE TO THE BSB CONSULTATION PAPER ON BEHALF OF THE MEMBERS OF [REDACTED]

We do not consider in principle that the BSB should regulate for the civil standard of proof to be applied to allegations of professional misconduct. There are a number of reasons why the standard of proof for disciplinary findings against barristers should remain at the criminal standard (i.e. so that the tribunal must be "sure" or the allegation must be proved "beyond reasonable doubt").

1. We are not satisfied that there is a pressing need for the standard of proof to be altered. The only stated reason appears to be a desire to align with other professional regulators. Uniformity between professions is not a laudable aim in and of itself.
2. We ask what has changed from the Privy Council decision in *Campbell v Hamlet* [2005] UKPC 19? So far as Barristers are concerned, we would submit that nothing has changed. The change in the standard of proof in medical professions was predicated upon the Shipman enquiry. There has been no similar necessity for Barristers.
3. There is a distinction between the legal profession and the medical profession. Public protection is a key component of the medical profession. Direct physical harm can result from interventions or omissions by medical practitioners in a multitude of ways, not least as a result of medication errors, handling, wound management or surgery. Other forms of harm can also result, such emotional, psychiatric or financial. The same concerns do not arise on a regular basis in the legal profession. The risk of harm to the public is a good reason for the civil standard to apply in the medical profession, but it does not require the BSB to follow suit.
4. As an aside, it should be noted in paragraph 24 of the consultation document that there is a misguided assertion from the 2012 Law Commission that the were the civil standard not applied, the panel would need to be 'certain'. This is not the criminal standard. Being 'sure' is a lower standard than certainty.

5. While the legal professions are more closely aligned, there is still a key distinction between Barristers and Solicitors. Solicitors handle client funds. Barristers do not. The risk of financial harm to the public is not comparable between professions.
6. It is submitted that were the standard of proof to be lowered, there would be a likely increase in the number of complaints made by lay clients. It would be to the advantage of, say a convicted client to make an allegation against their 'brief'. Were they to be successful, they would have a ready made ground of appeal. It would be in the interests of most disgruntled clients to 'have a go'. The nature of criminal work is that unhappy clients or victims is par for the course of an adversarial process. That cannot be equated with professional wrongdoing and is another distinction between the unique profession that the BSB regulate.
7. The consideration of an allegation of professional misconduct by a barrister may not always be "clear cut". A lot of what a barrister does involves giving nuanced advice and making judgment calls, often with a limited amount of time to consider the options and sometimes having to take calculated risks. Some of these decisions will be crucial to a client's case, and could lead to an allegation that the wrong advice was given or the wrong action taken, amounting to a complaint of professional misconduct. Whilst doctors are similarly compelled to make quick decisions based on their judgment of a situation, they also have set protocols to assist in the process of making such decisions on a case, and additionally can often seek advice from colleagues if working in a team environment such as a hospital or operating theatre. On the other hand, barristers are generally expected to run their cases independently, and may have to make important decisions on their feet in court (such as whether to ask a particular question or not) or in a conference with a client within a few seconds or minutes.
8. We submit that the BSB should not lose sight of the serious consequences of a finding of professional misconduct against a barrister. Some allegations of misconduct are tantamount to allegations of criminality, such as dishonesty, disreputable behaviour or fraud. The repercussions for such findings of misconduct, if proved, are so devastating for the barrister concerned that they ought to be treated in the same way as we treat criminal allegations, in requiring them to be proved beyond reasonable doubt before taking life-changing action against the accused. Not only does a barrister risk losing their livelihood, but they risk incurring such a stain on their professional and personal record that they may be entirely unable to re-establish a career in any profession, if their character is perceived to be tarnished by the misconduct.
9. It is a characteristic of work at the Bar that individual barristers tend to be advertised to clients mostly or wholly on the basis of their reputation. Even findings of professional misconduct falling short of quasi-criminal allegations can have a serious adverse effect upon a barrister, both professionally and personally. In the small world of the Bar (and it is of note that there are far fewer barristers in the UK than, for example, solicitors or nurses), reputation travels far and fast and often precedes the person when it comes to decisions whether to instruct or work alongside a barrister. It is therefore particularly important that allegations of misconduct are sufficiently proved to be true.

10. If the standard of proof were to be lowered to the civil standard, the burden upon barristers to evidence their own case would increase. This is problematic for barristers, more so than for solicitors or doctors, who are usually required to record details of work done and decisions made on their cases as a matter of course, particularly so that others can view those details and be in a position to take action consistent with the approach taken previously. This is particularly so given that in the criminal sphere Barristers frequently are required to attend court unattended by their professional client. Barristers, especially when in the middle of a trial, are less likely to keep a detailed record of decisions made, advice given or actions taken which could later be called into question.
11. Furthermore, the nature of barristers' work means that many important decisions to do with case strategy are often considered with very little documentation to demonstrate the thought process and analysis that has been undertaken. This may be because it is not practicable to record such information, for example if the decision has to be made rapidly during evidence. It may, indeed, be impossible to explain in writing the reason for a particular decision being made at a particular time, as barristers are trained and encouraged to develop tactical instinct which will be influenced by their own personality, experiences and type of practice, and ultimately is integral to the "package" the client receives by instructing counsel.
12. Unlike for solicitors and doctors, there will be a much scarcer "paper trail" for a barrister to use as evidence in their own case when facing allegations of professional misconduct. A barrister may find themselves trying to prove they made a valid judgment call with very little evidence to show but their own word. Their own word may not suffice on the balance of probabilities, especially in a situation of confidentiality, or where another barrister may have legitimately taken an entirely different approach.
13. The evidential gap is particularly concerning when considered in the light of the inequality of arms between a self-employed barrister and the BSB. Unlike solicitors, the vast majority of whom are employed, a self-employed barrister has no manager or company to take responsibility for them or to support them in defending an allegation of professional misconduct. A self-employed barrister will therefore face the proceedings alone, with only their own resources to investigate allegations against them and produce any evidence they may be able to use to show their case is the one more likely to be true. There are no barristers' unions to turn to for assistance in their defence, and a barrister (particularly if they continue to practise in the interim) is unlikely to have the time, energy and resources required to prepare their own disciplinary case to the same standard as it is being prepared against them. Lowering the standard of proof would put pressure on the barrister to essentially prove that their case is more likely than the one being advanced by the BSB, which is disquieting in light of the difficulties already outlined.

14. For all of the above reasons, we respectfully submit that the standard of proof in professional misconduct proceedings against Barristers should remain the criminal one.

21.7.17

[REDACTED]

From: [REDACTED]
Sent: 21 July 2017 12:16
To: [REDACTED]
Cc: [REDACTED]
Subject: Bar Council response to BSB consultation on standard of proof
Attachments: BC standard of proof response.pdf

Importance: High

[REDACTED]

Please find attached the Bar Council response to the BSB consultation on the standard of proof. .

If you need any further information, please let us know.

Kind regards, [REDACTED]

[REDACTED]



Annual Bar Conference and Young Bar Conference 2017
Saturday 4 November 2017
Westminster Park Plaza, London

One BAR: Threats, opportunities and strengths in an age of change



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Bar Council response to the Bar Standard's Board 'Review of the Standard of Proof Applied in Professional Misconduct Hearings' consultation paper

1. This is the response of the General Council of the Bar of England and Wales (the Bar Council) to the Bar Standards Board (BSB) consultation paper entitled 'Review of the Standard of Proof Applied in Professional Misconduct Hearings.'¹

2. The Bar Council represents over 16,000 barristers in England and Wales. It promotes the Bar's high quality specialist advocacy and advisory services; fair access to justice for all; the highest standards of ethics, equality and diversity across the profession; and the development of business opportunities for barristers at home and abroad.

3. A strong and independent Bar exists to serve the public and is crucial to the administration of justice. As specialist, independent advocates, barristers enable people to uphold their legal rights and duties, often acting on behalf of the most vulnerable members of society. The Bar makes a vital contribution to the efficient operation of criminal and civil courts. It provides a pool of talented men and women from increasingly diverse backgrounds from which a significant proportion of the judiciary is drawn, on whose independence the Rule of Law and our democratic way of life depend. The Bar Council is the Approved Regulator for the Bar of England and Wales. It discharges its regulatory functions through the independent Bar Standards Board (BSB).

Overview

4. The Bar Council recognises that the wider regulatory landscape has changed since our 2011 consultation response on the subject of the standard of proof in disciplinary proceedings, in which we came down firmly in favour of retaining the criminal standard. In this response, the Bar Council seeks to represent the current diverse views of its members on both the principle and the practicalities of the proposal and invites the BSB to scrutinise the available evidence to consider if the case for change has really been made out. It does not seem to us that the BSB has done this as yet.

¹ BSB consultation paper entitled Review of the Standard of Proof Applied in Professional Misconduct Hearings

5. We have posed a number of questions that we suggest must be answered before any final decision is made on whether the standard of proof used in Bar Disciplinary Tribunals should change from the criminal to the civil standard.

6. Before compiling this response, we sought the views of our members who work in the disciplinary field. We set up a number of meetings with those who defend and prosecute barristers before disciplinary tribunals. We had similar meetings with Bar Tribunals and Adjudication Service (BTAS) panel members, barristers who defend and prosecute in disciplinary tribunals of other professions (including solicitors) and barristers instructed in cases before the higher courts in which the standard of proof in disciplinary proceedings has been examined. The topic was also fully debated at a Bar Council meeting held on 8 July. A non-binding vote of Bar Council members present at the meeting on the proposed change produced an even split. We have since received further members' views conveyed to us by circuit representatives.

7. In summary, the Bar Council sees that adopting the civil standard would be to join with other regulators and other jurisdictions which have taken that step in recent years. We recognise and support the protection of the public and appreciate that careful consideration needs to be given to the standard of proof appropriate for that purpose. However, we consider that there are also other public interest considerations to be borne in mind, and are not persuaded that we should adopt a change merely because others have done so. There must be careful scrutiny of the evidence of a need for change within our own jurisdiction and within our own profession, of the rationale for making any change, and of the benefits, disadvantages and ramifications of doing so. Before any change is brought about, there must be a careful study of the medium-to-long-term impact on the profession and those it serves. The BSB must also be sure – and recognise clearly in any rules and guidance making or reflecting such a change – what the effect would be in practice of stipulating that the civil standard should be applied, particularly in relation to allegations of serious misconduct.

Q1: 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?

8. By way of a preface, we underline that it is of the utmost importance that the high standards for which the Bar is renowned are upheld robustly and that there are effective safeguards in place to prevent barristers who pose a demonstrable risk to the public from practising. Barristers trade on their reputation and of course the reputation of the profession as a whole is of fundamental importance. We would not wish for the profession or any part of it to be brought into disrepute by a small minority who do not meet the high ethical standards of the Bar as reflected in the BSB Handbook and elsewhere.

Views of those who favour moving to the civil standard

9. We begin with a summary of the views of those members of the profession who favour the proposed change.

Alignment with other professions and regulatory best practice

10. As indicated, we recognise that the wider regulatory context now is different from that in 2011. Over time there has been a shift by other professions to the civil standard in professional regulation, prompted in part by the Shipman enquiry in 2008-2009. For the legal professions, the case of *The Solicitors Authority v Solicitors Disciplinary Tribunal*² brought this issue to the fore when Sir Brian Leveson suggested that the standard of proof in disciplinary proceedings was ripe for reconsideration. As it stands, "the Bar Standards Board and the Royal College of Veterinary Surgeons are now the only legal regulators applying the criminal standard when determining charges of professional misconduct." The current standard in Bar disciplinary tribunals has become out of step with the regulatory norm.

11. Those in favour of the civil standard do not see any strong justification for treating the Bar differently from the medical profession, in particular, and highlight the parallels that can be found between the two professions. Both professions perform roles that are important to the public interest, and where the protection of that interest is paramount. Given the movement towards the civil standard in other areas of professional regulation, practitioners in favour of the civil standard highlight the anomaly of continuing to apply the criminal standard in Bar disciplinary tribunals, and suggest that the civil standard has become accepted as regulatory best practice.

Protection of the public

12. Those in favour of the civil standard of proof point to the overriding importance of protection of the public as the guiding principle. There is a tension between the serious consequences to the livelihood and reputation of the barrister subject to professional misconduct proceedings and the risk to a prospective client if a barrister is able to continue to practise despite being considered more likely than not to have committed professional misconduct, but where the evidence was not sufficient to prove the misconduct to the criminal standard.

13. Most of the barristers that we interviewed as part of our research for this consultation were of the view that changing or retaining the standard of proof would not make a difference to the outcome of the case in the vast majority of cases. However, there is a small minority of cases where it **could** lead to a different outcome. A BTAS

² [2016] EWHC 2862 (Admin).

Panel member gave an example of one case that they had been involved in, where they thought applying a different standard of proof would have made a difference to the outcome of the case.

15. Those in favour of change are dismayed by the prospect that a barrister who has, on a balance of probabilities, committed serious misconduct but is permitted to continue practising. This is at odds with the high professional and ethical standards to which the Bar adhere. A number of practitioners to whom we have spoken have highlighted the importance of the role of the disciplinary process in maintaining ethical standards and preventing those who do not adhere to the Bar's ethical values from being able to practise and hold themselves out as barristers. This point is extremely important. The Bar prides itself on its core values and its ethics are not only an integral part of what it means to be a practising member of the Bar, but are also of the utmost importance to the administration of justice and to the Bar's role in supporting the wider public interest.

16. Similarly 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.

Professional misconduct proceedings as civil proceedings

17. There is some debate about the nature of professional misconduct proceedings. Those in favour of the civil standard emphasise that first and foremost, regulatory proceedings are "civil" in nature and the right to earn a livelihood has to be balanced against the need to protect the public. Whilst it cannot be ignored that professional misconduct proceedings can cause much distress to the individual who is the subject of those proceedings, and may lead to an outcome which is severe for the barrister concerned, such as disbarment and the loss of the right to practise as a barrister, such proceedings are not brought in order to deliver punishment but in order to regulate the profession and so protect clients and the public. In more serious allegations of misconduct, it is of course possible that separate criminal proceedings will have preceded the disciplinary proceedings.

Views of those who favour retention of the criminal standard

18. We next summarise the views of those to whom we spoke who favoured retention of the criminal standard of proof, roughly similar in number to those that favour change.

Lack of evidence of problems with the criminal standard

19. There is a strong feeling amongst many that the public are already adequately protected in the current disciplinary system and that barristers who pose a risk to the public are not being acquitted of misconduct by disciplinary tribunals. We note that the BSB has not sought to rely on statistics or any suitably anonymised evidence to suggest that there are any or any significant number of barristers who are unfit to practise yet continue to do so.

20. The barristers we consulted, including those in favour of the civil standard, accept that cases where the barrister more likely than not committed a misconduct offence but the charges could not be proved to the criminal standard were likely to be few and far between. Only 42 cases came before a Bar disciplinary tribunal in 2015-16 and of those, four were dismissed because the conduct issues were not serious enough to constitute professional misconduct.³ Of those that proceeded, 83% resulted in one or more of the charges against the barrister being proved. There is not data (nor research so far as we are aware) providing an explanation for the acquittal of the remaining 13% but we gather that many acquittals flow from the tribunal taking the view that the wrong charges have been brought. Others are likely to have been acquitted 'on the merits' whatever the standard of proof.

21. So the number of cases where the burden of proof may make a difference to the outcome of a disciplinary case is unknown but likely, we suggest, to be very few. If so, this somewhat undermines a rationale for change based upon any perception that the status quo fails to protect the public.

22. It is also worth noting that we have not seen any evidence that the public perceive the current standard of proof to be unfair or causing harm.

Comparison with other professions

23. The Bar cannot and should not be compared with other professions who offer different services, practise in very different ways and deal with different levels of risk. As the BSB concede, there are no known "clear empirical studies"⁴ to support the contention that the civil standard confers greater public protection.

24. Internationally, the picture is also mixed. Scotland, Northern Ireland and the Republic of Ireland use the criminal standard in disciplinary tribunals. However, Australia, New Zealand and Canada have used the civil standard for a number of

⁴ BSB Review of the Standard of Proof Applied in Professional Misconduct Proceedings Consultation Paper 2017: 19 https://www.barstandardsboard.org.uk/media/1830289/sop_consultation_paper.pdf

years. The picture is varied in the USA. We suggest there is no single approach that must be universally correct. What may be right for one jurisdiction or one profession will not necessarily be right for another.

Case law

25. Although we appreciate that case law is not the decisive factor, and that the BSB may choose of its own volition to amend the standard of proof (subject to approval by the Legal Services Board), consideration of case law is revealing and we note that the BSB has provided some analysis in the consultation paper.

26. There are persuasive authorities from both the UK and commonwealth nations which support the retention of the criminal standard. The decision of the Divisional Court in *Re A Solicitor*⁵ supports the proposition that the standard of proof applicable in professional disciplinary proceedings should be the criminal standard where the charge is similar to a criminal offence. The BSB's 2015/16 Annual Report indicates that dishonest/discreditable conduct was by far the most common aspect of cases closed at tribunal stage.⁶ There is a powerful underlying argument that given the consequences for practitioners of an adverse finding in such cases, fairness demands that the criminal standard should be retained. This point is developed below.

27. In *Campbell v Hamlet*⁷ the Privy Council approved the criminal standard for all legal sector disciplinary proceedings.

28. More recently, in *Z v Dental Complaints Assessment Committee*⁸ before the Supreme Court of New Zealand, the majority ruled in favour of a change to the civil standard. However, the Chief Justice dissented, convinced that:

“the standard of proof beyond reasonable doubt protects against error in decision making Where serious disciplinary charges are brought under statutory process in circumstances where substantial penalties may be imposed and damage to reputation and livelihood is inevitable if adverse findings are made, fairness requires application of a higher standard of proof than one on the balance of probabilities.”⁹

⁵ [1993] QB 69.

⁶ BSB Enforcement Annual Report 2015/16: 18.

https://www.barstandardsboard.org.uk/media/1777872/enforcement_report_2015-16_-_final.pdf

⁷ [2005] 3 All ER 1116.

⁸ [2009] 1 NZLR 1.

⁹ *Ibid.*

29. *The Solicitors Regulation Authority v Solicitors Disciplinary Tribunal*¹⁰ (referred to, in the consultation paper, as ‘*Arslan*’) is relied on by the BSB as indicating that there is appetite for change to the civil standard amongst the judiciary, but we note that comments in this regard were *obiter*.

More certainty is necessary where barristers’ livelihoods and wellbeing are at risk

30. Practitioners who work in the disciplinary field reported to us that even if a barrister is cleared of all charges, an appearance before a disciplinary tribunal may in itself damage a barrister’s reputation. If some or all of the charges are proved by the BSB and a barrister is suspended or disbarred, their livelihood may be destroyed and it can be difficult if not impossible to return to practice. The risks to wellbeing are obvious. The majority of barristers appearing before a tribunal are self-employed and as such pursue their livelihood on their reputation alone. This characteristic makes it more difficult for barristers to rehabilitate their professional lives than some other professionals, who may be employed and supported by their employer.

31. If a lower standard results in more cases coming before the tribunal the corresponding risks to reputation and wellbeing increase.

No variable civil standard

32. We note that many of those who favour the civil standard do so in the belief that a court or tribunal would look more closely at the evidence where the issue concerns serious misconduct. However, this is not to be confused with a ‘variable standard’: see *Re B*¹¹; (a Family case) *R (IPCC) v AC Hayman*;¹² and *Inayat Inayatullah v General Medical Council*¹³ (concerning disciplinary proceedings) which acknowledge the application of a ‘single unvarying standard.’

33. The General Medical Council reassured medical professionals in advance of its adoption of the civil standard in 2008 that a ‘flexible’ civil standard would be used: in other words, that a higher standard would be employed where the charges were particularly serious. However, the courts have subsequently ruled (in the cases referenced in the preceding paragraph) that there is only one civil standard, and no so-called sliding scale or flexibility of application.

34. We suggest that the state of the law is such that no false comfort should be taken from the misconception that there is a sliding scale or a higher evidentiary burden for more serious allegations. An application of the civil standard, however

¹⁰ [2016] EWHC 2862 (Admin).

¹¹ [2008] UKHL 35.

¹² [2008] EWHC 2191 (Admin).

¹³ [2014] WL 5311793 (Admin).

serious the allegation, will result in the case being proved if the tribunal is satisfied on the balance of probabilities that the charge is made out.

The particular vulnerability of lawyers in an adversarial system.

35. 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.

36. 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 in order to deflect responsibility. This dynamic is less evident in other professions.

37. Barristers who work in difficult publicly-funded practice areas, in which clients stand to lose a great deal (e.g. 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.

38. 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.

Chilling effects

39. Criminal and family barristers currently feel there is some degree of protection in the form of the criminal standard of proof should an allegation of misconduct be made by a client. If the standard is lowered, the resulting sense of increased vulnerability may have a chilling effect on interaction with clients and deter imaginative or innovative approaches in advocacy. Over-protective note-taking of exchanges with the client is not conducive to a good working relationship, and becomes impractical given the competing demands on them. Ensuring that another

person witnesses client meetings, or is able to produce a written record of their relations with their client, is impractical given the cost and the low level of their own fees and those payable to their instructing solicitors. Such measures would, in any event, inhibit the relationship of trust with their client. It may deter barristers from entering into these areas of practice, which are already perceived to be unattractive because of cuts to legal aid and long hours.

40. Similarly, barristers may be deterred from interacting with litigants in person when they are not before the court. This is already fraught with difficulty in many cases: a lower standard of proof applied to allegations made by litigants in person will compound the problem.

41. If barristers become more mindful of the risk of unfounded complaints being brought, this may result in overly-protective behaviour. For example, unnecessary submissions to the court in an attempt to placate an unreasonable client so as to avoid a complaint being brought. Barristers need to be fearless in representing their clients, but must also not be inhibited in complying with their duty to the court to act in the administration of justice. These core duties may be compromised if barristers feel compelled to 'watch their back' in case unjustified complaints might be made.

42. None of these potential impacts serves the interests of justice or protects the public. These wider 'public protection' implications of a change to the standard of proof need to be weighed against the proposition that a lower standard of proof will benefit clients and the public.

Public Access

43. Similar concerns arise in relation to public access. Barristers take instructions directly from their clients, without the involvement of a solicitor under this mode of instruction. 41% of complaints received by the Legal Ombudsman in 2016/17 concerned barristers acting on a public access basis. This is disproportionately high. We do not know how many of the cases brought before disciplinary tribunals concerned public access instructions, but they may well be similarly disproportionate. Some public access barristers have expressed their concern that a change to the standard of proof would make them more vulnerable to complaints, and this concern would appear to be supported by research already carried out by the BSB into public access work in 2016, which noted:

"Qualitative feedback indicates that there may be greater scope for complaints within the public access scheme, as clients have less experience of the law and may be more likely to misinterpret statements or legal advice. One barrister said she received a complaint after providing advice which the client misinterpreted – this was overturned post-investigation – but she felt the

incident highlighted that barristers are less likely to keep a record of everything they do and say, unlike solicitors, which again increases the risk of complaints.”¹⁴

44. A change to the standard of proof could be an additional disincentive to barristers to undertake public access work: and even more so in those fields of practice we have already identified as giving rise to greater vulnerability for barristers.

45. We know that the Competition and Markets Authority (CMA) wishes to increase consumer choice and the accessibility of legal services to consumers through the mechanism of increased competition, and they cite the LSB in their Legal Services Market Study Final Report as asserting that the public access scheme helps barristers compete on a more level playing field with solicitors who offer advocacy services.¹⁵ We believe that public access work is an important part of unbundling, which both increases consumer choice and lowers costs, thereby increasing accessibility to legal services—a stated aim of the CMA.

46. We suggest this is another potential unintended consequence of a change to the standard of proof that may run contrary to the public interest.

Disciplinary proceedings are more akin to criminal proceedings

47. There is no agreement on whether disciplinary proceedings can be more accurately equated with criminal or civil proceedings. In truth they probably sit on their own and defy categorisation into either the criminal or civil mould. However some believe that they are more akin to criminal proceedings because a statutory body is empowered to bring charges against an individual with the possibility of life-altering sanctions. If the disciplinary process is more analogous to criminal proceedings it would follow that it was more appropriate to apply the criminal standard.

Undermining the seriousness of professional misconduct proceedings

48. Some thought should be given to the fact that lowering the standard of proof may undermine the seriousness of a finding of professional misconduct. If the outcome is decided on a (mere) balance of probabilities, this may undermine the

¹⁴ Pye Tait Research into the public access scheme 2016: 44,45

https://www.barstandardsboard.org.uk/media/1788136/public-access-final-report_26.9.2016.pdf

¹⁵ Competition and Markets Authority, Legal Services Market Study Final report, 2016: G4

<https://assets.publishing.service.gov.uk/media/5887374d40f0b6593700001a/legal-services-market-study-final-report.pdf>

public sense of its seriousness and more readily enables the disciplined barrister to assert that the Tribunal's finding is wrong.

Questions for the BSB

49. We suggest that the BSB should not effect a change of this significance without focussing on the evidence demonstrating the need for change, the impact of such a change on barristers and public protection, the effect on the number of cases being heard before the tribunal, the process during any transition and the composition of the Professional Complaints Committee (PCC) and tribunal panel. We invite the BSB to consider our observations below, and we suggest that careful scrutiny of the available evidence is required before the case for a reduction of the standard of proof is made out.

Evidence of need for a change

50. As already mentioned, the consultation paper is bereft of any evidence that suggests that problems have been encountered with the current approach. We have been provided with no data which suggests that any material proportion of cases brought fails because the criminal standard of proof is applied. Neither has it been suggested that there are 'recidivists' who escape censure because of the current standard of proof. Many we have spoken to suggest that it is rare for a case to be dismissed in circumstances when it might have succeeded had the civil standard been applied. Indeed, it has been suggested to us that an acquittal is normally due to lacunae in the evidence or the wrong charges being preferred.

51. The BSB should explain the evidence which demonstrates the need for this regulatory change, and explain the rationale.

Wider consideration of the implications of a change to the standard of proof

52. We urge the BSB to look more closely at the implications of any proposed change. We note that the consultation paper is considering this issue from a position of principle and for that reason, or so we understand, no analysis is included on the effects of any change. However, the principle cannot be divorced from the practicalities or risks and implications of such a change. A full and thorough assessment of the impacts of any change and its effects on the public and the profession is required before a decision is made. This would also meet regulatory best practice.

53. For example: what will be the impact on the number of cases being brought before a tribunal? How will such change affect the public interest and the profession?

What will be the cost to the BSB and the BMIF and thus to the profession itself? The BSB should also seek to identify any unintended consequences of such a change. We have, for example, outlined our concerns about the possibility of a chilling effects earlier in the paper, which we are concerned could harm both the interests of clients and the administration of justice.

Impact on the number of cases coming before BTAS panels

54. We would like the BSB to provide a thorough assessment of the impact that change to the standard of proof would have on the number of cases being prosecuted by the BSB before BTAS. Some practitioners involved in such cases consider that an increase is likely. As a matter of common sense, if the threshold standard is lowered there will be more cases where there is “a reasonable prospect of success of a finding of professional misconduct being made.”¹⁶ Some attempt to assess the increase in numbers ought to be made. In the light of the anticipated size of the increase the BSB ought to consider supplementary questions:

- a) Will an increase in the number dilute the impact of such findings?
- b) What safeguards, if any, will be in place to meet the increased risk of marginal or unmerited cases being pursued, given the reports we have heard of the distress caused to barristers who are subjected to such proceedings?
- c) What are the cost implications for the profession?

Application of the civil standard of proof to the most serious allegations

55. We have discussed the case law concerning the interpretation of the civil standard and cautioned against the false comfort of a ‘variable’ standard. However, in the light of certain dicta which suggest that the more serious allegations require a greater cogency of evidence we believe that the BSB should clarify what its approach will be to proving the more serious allegations if the standard of proof is reduced.

Composition of the PCC and BTAS panels

56. We urge the BSB to ensure that both those who decide whether a case meets the required threshold to progress to tribunal, i.e. the PCC, as well as Tribunal members who decide the outcome of BTAS cases, have the necessary expertise and understanding of the barrister’s profession. This ensures that barristers are judged fairly by those with an understanding of their often complex duties to clients and the court, and provide a degree of reassurance to barristers that they will be treated fairly,

¹⁶ BSB Review of the Standard of Proof Applied in Professional Misconduct Proceedings Consultation Paper 2017: 4 https://www.barstandardsboard.org.uk/media/1830289/sop_consultation_paper.pdf

given what is at stake for them. The importance of this will be more acute if cases are decided on the civil standard of proof.

Process for transition

57. If the standard is changed, it is not clear to us whether the barrister who is charged would be subject to the standard in force at the time of the alleged misconduct or the standard in force at the time of the disciplinary tribunal. The BSB should develop a clear policy on this point, to avoid any uncertainty.

Q2: 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?

58. If moving to the civil standard is the right thing to do, implementation should not be delayed because of what the SDT does or does not do. However we ought to point out there are some who would see it as anomalous for what they consider to be two branches of the same profession to apply different standards at their respective disciplinary tribunals and so consider that BTAS should adopt the civil standard only if or when the Solicitors Disciplinary Tribunal (SDT) does the same.

Q3: 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?

59. We understand that the BSB does not yet have detailed information on the areas of practice that generate most complaints which reach the tribunal stage. We think this information, which will soon be more readily available through changes to the Authorisation to Practice process, should, when available, be analysed to determine whether any other individuals with protected characteristics will be adversely impacted by a change in the standard of proof.

60. We understand anecdotally that women are over-represented in the field of family law and BAME barristers are over-represented in publicly funded work. These areas are thought to be those most exposed to complaints, owing to a number of factors including high rates of litigants in person, lack of a solicitor presence at client conferences (that, if present, would afford some degree of protection to barristers against complaints as witnesses to discussions) and the potentially devastating consequences for clients of a lost case in these areas of work, for example, loss of custody of a child or imprisonment.

61. If female or BAME barristers, because of their work in this area, are more likely to appear before the Bar’s Disciplinary tribunal, and because of a change in the standard of proof, more likely to be suspended or disbarred, then the impact on

diversity at the Bar should be a concern. The impact would be twofold; first there would be the actual impact on numbers of women and BAME barristers practising at the Bar and secondly, it may act as a disincentive to people with such protected characteristics being attracted to and retained at the Bar. Both would have the effect of making the Bar less reflective of the population it serves.

62. Before the establishment of the Legal Ombudsman, the BSB handled both service and conduct complaints. According to the BSB's 2013 report on diversity of barristers subject to complaints,¹⁷ in the period between 2007 and 2011 they found that the areas of law that generated the most complaints were civil (36.7%), criminal (35%) and family (15%). Whilst the practice areas generating complaints to the BSB will have changed since they began taking only conduct complaints, there are likely to be some similarities with those recorded as being the most common in the 2007-11 period.

63. We also know that service complaints referred to the Legal Ombudsman over the last three years are predominantly from clients of barristers working in the areas of crime, family and immigration and asylum (see Annex 1). While we recognise that the practice areas of barristers appearing before BTAS for misconduct will be different from those referred to the Legal Ombudsman for service complaints, there is referral of cases between both organisations and as such there is likely to be some overlap in the practice areas of barristers referred to the Legal Ombudsman with those appearing before BTAS.

64. Both assumptions would indicate there is a strong possibility that crime, family and immigration law practitioners, who tend to be over-represented by female and BAME barristers, will be disproportionately affected by any change to the standard of proof, since they are likely to be over-represented at Bar Tribunals. The possibility of a disproportionate impact on female and BAME barristers will require further investigation by the BSB once more data is available.

Bar Council
21 July 2017

¹⁷Table 1 https://www.barstandardsboard.org.uk/media/1451930/diversity_report_2012_report.pdf

For further information, please contact
~~Sarah Richardson, Head of Policy, Regulatory Issues and Law Reform~~
~~The General Council of the Bar of England and Wales~~
~~289-293 High Holborn, London WC1V 7HZ~~
~~Direct line: 0207 611 1316~~
~~Email: SRichardson@barcouncil.org.uk~~

Annex 1

The top 5 areas of law the Legal Ombudsman investigates about barristers are:

	% of all complaints resolved		
	2014/15	2015/16	2016/17
Crime	24%	20%	23%
Family law	17%	15%	22%
Immigration and asylum	23%	21%	11%
Litigation	13%	17%	19%
Employment	9%	10%	7%

Source: Legal Ombudsman

[REDACTED]

From: [REDACTED]
Sent: 09 May 2017 15:35
To: [REDACTED]
Subject: Review of the Standard of Proof Applied in Professional Misconduct Proceedings

[REDACTED]

I write in response to your consultation on the standard of proof applied in professional misconduct proceedings.

Firstly, in answer to the three questions posed:

Q1: 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?

Campaign Against Antisemitism does believe that the civil standard should be applied to allegations of professional misconduct. Whereas conviction of a criminal offence may entail dire consequences, particularly depriving an individual of his liberty, the penalties available in professional misconduct proceedings are severe, but much less so. We believe that the public should also be confident that barristers are more likely to be sound practitioners than otherwise, and to that end we agree with the Law Commission. We believe that using the balance of probabilities gives barristers adequate protection whilst ensuring that misconduct proceedings are able to protect the public from unscrupulous practitioners.

Q2: 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?

We understand the reason why the SDT is not able to change its standard of proof as easily as the BSB. We do not see any reason to delay adopting the civil standard of proof straight away.

Q3: 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?

We are very familiar with the Equality Act as a charity that campaigns against antisemitism. If the standard of proof is changed uniformly, so long as there is adequate recourse to appeal a professional misconduct decision, we do not foresee any adverse impacts for people with protected characteristics under the Equality Act.

Finally, we would add that we have been working with the Solicitors Regulation Authority regarding the use by professionals of social media. We have seen cases in which antisemitic material is posted on social media from accounts which appear to be operated by solicitors in their own name, but they have told the SRA that they share their social media accounts with multiple people and they may not have posted the material themselves. We are helping the SRA to close this loophole by warning that solicitors must not permit anybody else to use their social media accounts and must keep them adequately secured. We suggest that the BSB should adopt a similar stance.

We hope that you find this useful and would be grateful for an embargoed advance copy of the BSB's eventual decision, if that is possible?

Yours sincerely,

[REDACTED]

From: [REDACTED]
Sent: 27 July 2017 14:04
To: [REDACTED]
Subject: Re: Review of the Standard of Proof Applied in Professional Misconduct Proceedings
Attachments: Response by the Criminal Bar Association to the Bar Standards Board Consultation on the Standard of Proof in Disciplinary Proceedings.pdf

[REDACTED]

Once again, many thanks for agreeing to the extension.

We have a final copy for you ahead of 31st July.

Please find the response of the Criminal Bar Association to your Review of the Standard of Proof Applied in Professional Misconduct Proceedings, attached.

Best wishes and thank you once again,

[REDACTED]

Date: Thursday, 20 July 2017 at 14:57

[REDACTED]

Subject: RE: Review of the Standard of Proof Applied in Professional Misconduct Proceedings

[REDACTED]

We are happy to grant the Criminal Bar Association an extension until close of business on Monday 31st July, we look forward to receiving your response.

If you have any questions or queries then please do not hesitate to contact me.

Kind regards,

[REDACTED]

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From: [REDACTED]
Sent: 20 July 2017 10:35

To: [REDACTED]
Subject: Review of the Standard of Proof Applied in Professional Misconduct Proceedings

[REDACTED]

I write to you from the Criminal Bar Association to humbly ask whether you would grant an additional week for us to submit a formal response to your recent consultation on 'Review of the Standard of Proof Applied in Professional Misconduct Proceedings'.

I attended a meeting last night when I requested an update on the CBA response and was asked to seek an extension.

Might you grant an extension until 10am – Monday 31st July?

Best wishes,

[REDACTED]

[REDACTED]

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CBA Response to the Bar Standards Board Consultation on the Standard of Proof in Disciplinary Proceedings

1. The Executive Committee of the Criminal Bar Association discussed the BSB Consultation at its meeting on 19 July 2017. The majority opposed lowering the standard of proof and there was no appetite for change.
2. The main argument in favour of retaining the criminal standard, when other professions have moved away from it, was that barristers – and criminal practitioners most acutely – are unusually vulnerable to groundless and malicious complaints. The reasons given for that are (i) often those either convicted of or with previous convictions for dishonesty offences, and have few inhibitions about lying when aggrieved; (ii) allegations are relatively easy to make, especially now that solicitors frequently fail to attend conferences or Court, where they could act as witnesses to any conduct the subject of a complaint; (iii) convicted defendants have little to lose by making a false complaint; (v) the analogy is with police officers, who are protected from such complaints by the higher standard of proof; (iv) the above risks are higher in direct access cases. Therefore, a higher degree of protection is required than for other professions.
3. The minority view was that it is anomalous for Barristers (the only professionals apart from veterinarians) to retain the criminal standard. Many disciplinary offences are not criminal in character. The public perception may be that we are protecting vested interests and are unwilling to sanction breaches of professional conduct rules.
4. We note that the consultation paper gives little evidence of a specific problem that the proposed change may remedy. We are concerned that not enough research or forecasting have been done on the impact of changes, especially for those with protected characteristics under the Equality Act 2010.
5. We would welcome further evidence as to the need for the change.

Consultation questions

Q1: 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?



THE
CRIMINAL BAR
ASSOCIATION

OF SOLICITORS' WIVES

Q2: 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?

Q3: 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?

Response

Q1: No

Q2: N/A

Q3: UNKNOWN

[REDACTED]

From: [REDACTED]
Sent: 15 May 2017 18:10
To: [REDACTED]
Subject: Consultation response: Standard of Proof

Dear Sirs,

We write in response to the current BSB consultation, in answer to the specific questions raised:

Q1: Yes.
Q2: No.
Q3: No.

Comments as to why we reached these conclusions:

1. The CLSB is an approved regulator under the Legal Services Act 2007 and applies the civil standard of proof at all levels:
Level one: Where a minor disciplinary finding is dealt with by the CEO, the equivalent of the BSB administrative sanction.
Level two: Where an independent investigation recommends the matter is serious in nature and should be referred to a Conduct Committee.
Level three: Where an appeal has been filed and a Conduct Appeal Committee is convened.
By making this change, the BSB would bring this highly regarded legal profession in line with other regulated legal professions.
2. The CLSB considers a civil standard of proof appropriate to:
 - (i) maintain standards; and
 - (ii) inspire faith in the regulatory process; and
 - (iii) ensure greater consumer protection.
3. It seems somewhat unfair on the profession itself to have an arrangement which applies a lower standard of proof to a breach considered minor. In our view, a breach of a code of conduct is a breach and should be judged on the same standard of proof no matter the actions and consequences of that breach.
4. To apply a criminal law standard of proof where that alleged is not a criminal activity does not seem appropriate.
5. In the event of criminal activity, this would also be a matter for the courts who would rightly apply the criminal standard of proof due to greater sanctions available to it e.g. loss of liberty.

Regards,



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[REDACTED]

From: [REDACTED]
Sent: 01 August 2017 17:23
To: [REDACTED]
Subject: [REDACTED] Response to Consultation Paper on Standard of Proof Applied in Professional Misconduct Proceedings - request for extension
Attachments: [REDACTED] Response to BSB Consultation on Standard of Proof in Disciplinary Proceedings.docx

[REDACTED]

Further to the below, please find attached COMBAR's response to the BSB's Consultation Paper, "Review of the Standard of Proof Applied in Professional Misconduct Proceedings".

Please could you acknowledge safe receipt of this email and attachment.

Kind regards
[REDACTED]

From: [REDACTED]
Sent: 13 July 2017 17:14
To: [REDACTED]
Subject: [REDACTED] Response to Consultation Paper on Standard of Proof Applied in Professional Misconduct Proceedings - request for extension

[REDACTED]

Thank you for your email.

We are happy for COMBAR to provide their response by the close of business on 4 August 2017.

If you have any questions then please do not hesitate to contact me.

Kind regards,
[REDACTED]

[REDACTED]

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From: [REDACTED]
Sent: 13 July 2017 08:35
To: [REDACTED]
Subject: [REDACTED] Response to Consultation Paper on Standard of Proof Applied in Professional Misconduct Proceedings - request for extension

[Redacted]

I am a member of the Executive Committee of the Commercial Bar Association ("COMBAR"), a specialist bar association representing 1,500 self-employed and employed barristers practising in the field of international and commercial law, and 37 sets of Chambers who are corporate members of COMBAR. I have been tasked with coordinating COMBAR's response to the BSB's Consultation Paper, "Review of the Standard of Proof Applied in Professional Misconduct Proceedings".

The current Executive Committee was elected at our AGM on 21 June and we have since exchanged views by email on the stance (if any) COMBAR should take in response to the consultation paper. Those exchanges have shown that there are strongly held views on both sides, and in the circumstances we have considered it best for the matter to be debated more fully and for there to be a vote at the next Executive Committee meeting, on 25 July.

We are conscious that the closing date for consultation responses is 21 July and that this is before the Executive Committee's next meeting. Accordingly, we would be grateful if you could permit COMBAR a two-week extension for the submission of its response, to close of business on 4 August 2017.

I look forward to hearing from you.

Kind regards

[Redacted signature]

[Redacted signature block]

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**COMBAR RESPONSE TO BSB CONSULTATION:
REVIEW OF THE STANDARD OF PROOF APPLIED
IN PROFESSIONAL MISCONDUCT PROCEEDINGS**

1. The Commercial Bar Association (“COMBAR”) is a specialist bar association representing self-employed and employed barristers who practise in the field of international and commercial law.
2. COMBAR has over 1,500 individual and honorary members. In addition, thirty-seven of the leading sets at the commercial Bar are chambers (i.e. corporate) members of COMBAR.
3. This is COMBAR’s response to the BSB’s Review of the Standard of Proof Applied in Professional Misconduct Proceedings (“the Consultation”).
4. The membership and Executive Committee of COMBAR hold a range of views on the issues raised in the Consultation. There are proponents for an immediate move to the civil standard, for a move to the civil standard but only if and when the Solicitors Disciplinary Tribunal (“SDT”) also does so, and for retaining the criminal standard. In those circumstances, COMBAR does not consider it appropriate for it corporately to support (whether conditionally or otherwise) or oppose the proposed change.
5. COMBAR has, however, had sight of the Bar Council’s response to the Consultation (“the Bar Council Response”). COMBAR considers that the Bar Council Response summarises the arguments for and against the proposed change in a measured and balanced manner and raises a number of important and salient questions that the BSB must investigate and answer before making a move to the civil standard; to that extent COMBAR therefore endorses and adopts the Bar Council Response.

[Redacted]

From: [Redacted]
Sent: 22 June 2017 11:22
To: [Redacted]
Subject: [Redacted] response to BSB Standard of Proof Consultation
Attachments: Bar Standards Board consultation response - GMC.pdf

[Redacted]

Please find attached the GMC's response to the BSB consultation regarding the review of the standard of proof applied in professional misconduct proceedings.

If you have any questions or concerns please feel free to contact me at the details listed below.

Best wishes,

[Redacted]
[Redacted]
[Redacted]
[Redacted]
[Redacted]
[Redacted]

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[Redacted]
[Redacted]
[Redacted]

22 June 2017

~~Regent's Place~~
~~250 Euston Road~~
~~London NW1 3JN~~

~~Email: gmc@gmc-uk.org~~
~~Website: www.gmc-uk.org~~
~~Telephone: 0161 923 6602~~
~~Fax: 020 7189 5001~~




Response to your consultation on the introduction of a civil standard of proof

I am writing to respond to your consultation on proposals for the Bar Standard Board to adopt a civil standard of proof for professional misconduct. A response to the three consultation questions is set out below.

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

Yes. The principle of civil standard of proof is established in medical regulation. The rationale for this change was upheld by the Law Commission, the Scottish Law Commission and Northern Ireland Law Commission in their Joint Report on the Regulation of Health Care Professionals, published in April 2014 (Cm 8839). Recommendation 81 of the Report found that "the civil standard of proof should apply to all fitness to practise hearings". The rationale for this was as follows:

"It was argued by some that the sanctions imposed by the regulators can be so devastating to an individual registrant's livelihood and reputation that the criminal standard of proof must apply. We think this would set the threshold too high and could lead to a situation where a registrant survived a challenge to continued registration, but was not regarded as someone who, for example, the NHS could safely employ to look after patients. It is not acceptable that a registrant who is more likely than not to be a danger to the public should be allowed to continue practising because a panel is not certain that he or she is such a danger." (par 9.63)

Recent case law has also upheld the principle of application of a civil standard of proof in medical regulation. It may be helpful to consider Bhatt v General Medical Council [2011] EWHC 783 (Admin).

A transition to a civil standard of proof may support uniformity across the 'comparable professions', which may in turn lead to more judicial certainty, for example in cases of dishonesty.

Do you consider that the BSB should only change the standard of proof if and when the Solicitors Disciplinary Tribunal also does so?

Appropriate transition arrangements will clearly need to be put in place to support the smooth introduction of a civil standard of proof. This may include consideration of how to deal with any impacts where a different standard of proof is applied by the Solicitors Disciplinary Tribunal, to inform a decision on the timing of any change to approach.

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?

No. I am not aware of any evidence that those with protected characteristics would be adversely impacted by the change in the standard of proof.

Yours sincerely

A large black rectangular redaction box covering the signature area.

[Redacted]

From: [Redacted]
Sent: 12 July 2017 12:09
To: [Redacted]
Subject: Response from the ~~Honourable Society of Gray's Inn~~ to the BSB Consultation on the Review of the Standard of Proof Applied in Professional Misconduct Proceedings
Attachments: ~~RESPONSE BY THE HONOURABLE SOCIETY OF GRAY.docx~~

[Redacted]

Please find attached the response from Gray's Inn to the consultation on the Review of the Standard of Proof Applied in Professional Misconduct Proceedings.

This is a consolidated view of the Inn which has been endorsed by the Inn's executive committee and it is therefore hoped the appropriate weight will be attached to it.

I would be grateful if you could acknowledge receipt

Best wishes,

[Redacted]

[Redacted]

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~~RESPONSE BY THE HONOURABLE SOCIETY OF GRAY'S INN~~

TO THE BSB CONSULTATION PAPER ON THE

REVIEW OF THE STANDARD OF PROOF APPLIED IN

PROFESSIONAL MISCONDUCT PROCEEDINGS

1. The Bar Standards Board (BSB) has launched a new consultation about the standard of proof used in professional conduct proceedings. Currently the criminal standard is applied but the Board is seeking views as to whether the time has come to change and adopt the civil standard.
2. What follows represents the response of the Honourable Society of Gray's Inn.
3. Under the Legal Services Act 2007 the BSB is responsible for regulating barristers and other authorised individuals and bodies. One of the functions of the BSB is to investigate and respond to potential breaches of the BSB Handbook.
4. Under regulation E37 of the Complaints Regulations, following an investigation, the BSB's Professional Conduct Committee (PCC) may determine whether the conduct under investigation constituted a breach of the handbook and in making that determination they apply the civil standard of proof namely the balance of probabilities. It may then impose administrative sanctions if it feels that is appropriate.
5. If however the PCC considers that a potential breach is not appropriate for disposal by way of an administrative sanction then it must refer the complaint for disciplinary action. Before it can take this step the PCC must consider whether there is a reasonable prospect of proving the potential breach to the criminal standard, namely beyond reasonable doubt.
6. Any resulting disciplinary proceedings are then conducted applying the criminal standard of proof by either the Determination by Consent procedure or more commonly by a Disciplinary Tribunal. The Bar Tribunals and Adjudication Service Regulation E143 of the Disciplinary Tribunals Regulations 2014 (Part 5, Section B of the BSB Handbook) so provides *"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.”

7. The argument in support of maintaining the criminal standard of proof is that the consequences of an adverse finding can lead to disbarment or suspension from practice and have career and life changing consequences for the barrister involved. Such draconian consequences should only follow if the Disciplinary Tribunal is satisfied to the criminal standard that the allegation of professional misconduct has been made out.
8. The argument in support of changing the standard of proof to the civil standard is that consumers need protection from barristers whose action or conduct mean that they pose a risk to those consumers either as a result of their incompetence or dishonesty. Furthermore consistency between the professions is desirable and there is no logical reason to distinguish between the standard of proof needed in disciplinary proceeding against those in the field of medicine and social care and those in the field of law.
9. The historical position of the development of the standard of proof in each profession is deserving of consideration. In Campbell v Hamlet [2005] UKPC 19 The Privy Council approved the observations of Lord Lane CJ in Re A Solicitor [1993] QB 69 that *“the criminal standard of proof is the correct standard to be applied in all disciplinary proceedings concerning the legal profession, their Lordships entertain no doubt.”*
10. This reflected the approach of the courts at that time to disciplinary proceedings against other professionals. The position in the medical profession then was, that the Fitness to Practice Panels, also applied the criminal standard of proof.
11. This changed for the medical profession, effective from 31st May 2008, following Sir Liam Donaldson’s report *“Good doctors, safer patients”* (July

2006) which questioned whether it was appropriate for the GMC to retain the criminal standard of proof at fitness to practice hearings. There followed extensive consultation with the ultimate result that the standard of proof was changed from the criminal to the civil standard. That standard is now applied by the Medical Practitioners Tribunal Service (formally known as the GMC)

12. This brought the medical profession into line with most other regulatory bodies.

13. The civil standard of proof was at one time thought to be flexible to allow for a higher standard of proof in cases where the allegation was particularly serious, *"the civil standard of proof does not invariably mean a bare balance of probabilities, and does not mean so in the present case. The civil standard is a flexible standard to be applied with greater or lesser strictness according to the seriousness of what has to be proved and the implications of proving those matters."* Per Lord Bingham CJ in B v Chief Constable of Avon and Somerset Constabulary [2001] 1 WLR 340. However this more flexible approach was rejected by the House of Lords in Re B (Children) [2009] 1 AC 11 which concerned allegations of sexual assault but where, the court held in a unanimous decision, *"there is only one civil standard of proof and that is proof that the fact in issue more probably occurred than not."* Per Lord Hoffman at 13.

14. If the standard of proof were to be altered for professional misconduct proceedings then the standard of proof would be the civil standard with no heightened standard in cases where dishonest and/or criminal conduct was alleged.

15. The current position is believed to be that, apart from disciplinary committees set up by the Royal College of Veterinary Surgeons, the Solicitors Disciplinary Tribunal (SDT) and the BSB, all regulatory bodies now apply the civil standard of proof in disciplinary proceedings. This is analogous to the

position in civil proceedings where allegations of criminal conduct do not require the criminal standard of proof even though the allegations are of rape, assault, dishonesty or dealing in drugs. Dadourian Group International Inc. v Sims [2009] 1 Lloyd's Rep 601 an action for the tort of deceit and Wanjiku v Secretary of State for the Home Dept. [2011] EWCA 264 concerning automatic refusal to enter or remain in the UK where "false representations" have been made are both examples of the courts applying the civil standard with no heightened threshold to account for the gravity of the allegations or consequences to the individual.

16. It is also the position that the body that considers complaints against judges, the Judicial Conduct Investigation Office, uses the civil standard of proof when it considers allegations against judicial office holders, as was the position under its predecessor the Office for Judicial Complaints.
17. So the question remains, why ought the standard of proof in professional conduct proceedings be different for the barrister than for the doctor or other professional facing identical allegations? Allegations of dishonesty or sexual assault are equally fatal to the careers of all. Why also should the standard of proof in professional conduct proceedings against a barrister be different from the standard of proof for the same allegation in civil proceedings?
18. The statutory framework under which the BSB operates identifies the regulatory objectives of the legislation in Section 1 (1) of The Legal Services Act 2007 as including "protecting and promoting the public interest" as well as "protecting and promoting the interests of consumers" and "promoting and maintaining adherence to the professional principles." It is difficult to see how these laudable regulatory objectives are achieved by allowing barristers to continue to practise where evidence proves on the balance of probabilities that they are dishonest and/or have sexually assaulted their clients.

19. The fact that the SDT still adopt the criminal standard is a factor we are asked to consider. The SDT is constituted as a Statutory Tribunal under section 46 of the Solicitors Act 1974, it continues to apply the criminal standard of proof when determining issues of professional misconduct and considers itself bound by precedent so to do. Recent authority has suggested that the Court of Appeal considers that this needs reconsidering in the light of the change in *“the climate and approach to professional regulation and discipline”* per Leggatt J. in The Solicitors Regulation Authority v Solicitors Disciplinary Tribunal [2016] EWCA 2862 (Admin) Leveson LJ in the same case observed *“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.”* However the Court held that the case was not suitable to address the issue as the Tribunal had not undertaken a primary fact-finding role.
20. Were, in the future, the Court of Appeal or the Supreme Court to change the standard of proof required before the SDT from the criminal standard to the civil standard then many would consider that any justification the BSB had to apply a different and higher standard for barristers would disappear.
21. It would however be illogical to acknowledge that the BSB currently applies the wrong standard of proof but recommend no change until another body also changes the standard it applies.
22. The Legal Services Board, as the oversight regulator for the legal professions, issued a paper in March 2014, *“Regulatory sanctions and appeals processes; an assessment of the current arrangements.”* In the executive summary it described four features of best practice in regulatory sanctions as including *“the consistent use of the civil standard of proof.”* In support of that view it cited the view of the Law Commission, which was expressed in the context of health and social care professionals, namely that there were strong public protection arguments for adopting the civil standard of proof, observing that

the criminal standard *"implies that someone who is more likely than not to be a danger to the public should be allowed to continue in practice."* (Page 185, Law Commission, Scottish Law Commission and Northern Ireland Law Commission March 2012 Regulation of Health Care Professionals, Regulation of Social Care Professionals in England a joint consultation paper.)

23. Any change in the standard of proof applied to professional misconduct proceedings cannot impact adversely on any of those with protected characteristics under the Equality Act.

24. Having considered all the available evidence the view of the Honourable Society of Gray's Inn is that the time is right to change the standard of proof in professional misconduct proceedings from the criminal standard to the civil standard.

25. ~~The Honourable Society of Gray's~~ answers the questions posed by the consultation paper as follows:-

Q1 : 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? Answer Yes

Q2 : 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? Answer No

Q3 : 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? Answer No.

[REDACTED]

From: [REDACTED]
Sent: 20 July 2017 15:50
To: [REDACTED]
Subject: Consultation on Standard of Proof - ICAEW Submission
Attachments: ICAEW Representation re BSB Burden of Proof 18 Jul 17.pdf

[REDACTED]

Please find attached ICAEW's observations on the BSB consultation on the Standard of Proof.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

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ICAEW REPRESENTATION 78/17 REGULATORY REPRESENTATION

Review of the Standard of Proof Applied in Professional Misconduct Proceedings

ICAEW Professional Standards welcomes the opportunity to comment on the document *Review of the Standard of Proof Applied in Professional Misconduct Proceedings* published by the Bar Standards Board (BSB) on 2 May 2017, a copy of which is available from this [link](#). This response is dated 18 July 2017.

The Institute of Chartered Accountants in England and Wales
Chartered Accountants' Hall
Moorgate Place
London
EC2R 6EA UK

T +44 (0)20 7920 8100
F +44 (0)20 7920 0547
DX 877 London/City
icaew.com

ICAEW is a world-leading professional accountancy body. We operate under a Royal Charter, working in the public interest. ICAEW's regulation of its members, in particular its responsibilities in respect of auditors, is overseen by the UK Financial Reporting Council. We provide leadership and practical support to over 147,000 member chartered accountants in more than 160 countries, working with governments, regulators and industry in order to ensure that the highest standards are maintained.

ICAEW members operate across a wide range of areas in business, practice and the public sector. They provide financial expertise and guidance based on the highest professional, technical and ethical standards. They are trained to provide clarity and apply rigour, and so help create long-term sustainable economic value.

ICAEW as a regulatory body is;

- (a) the largest recognised supervisory body (RSB) and recognised qualifying body (RQB) for statutory audit in the UK, registering approximately 3,000 firms and 7,500 responsible individuals under the Companies Act 1989 and 2006.
- (b) the largest prescribed accountancy body (PAB) and recognised accountancy body (RAB) for statutory audit in Ireland, registering approximately 3,000 firms and 7,500 responsible individuals under the Companies Act 2014
- (c) the largest recognised supervisory body (RSB) for local audit in the UK, registering approximately 10 firms and 100 responsible individuals under the Local Audit and Accountability Act 2014
- (d) the largest single insolvency regulator licensing some 800 insolvency practitioners as a recognised professional body (RPB) under the Insolvency Act 1986 out of a total UK population of 1,700.
- (e) a designated professional body (DPB) under the Financial Services and Markets Act 2000 currently licensing approximately 2,300 firms to undertake exempt regulated activities under that Act.
- (f) An approved regulator (AR) and licensing authority (LA) for the reserved legal service of probate, accrediting 90 authorised firms and 180 Alternative Business Structures (ABSs) for probate services
- (g) a supervisory body recognised by HM Treasury for the purposes of the Money Laundering Regulations 2007 dealing with approximately 13,000 member firms.

In discharging these duties ICAEW are subject to oversight by the FRC's Conduct Committee, the Irish Auditing and Accounting Supervisory Authority (IAASA), the Insolvency Service, the FCA and the Legal Services Board.

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For more information, please contact Duncan Wiggetts, Executive Director Professional Standards
duncan.wiggetts@icaew.com icaew.com

Executive summary

1. The consultation document issued by the BSB seeks views on whether the burden of proof used in disciplinary cases under their responsibility should continue to be based on the criminal standard, or should be amended to be the civil standard that is used by other regulatory bodies.
2. ICAEW welcomes this initiative by the BSB which in our view moves forward the wider regulatory environment envisaged under the Legal Services Act 2007 (the act) and brings greater consistency into the way that legal services are regulated and enforced.
3. 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.
4. The historical basis for the criminal burden of proof is well set out in the consultation document, and was perhaps appropriate for its time. However state regulation of the professional services sector has changed markedly across the world in the last 20 years, and the alignment of legal services within those frameworks requires it to meet the common standards expected of regulatory bodies acting on behalf of the state. As a tool of the state as against that of a professional body it requires consistency.

Detailed responses

Q1 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?

5. We agree with the principle.

Q2 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 (SDT) also does so?

6. We disagree with this assessment. The evolution of the Alternative Business Structures is already creating a climate where two individuals in the same entity jointly responsible for a regulatory breach could have different sanctions outcomes simply as a result of inconsistent burdens of proof within their professional bodies. Just because the SDT has been slow in addressing this regulatory imbalance does not in our view provide an excuse for the BSB to delay.

Q3 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?

7. We do not know of any..

[REDACTED]

From: [REDACTED]
Sent: 21 July 2017 14:46
To: [REDACTED]
Subject: FW: Consultation on changing the standard of proof used in professional misconduct proceedings for barristers - Inner Temple BLC response
Attachments: BLC response to the BSB Standard of Proof Consultation.pdf
Importance: High

From: [REDACTED]
Sent: 21 July 2017 14:36
To: [REDACTED]
Subject: Consultation on changing the standard of proof used in professional misconduct proceedings for barristers - Inner Temple BLC response...
Importance: High

To whom it may concern,

Please find the Bar Liaison Committee of The Honourable Society of the Inner Temple's response to the consultation on changing the standard of proof used in professional misconduct proceedings for barristers attached.

I appreciate that the deadline is today and would be very grateful if you could confirm that this paper has been accepted and has reached the correct person/panel.

With thanks and kind regards,

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]



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**BSB CONSULTATION: REVIEW OF THE STANDARD OF PROOF APPLIED IN PROFESSIONAL
MISCONDUCT PROCEEDINGS**

RESPONSE FROM THE INNER TEMPLE BAR LIAISON COMMITTEE

1. The Inner Temple Bar Liaison Committee ("BLC") represents over 3,000 practitioner members of the Honourable Society of the Inner Temple. Committee members range from recently qualified barristers to QCs and come from both the independent and the employed bar.

Q1: 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. The BLC strongly supports the principle of ensuring protection for consumers of legal services from barristers whose action or conduct pose a risk to those consumers, either as a result of incompetence or dishonesty. One such (although not the only) protection is the ability of the BSB to bring misconduct proceedings against barristers where there is evidence of such behaviour. The question currently being considered is whether the standard of proof should be lowered in such proceedings.
3. The BLC recognises that some (although not all) professions have moved to a civil standard in disciplinary proceedings in recent years. However, barristers, unlike other professionals, owe a duty not just to their clients but to the court. Indeed, their duty to the court overrides their duty to the client, which may at times result in barristers having to take action which is contrary to their client's wishes. This is a fertile area for complaints by disaffected or disappointed litigants, who may make unmeritorious complaints against their barrister. The problem is particularly acute in publicly funded areas of the Bar, where the restrictions on funding often mean that the

barrister has to deal with clients without a solicitor being present (and hence without an independent witness to important tactical and confidential discussions about the trial).

4. The fact that the standard of proof in relation to disciplinary proceedings (although not of course in relation to civil proceedings) is a criminal one provides an important check and balance in such circumstances, and its removal could affect the proper administration of justice. A lowering of the requisite standard for a finding of misconduct may lead to more defensive practice, where greater weight may, if only subconsciously, be attached to the duty to the client than the duty to the administration of justice more generally. It might also impact on the cab-rank rule given that some individuals (including those who may need most protection) may be more litigious or prone to dissatisfaction with the outcome than others.
5. We also note that disciplinary proceedings will often involve allegations of dishonesty or conduct tantamount to contempt of court which effectively amount to findings of criminal conduct. We believe that there is a strong public interest in ensuring that no such finding should be made by a disciplinary tribunal unless proved to the criminal standard.
6. In light of the above, we do not consider it to be in the public interest to lower the burden of proof in disciplinary proceedings against barristers. We consider that the use of the criminal standard appropriately balances the public interest in ensuring sanctions are imposed upon those who do not meet the required standards whilst at the same time preserving the public interest in ensuring that all members of Bar are able to effectively discharge their duties to the administration of justice. No evidence is referred to in the consultation paper to suggest that the current standard of proof is resulting in outcomes which fail to provide the necessary protection for consumers and the public, and we are not aware of any such evidence.

Q2: 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?

7. The fact that solicitors are not currently subject to a lower standard of proof on the balance provides an additional reason for not changing the standard of proof against barristers (and certainly not unilaterally) in circumstances where:
- a. both may on occasions be subject to the same or substantially the same complaint;
 - b. an individual may be subject to regulation by more than one professional body, and therefore subject to different standards;
 - c. different legal professionals working within the same multi-disciplinary practice could be subject to different standards of proof.
8. We therefore would agree that if, notwithstanding the points we have made in relation to question (1), the BSB takes the view that it would be in the public interest to lower the burden of proof against barrister, such a change should only be implemented in tandem with the SRA.

Q3: 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?

9. No.

~~Inner Temple Bar Liaison Committee~~

21st July 2017

[REDACTED]

From: [REDACTED]
Sent: 11 July 2017 17:04
To: [REDACTED]
Subject: Standard of proof applied in professional misconduct proceedings consultation response
Attachments: 2017 07 11 LSCP consultation responde to BSB.pdf

Dear Sir/Madam

Please find enclosed the Legal Services Consumer Panel's consultation response on the BSB's standard of proof applied in professional misconduct proceedings.

If you have further queries please do not hesitate to contact me or my colleague Lola Bello.

Many thanks

[REDACTED]

[REDACTED]

[REDACTED]

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Sent by email only to: [REDACTED]

11 July 2017

Dear Sir/Madam

Review of the standard of proof applied in professional misconduct proceedings.

We welcome the opportunity to respond to the Bar Standards Board's (BSB) consultation on the standard of proof applied in professional misconduct proceedings.

We have responded to the full set of questions below, but first I would like to take this opportunity to strongly welcome this proposal. Moving from the criminal standard of proof to the civil standard of proof will be fairer on consumers, and it may act as a positive incentive for barristers to deliver good services.

Adopting the civil standard of proof will also bring the BSB in line with all the other Approved Regulators in the legal services sector, as well as other professional bodies in England and Wales.

The Panel is of the strong opinion that the current standard of proof is too stringent and does not serve the consumers interest. It is important to note that when the Law Commission considered the standard of proof adopted by the health and social care professionals in 2012, it opined that the civil standard of proof should be adopted and said:

*"There are strong public protection arguments for adopting the civil standard [of proof]. The criminal standard [of proof] implies that someone who is more likely than not to be a danger to the public should be allowed to continue practising, just so long as the panel is not sure that he or she is a danger to the public. It seems to us that professional regulation is quite different from the criminal context, where the state is required to make sure that someone has committed a crime before taking the extreme and punitive step of imprisoning him or her."*¹

Although the Law Commission view was expressed in the context of health and social care professionals, the argument could be applied to legal professionals.

The time is therefore right for the BSB to change its position on this important issue. More so because it does not need primary or secondary legislation or a precedent-setting judicial decision to do so.

¹ Law Commission, "Regulation of Health Care Professionals; Regulation of Social Care Professionals in England Report", (LC 345), link [here](#).

Please find below the Panel's answers to the consultation questions.

Q1: 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?

We support the principle of changing to the civil standard of proof for the reasons outlined in the consultation paper. Trust and confidence in the profession will be best served when consumers can be assured that the probability of misconduct will be addressed in all reasonable circumstances. This change should also give greater confidence of redress for consumers with a legitimate complaint, particularly in the face of evidence from our research showing that there is an increase in the number of 'silent sufferers' (consumers who had a complaint, but did nothing about it). The proportion of 'silent sufferers' increased from 35% in 2016 to 49% in 2017.

In 2014, The Legal Services Board (LSB) recommended that both the Solicitors Disciplinary Tribunal (SDT) and the Bar Tribunals and Adjudication Service should adopt the civil standard of proof.² At the time, the LSB argued that a barrister or solicitor who is more likely than not to be incompetent may be a risk to the liberty of their clients. The LSB also said that it cannot be right that a professional who probably stole client funds is allowed to continue practising just because the regulator is not sure beyond reasonable doubt that they stole client funds. The LSB went on to make the important point that the organisation that considers complaints against judges, the Judicial Conduct Investigations Office, uses the civil standard of proof when it considers allegations against judicial office holders' personal conduct. This has been the case since the inception of the office. We completely agree with the LSB's arguments.

Q2: 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?

We believe the change from the criminal to the civil standard of proof should be introduced independently of the SDT. It may be argued that since the SDT is not an Approved Regulator, the BSB should align itself with the rest of the regulators who have already changed their standard of proof to the civil standard. But this is not the strongest argument for change. This change must come about because it is right, reasonable and fair, irrespective of what may be going on in another place.

Q3: 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?

The Consumer Panel believes the proposed change of standard of proof would have a positive impact on vulnerable consumers. Vulnerable consumers will be better protected if regulated persons who have probably breached conduct rules are disciplined appropriately. The civil standard of proof should also give encouragement to vulnerable consumers and their representatives to raise concerns and seek redress when appropriate.

² The Legal Services Board, "*Regulatory sanctions and appeals processes*", link [here](#).

We would be very happy to meet and discuss any aspect of this response in further detail.
Please contact [REDACTED] for further queries at

Yours sincerely

[REDACTED]
[REDACTED]
[REDACTED]

[REDACTED]

From: [REDACTED]
Sent: 06 June 2017 18:24
To: [REDACTED]
Subject: Review of the Standard of Proof Applied in Professional Misconduct Proceedings

[REDACTED]

The Middle Temple Conduct, Disciplinary & Regulatory Affairs Sub-Committee, which reports to the Inn's Education & Training Committee, has carefully considered the questions raised in the Consultation on the Review of the Standard of Proof Applied in Professional Misconduct Proceedings. Both committees concluded that it would be difficult and not appropriate to attempt to identify and draft a response which speaks on behalf of the whole Inn, given that the subject is one on which there appear to be quite widely divergent views in this Inn. Instead of aiming for a single response, therefore, Middle Temple has urged its members to respond individually.

Best regards,



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[REDACTED]

From: [REDACTED]
Sent: 20 July 2017 10:34
To: [REDACTED]
Subject: BSB Consultation - Review Of The Standard Of Proof Applied In Professional Misconduct Proceedings
Attachments: SDT Response - BSB Consultation 20.07.17.pdf

[REDACTED]

I attach the "Response of the Solicitors Disciplinary Tribunal to the Bar Standards Board Consultation on the Standard of Proof Applied in Professional Misconduct Proceedings."

The SDT has no objection to the publication by the BSB of this Response.

Please acknowledge safe receipt.

Kind regards

[REDACTED]



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SOLICITORS DISCIPLINARY TRIBUNAL

**RESPONSE TO BAR STANDARDS BOARD
CONSULTATION**

**REVIEW OF THE STANDARD OF PROOF APPLIED
IN PROFESSIONAL MISCONDUCT PROCEEDINGS**

JULY 2017

INDEPENDENT - IMPARTIAL - TRANSPARENT



SOLICITORS DISCIPLINARY TRIBUNAL RESPONSE - BAR STANDARDS BOARD CONSULTATION

REVIEW OF THE STANDARD OF PROOF APPLIED IN PROFESSIONAL MISCONDUCT PROCEEDINGS

Introduction

1. When responding to this and other Consultations, the Solicitors Disciplinary Tribunal ("the Tribunal") must have in mind that it should not make public statements (even in the context of consultation) which might give rise to a complaint at a future date from those appearing before it of predetermination and/or apparent bias. The Tribunal is able to respond to a Consultation highlighting difficulties or issues that have been encountered while sitting to determine cases. That is an appropriate function enabling the Tribunal to pass on knowledge and experience to policy makers. However the Tribunal must not stray outside that parameter.

The observations in this response pay due regard to the Tribunal's overriding objective when managing cases, as expressed in its Practice Direction No. 6, namely to ensure that they are dealt with justly.

2. The Tribunal responds below solely to Consultation Q2. The Tribunal makes no response to Consultation Q1 and Q3. The fact that the Tribunal has responded to Q2 should not be taken as an indication that the Tribunal's answer to Q1 if expressed would be "Yes" (as stated in Q2).

Q2

3. The question posed is: "If your answer to (1) above is "yes"¹, do you consider that the BSB should only change to the standard of proof if and when the Solicitors Disciplinary Tribunal also does so?"
4. The Tribunal would not wish its decisions to delay or accelerate the Bar Standard Board's proper reflections on their own rules.
5. 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.

19 July 2017

¹ Q1 asks: "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?"

[REDACTED]

From: [REDACTED]
Sent: 09 June 2017 11:25
To: [REDACTED]
Subject: SRA response to BSB consultation on standard of proof
Attachments: SRA response to BSB consultation on standard of proof.pdf

[REDACTED]

Please find attached a response by the Solicitors Regulation Authority (SRA) to the BSB review of the standard of proof applied in professional misconduct hearings.

If you would like any further information, or would like to discuss further please don't hesitate to contact me.

[REDACTED]

www.sra.org.uk



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SRA response to BSB consultation on standard of proof

Introduction and key points

1. The Solicitors Regulation Authority (SRA) is the regulator of solicitors and law firms in England and Wales, protecting consumers and supporting the rule of law and the administration of justice. We do this by overseeing all education and training requirements necessary to practise as a solicitor, licensing individuals and firms to practise, setting the standards of the profession and regulating and enforcing compliance against these standards. Further information is available at www.sra.org.uk.
2. We consider that all regulatory decisions should be made on the civil standard of proof to:
 - protect the public by putting their interests first rather than those of individual members of the profession, ensuring that action is taken when on the balance of probabilities an individual or firm presents a risk to the public
 - give the public confidence in the regulatory system and the profession
 - deliver a consistent, fair and efficient disciplinary process.
3. We, like most modern regulators, make our own regulatory decisions on the civil standard of proof. That means if it is clear on the balance of probabilities that there has been a breach, we may impose an appropriate sanction. Our powers, however are limited. We have a number of options available, which we may use as a result of our disciplinary investigations (for example, we can issue a rebuke or a fine, impose conditions on a solicitor's practising certificate or restrict the employment of a non-solicitor, or the ability of a person to own or manage a firm).
4. We prosecute more serious concerns at the Solicitors Disciplinary Tribunal (SDT), which in contrast applies a criminal standard of proof, as well convening panels with a legal majority and solicitor chairs. The SDT can impose more robust sanctions including higher fines, suspending a solicitor (either for a period of time or indefinitely), or striking an individual off the Roll of Solicitors.
5. We have, since 2010, consistently called upon the SDT to move to the civil standard of proof so that the public interest can be better served. This is particularly important as the SDT has the powers to suspend or strike off a solicitor when they present significant risks to the public or the administration of justice. Our calls have also been echoed by others, for example, the Law Commission said in its 2012 consultation paper¹ that:

"...there are strong public protection arguments for adopting the civil standard [of proof]. The criminal standard [of proof] implies that someone who is more likely than not to be a danger to the public should be allowed to continue practising, just so long as the panel is not sure that he or she is a danger to the public. It seems to us that professional regulation is quite different from the criminal context, where the state is

¹ <http://www.lawcom.gov.uk/project/regulation-of-health-and-social-care-professionals/>

required to make sure that someone has committed a crime before taking the extreme and punitive step of imprisoning him or her."

6. The Insurance Fraud Taskforce addressed the issue of standard of proof in its report², published in January 2016. It recommended that there be a review of the standard of proof used in cases put before the Solicitors Disciplinary Tribunal.

"The Taskforce agrees that this high burden of proof is disproportionate, especially when compared to fines other regulators have issued during the period of this review, and may limit the deterrent message that such powers send out. The Taskforce considers that there is no rational justification for this discrepancy, and it may even prevent settlement by fines agreed above £2,000."

7. In the Court judgment in the case of Arslan (10 November 2016) the Court confirmed that the civil standard of proof was the appropriate one for the SRA to use and, whilst it refused to make a decision on the standard of proof to be applied by the SDT as primary decision maker as this went beyond the issues in the case, the judges made clear their view that the present situation in which the SDT applies a different standard of proof is unsatisfactory and illogical, and that the case law and current approach are "ripe for reconsideration".
8. We regulate in the public interest, as do all regulators, so our priority is public protection. The criminal standard of proof means that the interests of individual solicitors or barristers always be put above those of the public. The use of the criminal standard of proof in regulatory decisions is costly, burdensome, unfair to the users of legal services and undermines confidence in the profession. The need to prove professional conduct cases beyond all reasonable doubt is an anachronism, with its roots in self regulation.

Responses to consultation questions

9. **Q.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?**
10. We agree that the BSB should change its regulatory arrangements to allow for the civil standard to be applied to allegations of professional misconduct.
11. The use of the criminal standard for professional conduct hearings is disproportionate, and risks putting the interests of individual members of the profession ahead of the interests of the public, with the risk of associated poor consumer outcomes and a loss of confidence in the profession. The higher standard of proof creates higher costs and increases the chances of a person who is not safe to practise remaining within the profession. The higher burden of proof also creates an incentive for defendants to fight cases, rather than to settle them through a paper-based process. The higher burden of proof aligns with the criminal, and therefore prosecutorial process, rather than the civil or even inquisitorial process. This in turn affects the approach to the rules of evidence and attitude of the defence.
12. Using a civil standard of proof is considered regulatory best practice in the professions, both in the UK and internationally. The Insurance Fraud Taskforce final report recently recommended that the Government considers reviewing the standard of proof in cases

²

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/494105/PU1817_Insurance_Fraud_Taskforce.pdf

put before the SDT, and the current inconsistent approach with the SDT applying a standard of proof which is more generous to solicitors "*means [the SRA's] enforcement actions may not act as a credible deterrent*".

13. The civil standard is also used widely by other regulators including all the health professions regulators, Accountancy and Actuarial Discipline Board, General Institute of Public Finance and Accountancy, General Teaching Council for Scotland and the Royal Institution of Chartered Surveyors. Disciplinary matters around the conduct of judges are also dealt with using the civil standard of proof. Internationally, most states in America have adopted the Model Rules for Lawyer Disciplinary Enforcement, which use a civil standard of proof. Disciplinary cases by the Upper Canada Law Society and the Australian Health Practitioner Regulation Agency are determined to the civil standard. Only the bar, solicitors and veterinary surgeons continue to use the criminal standard.
14. We believe that all legal services regulators should make disciplinary decisions to the civil standard of proof, removing regulatory arbitrage (whereby an individual could select a regulator with a disciplinary system that is perceived to be more lax) and increasing consistency. The impact of using the correct standard of proof would be that cases could be resolved more quickly with a more appropriate amount of evidence being obtained, reducing costs and the burden of regulatory costs on the profession.
15. Consumers would benefit from a more proportionate and up to date disciplinary system which would allow action to be taken when it is more likely than not that an individual or firm has fallen short of the required standards. This would also increase public confidence in the profession.
16. The civil standard of proof is the most appropriate standard to use for professional disciplinary hearings. It would also have the effect of allowing barristers and firms to have allegations of disciplinary breaches dealt with in a more efficient manner. Both individuals and firms would benefit from having disciplinary cases resolved more quickly. Again, importantly, increased public confidence in enforcement enhances public confidence in a profession, so barristers would see further benefits.
17. **Q2. If your answer to (1) 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?**
18. The current approach risks undermining public protection and confidence in the profession. We do not believe that the BSB should wait for the SDT to move to a civil standard of proof in order to make changes to their disciplinary system. The BSB's primary concern has to be public protection and that is best served by the use of the civil standard, in line with the vast majority of protective jurisdictions.
19. In the Court judgment in the case of Arslan (10 November 2016) the Court confirmed that the civil standard of proof was the appropriate one for us to use and, whilst it refused to make a decision on the standard of proof to be applied by the SDT as primary decision maker as this went beyond the issues in the case, the judges made clear their view that the present situation in which the SDT applies a different standard of proof is unsatisfactory and illogical, and that the caselaw and current approach are "ripe for reconsideration". We continue to make the case for a change of the standard of proof used by the SDT, but we do not believe that change is imminent. We cannot require the SDT to move to a civil standard of proof, as it would require legislative change or a change to the SDT's policy or rules, but given that the BSB is not bound by the same constraint, it would be in both the public and the profession's interest to make the changes as soon as possible.

20. Q3. Do you consider that a change in the standard of proof could create and adverse impacts for any of those with protected characteristics under the Equality Act?

21. What matters is that there is an appropriate standard of proof consistently applied. We do not believe that there would be any adverse impacts on those with protected characteristics. Many users of legal services have protected characteristics and it is important that they are properly protected. That means using the civil standard of proof to protect all legal services consumers.

Further information and contact

22. If you have any questions relating to this consultation, or would like any further information, please contact 