

**BAR
STANDARDS
BOARD**

REGULATING BARRISTERS

Enforcement

Annual Report 2018/19

Professional Conduct Committee
Professional Conduct Department

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Executive Summary

This report provides an overview of the Bar Standards Board's (BSB) work in 2018/19 in enforcing the professional obligations of barristers and entities authorised by the BSB as set out in the BSB Handbook ("the Handbook").

This is the last report in this format on our enforcement work because, in October 2019, we introduced substantial changes to our regulatory decision-making processes and future reporting will need to reflect these changes.

The key trends in relation to our enforcement work in 2018/19 were as follows:

- a. The number of new complaints opened increased slightly: up by 1% as compared to 2017/18 (479 compared to 475). Although this was only a small increase on the previous year, it was the highest number of new complaints opened in one year since 2013/14.
- b. The number of complaints received from the public (known as "external complaints") continued to increase for a second year running. We received 359 external complaints as compared to 304 in 2017/18 (up by 18%) In contrast, there was a significant reduction in the number of complaints we opened of our own motion (known as internal complaints) – down by 30% from 171 in 2017/18 to 120 in 2018/19. The reduction was due, in part, to a spike in internal complaints in 2017/18 of failures to renew or obtain practising certificates.
- c. The number of formal complaint cases we worked on during the year went up slightly by 10 cases (689 as compared to 679 in 2017/18). There was also a small increase in the number of complaint cases we closed (up by 14 cases at 489 in 2018/19 as compared to 475 in 2017/18).
- d. There was also an upwards trend in relation to the "pre-complaints" we logged e.g. enquiries and reports made by barristers under their reporting obligations. A total of 1,087 pre-complaints were logged as compared to 1,026 in 2017/18.
- e. Overall, the number of reports of serious misconduct by barristers under their reporting obligations went down. In relation to reports of serious misconduct by others there was a substantial decrease, down to 46 as compared to 76 in 2017/18. Self-reports of serious misconduct also decreased, but only by 5% (54 as compared to 57 in 2017/18).
- f. Complaints from litigants in person still formed a substantial proportion, nearly a quarter, of the external complaints we received and again increased in number in 2018/19. We received 95 complaints from litigants in person as compared to 77 in 2017/18: an increase of 23%. Most of these complaints were closed at the preliminary assessment stage (91%), mainly because they did not reveal any breaches of the Handbook and stemmed from the complainants not fully understanding how the court system operates or the role of barristers.

- g. Complaints about misleading the court, and rudeness and misbehaviour, increased. The former went up from 159 to 170 and the latter from 53 to 67. Again, most of these complaints were dismissed at the initial assessment stage with the common theme being the lack of public understanding of the role of the barrister in adversarial proceedings.
- h. There was an increase in 2018/19 in the number of complaints referred to disciplinary action, with 50 cases being referred as compared to 37 in 2017/18. But of the number of cases closed in that year, the number which involved disciplinary action fell from 47 to 36, a fall in percentage terms from 10% to 7%.
- i. The trend in falling numbers of Disciplinary Tribunal cases being heard continued in 2018/19. There were 27 hearings in the year, as compared to 39 in 2017/18. However, there was a substantial increase in the number of cases awaiting hearings, with 43 cases at the tribunal stage at the end of the year as compared to 27 at the end of 2017/18. This indicates that the number of hearings in 2019/20 will increase.
- j. In line with the decreased number of hearings, the number of barristers disbarred reduced from six last year to four in 2018/19. The number suspended also decreased, from eight to four.
- k. We monitor the timeliness of progression of cases via a corporate Key Performance Indicator (KPI), which sets a target of 80% of cases completed within the service standards. We exceeded this target for the third year running with a year-end outturn of 81.6%. However, this achievement was solely due to a strong performance in relation to the service standard (Operational Performance Indicator – OPI) for completing the initial assessment of external complaints. 90% of initial assessments were completed with the eight-week target. The service standards (OPIs) for completing investigations were not achieved. Only 49% of investigations of external complaints were concluded within the eight-month target and the five-month target for completing the investigation of internal complaints was met in 72% of cases.
- l. End-to-end times (which include periods when cases are put on hold/adjourned) for progressing cases varied quite significantly with some reducing and others going up.
- m. The average time to conclude cases of all types was 1.8 months, the same as in 2017/18. This overall figure includes cases that we were able to deal with quickly at the initial assessment stage. However, the percentage of cases closed within three months decreased to 50.4%, down from 70.1% in 2017/18.
- n. The average time taken to conclude investigations of external complaints has continued to increase (now 10.5

months as compared to 8.5 in 2017/18 and 7.8 in 2016/17). This reflects the increasing complexity of investigations as well as issues with staffing during 2018/19. Similarly, internal complaint investigations took on average three months to conclude, an increase from the 2017/18 figure of one month. This again reflected the increasing complexity of internal complaints which include investigations of reports of serious misconduct.

- o. The time taken to conclude Disciplinary Tribunal cases went up, but only slightly: from 17.9 months in 2017/18 to 18 months in 2018/19. This increase was partly due to more lengthy adjournments and also to the increase in time taken to complete investigations.
- p. The proportion of cases where one or more findings of professional misconduct were made by a Disciplinary Tribunal remained static at 84% of the cases heard by the Tribunal.
- q. Detailed comments on the key findings above can be found in the relevant sections of the report.

Introduction and overview of our work

- 1.1 This annual report of the Bar Standards Board's (BSB) work on enforcing the professional obligations set out in the BSB Handbook, is the last such report that will be produced in this format. In October 2019, we introduced substantial changes to our regulatory decision-making processes following a public consultation in 2017.¹ As a result our reporting on the enforcement system in future will take a different format. The effects of these changes are outlined in paragraphs 1.21-1.27 below.
- 1.2 This report covers our enforcement work in the year from 1 April 2018 to 31 March 2019. It has been produced later than usual due to the extent of the work that was required to prepare for the introduction of the changes outlined below. It should be read taking into account that the Professional Conduct Committee ceased to exist on 15 October 2019 and several of the processes referred to have now changed, as have the indicators against which performance is judged.
- 1.3 The work of enforcing the terms of the Handbook was, in 2018/19, carried out by the Professional Conduct Department (PCD) and the Professional Conduct Committee (PCC). We considered all information received which might have indicated a breach of the Handbook. Where we were satisfied there was sufficient evidence of a potential breach, we carried out a formal investigation and, if appropriate, took enforcement action.

Contents of the report

- 1.4 This report is divided into four parts. The first: "What we did", reports on our handling of information and complaints received during 2018/19 including trends in caseloads and outcomes. The second part: "How well did we perform", looks at our performance including performance against the agreed indicators. The third: "Continuous improvement" provides an overview of the mechanisms we used to improve the enforcement system and the lessons that we learnt from key cases and their outcomes. Finally, in the fourth part we report on the "Wider work of the PCD" in 2018/19.

- 1.5 In addition to the information contained in this report, all the key supporting raw data is published on our website in an accompanying Statistical Report for 2018/19.

Data sources

- 1.6 Our enforcement system is supported by a comprehensive case management system (CMS) in which all actions taken on information received are recorded. This allows us to track, monitor and assess the progress and outcomes of cases and provide the statistical information set out in this report.
- 1.7 Data for the year 2018/19 (1 April 2018 to 31 March 2019) extracted from the CMS in April 2019. The data we hold is to some extent dynamic and is subject to change following the year end extraction, which can result in slight discrepancies between data reported in the previous year's reports. This is because data changes may occur as a result of user

¹ [Modernising Regulatory Decision-making consultation](#) and [the BSB's response](#).

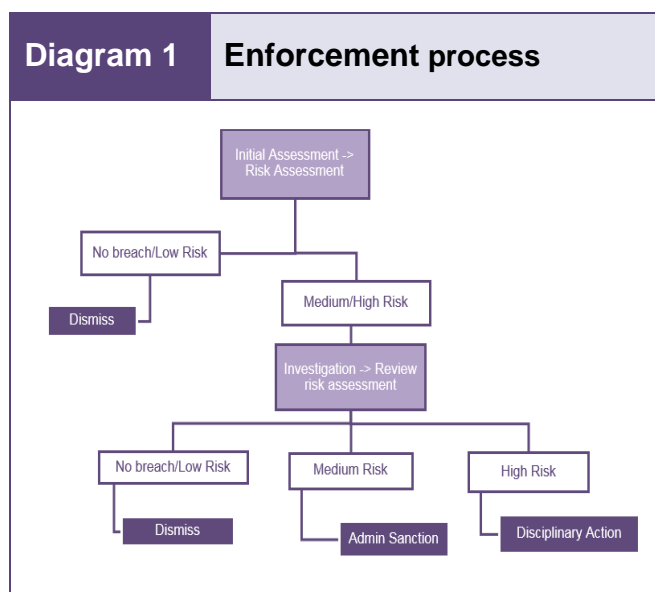
clarification as a case progresses. For example, the category of a case may be updated once the nature of the case becomes clear, or a pre-complaint open at the end of one year is converted to a full complaint in the next year.

Our approach to enforcement work

- 1.8 The BSB takes a risk-based approach to regulation which includes decisions on enforcement action. This means our resources are concentrated on those issues which present the greatest risks to the regulatory objectives.² Our Enforcement Strategy sets out our approach in more detail and all decisions are taken in accordance with this strategy.³

Decision-making structure

- 1.9 The BSB's enforcement system is governed by regulations set out in Part 5 of the BSB Handbook. In 2018/19, the Complaints Regulations governed the initial assessment and investigation of



complaints, including decisions arising from those processes, as well as the Determination by Consent procedure. These regulations were replaced on 15 October 2019 by the Enforcement Decision Regulations (see paragraph 1.25 below). The Disciplinary Tribunal process was, and remains, governed by the Disciplinary Tribunal Regulations.

- 1.10 The power to take all decisions under the Complaints Regulations was vested in the PCC, which in turn authorised members of the executive staff in the PCD to take a range of decisions on its behalf.
- 1.11 Diagram 1 shows in outline the enforcement process as it stood in 2018/19.

Professional Conduct Department

- 1.12 The PCD was divided into three teams: two casework teams (Assessment and Investigations and Hearings) and one support team (Operational Support).
- 1.13 The **Assessment Team** was responsible for the initial assessment of incoming information and complaints as well as providing advice and assistance to the public on the operation of the complaints system. The **Investigation and Hearings Team** was responsible for carrying out formal investigations and progressing cases referred to disciplinary action.
- 1.14 Relevant staff in both casework teams were authorised by the PCC to take the full range of decisions open to the PCC, subject to limitations placed on these authorities by relevant decision-making policies.

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

³ [Our Enforcement Strategy is published on the BSB website.](#)

1.15 The **Operational Support Team** of the PCD provided essential departmental wide support. This included administrative support for the PCC as well as handling project work and assisting with maintaining relevant information systems.

1.16 Finally, in 2018/19 we created a small legal support unit within the department consisting of two (one Senior) Professional Support Lawyers. Their role was to ensure that: legal knowledge within the department remained up to date; the ongoing legal training programme was provided to relevant staff; departmental lessons to learn were captured; and continuous improvement monitored. The unit also started to provide BSB wide support for litigation cases arising from regulatory decision making.

Professional Conduct Committee

1.17 Under the terms of the Complaints Regulations, the PCC had the power to take all decisions on enforcement action including imposing administrative sanctions, referring cases of professional misconduct to disciplinary action and, under the Determination by Consent procedure, adjudicating on charges of professional misconduct. As stated above, the PCC authorised a range of PCD staff to take decisions on its behalf. Nearly all decisions on whether to carry out formal investigations were taken by staff under delegated authority, as were decisions to impose administrative sanctions. However, the PCC continued to take the majority of decisions on whether to refer cases to disciplinary action.

1.18 In 2018/19 the PCC consisted of 32 members: 15 lay and 17 barristers. It was divided into two teams and met every three weeks to take decisions on cases.

Disciplinary action

1.19 Where the PCC (or PCD staff in certain cases) decided there was sufficient evidence of a breach of the Handbook that was serious enough to amount to professional misconduct, the matter was referred to disciplinary action. Disciplinary action can either be taken under the Determination by Consent procedure (where charges are decided with the barrister's consent by the PCC) or by an independent disciplinary tribunal.

1.20 Disciplinary tribunal panels are convened and administered by the Bar Tribunals and Adjudication Service (BTAS). The BSB's role is to bring charges of professional misconduct before the independent tribunal panels. In doing this, we were supported by a panel of practising barristers who assist us with the preparation of tribunal cases and represent us at hearings. The panel in 2018/19 consisted of 60 barristers who provided their services pro bono (i.e. without charge).

Changes to the enforcement process introduced in October 2019

1.21 On 15 October 2019, the BSB introduced substantial changes to our regulatory decision-making processes that have affected parts of the enforcement system. The changes do not affect the information presented in this report. However, as this report has been produced after the changes were introduced, to avoid confusion with the

information publicly available about the enforcement system, we have set out here an outline of the changes made since the reporting year 2018/19.

Readers should note that the changes do not affect the operation of the disciplinary tribunal process, which continues to operate in line with the Disciplinary Tribunal Regulations.

1.22 **Complaints** – we have ceased using the terms “complaint” and “complainants” and no longer operate a “pre-complaints” system. We have also removed the distinction between different types of complaints (‘external’ and ‘internal’ – discussed below). Under the new system, any incoming information, including concerns about the conduct of barristers or those we regulate, is treated as a “report”. All reports are processed in the same way and, where relevant, are risk assessed against a new risk assessment methodology that has been standardised across the BSB.

1.23 **Independent decision-making** – the PCC, and its role in taking decisions independent of the executive, has been disestablished. Its functions have been replaced by the Independent Decision-making Body (IDB) and the new role of Commissioner (see paragraph 1.24 below). Decisions on enforcement action that require independent input are now taken by panels of five members of the IDB.

1.24 **Role of the Commissioner**⁴ – this is a new role, which was created to provide a vehicle by which the executive could be granted direct decision-making powers (as opposed to deriving them from the PCC). The new regulations (see

paragraph 1.25 below) give the Commissioner powers to take certain decisions and the Commissioner in turn has delegated these powers to a range of staff in relevant BSB teams, at differing levels of seniority.

1.25 **New regulations** – the Complaints Regulations have been replaced with the Enforcement Decision Regulations (EDRs). The EDRs remove the requirement that decisions on initial assessments are taken independently and instead vest these powers in the Commissioner. The EDRs also give direct powers to the Commissioner and the IDB, via its panels, to take decisions on enforcement action. The role of the IDB is limited to taking decisions on the appropriate action to take following the conclusion of a formal investigation. However, the range of decisions that can be taken by staff (under delegated authority from the Commissioner) and/or by IDB panels remains the same as under the previous system, as covered in this report.

1.26 **Performance indicators and new case management system** - we have introduced a new case management system, which is intended to provide us with more sophisticated functionality to report on performance and trends. Associated with this we have also introduced new key performance indicators (KPIs) to cover each major area of our work. These revised KPIs take into account issues with the previous indicators as well as reflect the new processes.

1.27 **Staff structure** – the staff structure outlined at paragraphs 1.12-1.16 above

⁴ The role of Commissioner is performed by the Director General of the BSB.

has changed. The PCD has been disbanded and the assessment function has transferred to a new centralised team known as the “Contact and Assessment Team” which now falls within our new Regulatory Operations Department. The Operational Support Team has also been moved into this department and will support the administrative aspects of the IDB. Investigations and disciplinary action are now the responsibility of a new Legal and Enforcement Department, which includes the renamed Investigations and Enforcement Team as well as a new Legal Support Team

Part 1: What we did

2.1 Until October 2019, the BSB’s complaints procedure consisted of four formal stages: initial assessment; investigation; decision on action; and disciplinary action. Before commencing the formal complaints process, we also handled a large number of what we term “pre-complaints”. The paragraphs below outline the trends in information received, formal complaints registered, and the actions taken on cases during 2018/19.

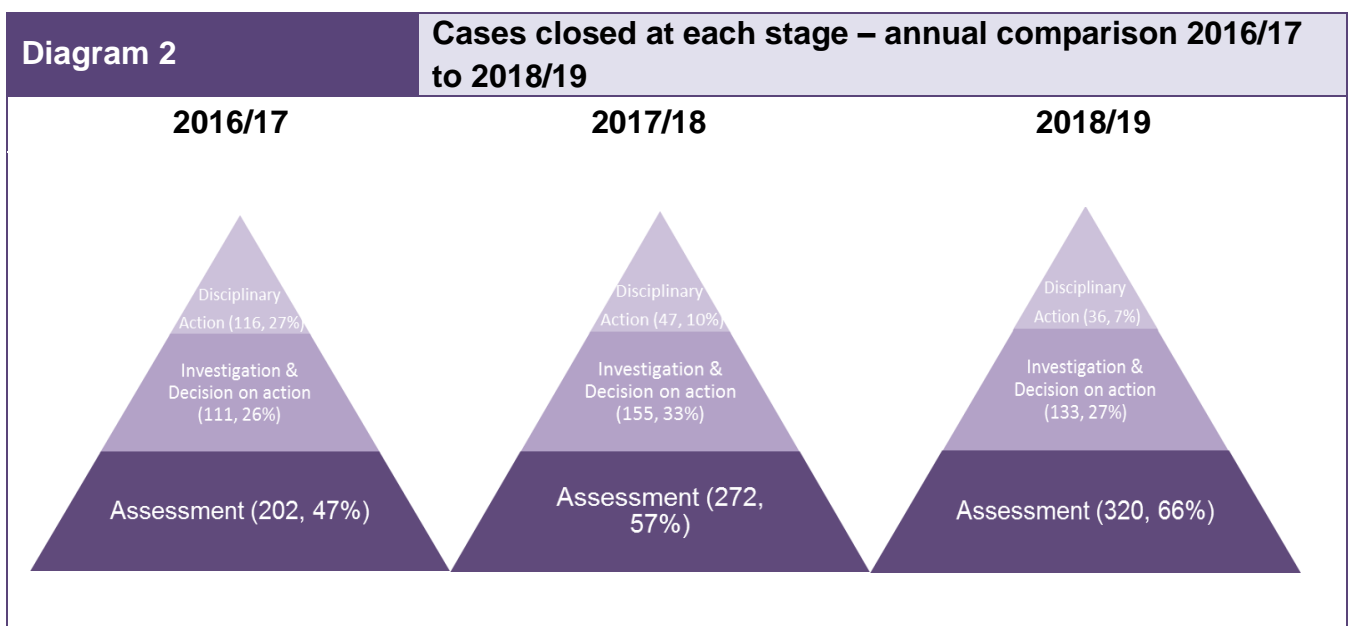
Overall trends

2.2 The total number of new complaints opened in 2018/19 increased by 1% as compared to 2017/18. This was the highest number of new complaints we had opened in one year since 2012/13 although it was only an increase of four complaints as compared to 2017/18. More detailed analysis of this increase can be found at paragraphs 2.22-2.26.

2.3 Throughput of cases also increased slightly. In 2018/19 we worked on 689

formal complaint cases as compared to 678 in 2017/18. We closed 489 cases in 2018/19 (14 more than in 2017/18) and 197 were still open at the end of the year. This performance, in terms of number of cases dealt with, is similar to 2017/18.

2.4 As diagram 2 demonstrates, the number of cases at each stage of the process reduces as decisions are taken. 2018/19 saw a continuation of the trend downwards in relation to the proportion of complaints that result in disciplinary action. In 2018/19 only 7% of formal complaints resulted in disciplinary action, which was a decrease as compared to 2017/18 (10%), which was itself a decrease from the previous year’s figures. In contrast, the number of complaints that did not progress further than the initial assessment stage continued to increase, reaching 66% in 2018/19, as compared with 57% in 2017/18.



This report describes the complaints system as it was in 2018-19. It does not necessarily reflect the enforcement system that replaced it on 15 October 2019.

Pre-complaints

- 2.5 “Pre-complaint” is a term we use to describe information received (other than formal complaints submitted by members of the public or others) which may indicate that a breach of the Handbook has occurred. This includes reports of non-compliance with Handbook provisions from other sections of the organisation and reports from barristers made in accordance with their reporting obligations e.g. reports of serious misconduct.
- 2.6 In some cases, we may consider it appropriate to refer the issues of concern to a barrister’s chambers or other bodies to address. In most cases, if there is evidence of a potential breach of the Handbook, and that breach represents a medium or high risk to the regulatory objectives, we will convert the pre-complaint to an internal complaint⁵ and the matter will be referred for formal investigation.
- 2.7 In 2018/19, we logged 1,087 pre-complaints, an increase on the number logged in 2017/18 (1,026), and the highest number since we first began

recording pre-complaints in 2014/15. The rising trend shows the increasing number of enquiries the PCD handled, which was not necessarily reflected in the reported number of formal complaints. There was also an increase in the number of general enquiries recorded that did not lead to the logging of a pre-complaint and in the number of complaints that were referred to the Legal Ombudsman (see paragraphs 2.39-2.40 below).

- 2.8 The proportion of pre-complaints that we converted into formal complaints in 2018/19 was slightly lower than in previous years, at around 21%.
- 2.9 In the paragraphs below, we set out in more detail the trends in relation to the “pre-complaints” we handled.

Serious misconduct reports

- 2.10 Under the terms of the BSB Handbook, barristers are required to report their own serious misconduct (rC65.7) as well as any serious misconduct by other barristers that they observe (rC66). Following several years of increases, we saw a decrease in such reports in 2018-19, mainly due to a substantial decrease in reports being made about conduct by others. We received 100 serious

	Pre-complaints	Pre-complaints converted	Conversion rate
2016/17	963	232	24.1%
2017/18	1024	257	25.0%
2018/19	1087	226	20.8%

⁵ Internal complaints are formal complaints raised by the Bar Standards Board of its own motion. We call **formal** complaints from external sources “external complaints” and information that we receive in any other way “pre-complaints” which may then be converted by the BSB into what we call “internal complaints”

misconduct reports in 2018/19, as compared to 133 in 2017/18, which is the lowest number of such reports received since 2016/17 (110).

- 2.11 In 2018/19, we received nine reports from barristers of sexual harassment by another barrister, almost the same as the number of such reports we received in 2017/18 (8). We comment further about sexual harassment reports in Part 3 of this report.

Self-reports of serious misconduct

- 2.12 In 2018/19 we received 54 self-reports of serious misconduct from barristers, a slight drop from the previous year's figure (57).
- 2.13 Over a quarter of the self-reports (12) related to the barrister's failure to obtain/renew a practising certificate, similar to the number submitted in 2017/18 (13). 13 self-reports related to criminal conviction matters (not including drink driving convictions, which are recorded separately), compared to nine in 2017/18. Other self-reports related to drink driving convictions and issues such as breaching confidentiality and not acting in the client's best interests.
- 2.14 There was a slight drop in the number and percentage of self-reports that resulted in an internal complaint being raised by the BSB and a formal investigation being undertaken: down from 66% (40) in 2017/18 to 52% (33) in 2018/19.
- 2.15 The reports that resulted in complaints being raised, generally related to: criminal convictions; failures to obtain practising certificates; breaches of confidentiality and making misleading and/or unfounded statements.

Reports of serious misconduct by others

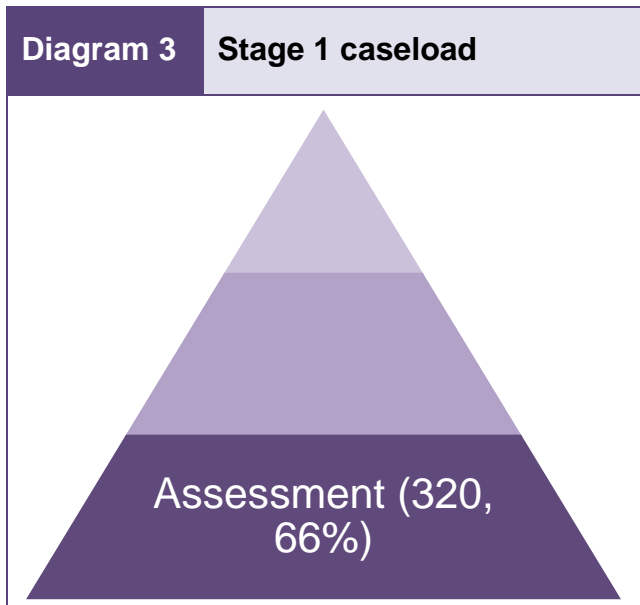
- 2.16 In 2018/19, there was a significant reduction in the number of reports of serious misconduct by others: down from 76 in 2017/18 to 46 in 2018/19 although this was still higher than the 33 such reports we received in 2016/17. The difference is most significant in the case of reports of dishonesty, which dropped from eight in 2017/18 to one in 2018/19. However, due to the low numbers involved these figures are unlikely to suggest any trend in overall behaviours at the Bar.
- 2.17 The number of reports by others which resulted in an internal complaint being raised by the BSB remained relatively static (26 as compared to 20 in 2017/18).

General conclusions in relation to reporting of serious misconduct

- 2.18 Barristers still appear to be erring on the side of caution when reporting serious misconduct and this is positive. The reporting obligations are an important means to allow the BSB to be alerted to potential issues of serious concern, but they place no responsibility on the person making a report for the action taken thereafter – this is solely a matter for the BSB.

Stage 1 – Initial Assessment of complaints

- 2.19 As mentioned above, at paragraph 2.1, the first stage of our process in 2018/19 was to decide whether a concern that had been brought to our attention (either



via a formal complaint or any other means) revealed a potential breach of the Handbook. We did this by carrying out an initial assessment to determine whether there was sufficient evidence of a breach that warranted formal investigation with a view to taking enforcement action.

2.20 Decisions at the initial assessment stage were normally taken by staff under delegated authority and it was rare that cases were referred to the PCC for decision. In 2018/19, 97% of initial assessment decisions were taken by staff, which is in line with the proportion from previous years.

2.21 Under the complaints system as it was in 2018/19, we divided complaints into those that were received from external sources (external complaints) and those that were raised by the BSB of its own motion based on information received (internal complaints). However, the initial assessment in relation to each was very similar. The assessment involved a consideration of whether the available evidence revealed a potential breach. If so, a risk assessment was carried out to determine the level of risk to the regulatory objectives the alleged conduct posed: low, medium or high. In most cases, a low level of risk would result in no action being taken but medium and high-risk cases would be referred to formal investigation. The revised risk methodology that is now being used by the BSB adopts a very similar approach.

2.22 In 2018/19, we opened a total of 479 complaints: 120 internal and 359 external complaints. This total figure is a 1% increase from the previous year (475) and the highest number of complaints we have opened in one year since 2012/13 (491). This continued the trend seen in 2017/18, which followed a number of previous years in which complaint numbers were going down. The early statistics from 2019/20 show that the

Complaint Source	2014/15	2015/16	2016/17	2017/18	2018/19
External	297	300	255	304	359
Internal	143	134	112	171	120
Total	440	434	367	475	479

upwards trend is not an anomaly and is continuing.

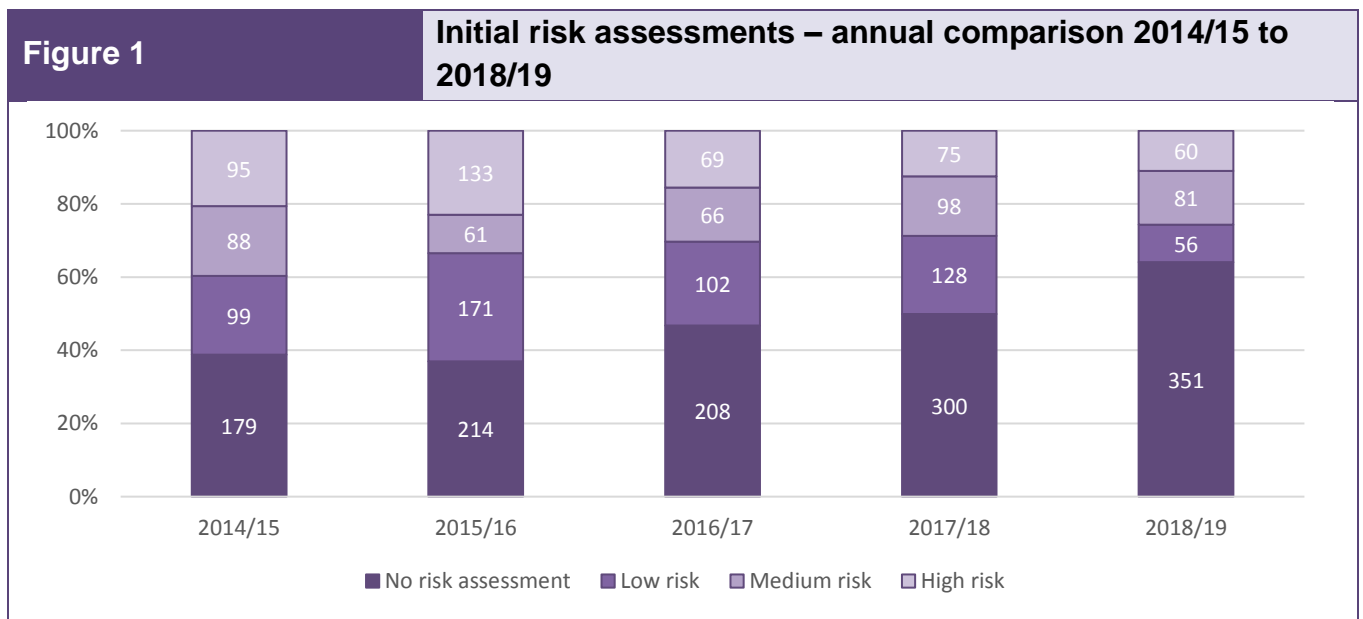
- 2.23 While the overall figure for complaints received/opened in 2018/19 was on a par with 2017/18, the type of complaints altered significantly in 2018/19: internal complaints were down by 30% although they were at similar levels as in 2015/16 and 2016/17 and external complaints were up by 18%.
- 2.24 The decrease in internal complaints, as discussed below, was partly due to the 2017/18 figures being ‘spiked’ as a result of an increase in the number of barristers failing to obtain or renew their practising certificates. It was also linked to the decrease in 2018/19 of reports of serious misconduct by others (see paragraph 2.16-2.17 above) which, if regulatory action was needed, were taken forward as internal complaints.
- 2.25 As stated above, in contrast, the number of external complaints (359) increased by 18% as compared to 2017/18 and was at the highest level since figures were

recorded in 2012/13. This is partly due to a significant increase (22%) in complaints received from litigants in person⁶ (up from 77 to 95), their highest level to date.

- 2.26 More detailed consideration of the factors contributing to these figures is given below at paragraphs 2.34-2.51.

Risk assessments (all cases)

- 2.27 In 2018/19, if the initial enforcement assessment process revealed that there was evidence of a potential breach of the Handbook, either via an external complaint or a report, a risk assessment was carried out to determine the next steps.
- 2.28 The risk assessment was, and remains, a tool used as part of the initial assessment process to assist us in determining what the most proportionate form of regulatory action should be (if any), taking into account the outcomes set out in the Handbook and the regulatory objectives. The higher the assessment of risk, the more likely it



⁶ A “litigant in person” is someone who represents themselves in court without a solicitor or barrister.

was, and is, that a matter will be referred for investigation and potential enforcement action. A low risk level at the initial assessment stage will usually lead to no further action being taken on the matter, if appropriate, being referred elsewhere, such as to our Supervision Team, chambers or another body. A medium or high-risk level would normally result in a referral to formal investigation.

- 2.29 In previous enforcement reports, we have provided a detailed rehearsal of the risk profile of cases subject to initial assessment. However, now that the BSB has adopted a new approach to both initial assessment and assessing risk, a detailed backwards looking comparison is not necessarily relevant or helpful.
- 2.30 However, as can be seen from figure 1, there was a significant change in the risk profile of cases subject to initial assessment in 2018/19. There was a substantial decrease in cases that required an initial assessment (548, compared to 601 in 2017/18 and 445 in 2016/17). There was also a significant increase in the number of cases that did not require a risk assessment (351 compared to 300 in 2017/18). Further, there was a decrease in cases that were assessed as low risk (down from 43% (128) in 2017/18 to 28% (56) in 2018/19).
- 2.31 The risk profile of cases at the initial assessment stage in 2018/19 is not easy to analyse. There was definitely a

Risk Profile	High risk	31% [60]
	Medium risk	41% [81]
	Low/no risk	28% [56]

significant change in the risk profile which resulted in more cases being dismissed at the initial assessment stage due to a low risk assessment or, indeed, a decision that no risk assessment was necessary.

- 2.32 The change in pattern was unusual. However, as it only occurred in one year, it is not possible to rate it as a trend and it may well be due merely to the nature and content of the complaints received in 2018/19. While it will not be possible to fully compare performance under the pre 15 October 2019 regime to the post 15 October regime, it has nevertheless been recognised that this is an area to watch to ensure that we are not being over cautious in our approach to risk assessing conduct issues.
- 2.33 In 2018/19, 27% of the risk assessments were subject to assessor adjustment (compared to 37% the previous year), the majority of which were reductions of the risk to a lower level following investigation. This demonstrates the dynamic nature of our risk-based system, which allows for appropriate adjustments to be made according to the circumstances presented and evidence obtained as a case is investigated.

External Complaints

- 2.34 As noted above, we opened 359 external complaints in 2018/19, the highest in seven years. This seems to confirm the suggestion in last year's annual report that the previous underlying trend since 2013/14 of a year on year reduction in the receipt of external complaints has reversed. We have been unable to identify any single specific reason for this considerable increase in external complaint numbers

although, as the paragraphs below show, there have been significant shifts in the numbers of complaints received from some sources.

2.35 **Sources of external complaints:** the trends in relation to the various sources of external complaints remain similar to previous years, with the main categories of complaints still arising from civil or family law cases. In 2018/19 we received 128 external complaints from civil law litigants, compared with 103 recorded in 2017/18. We received 71 complaints relating to family law, also an increase from the previous year (62).

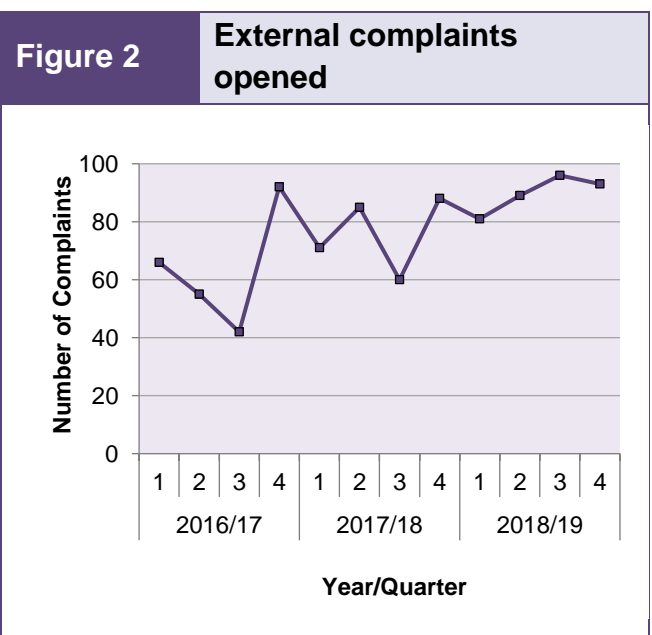
2.36 We saw a similar increase in these sources in 2017/18, and we speculated in the annual report then that this increase in complaints in relation to civil and family law could be a reflection of legal aid cuts. These are areas most severely affected by the cuts and the areas that give rise to the greater numbers of complaints from litigants in person. Again, however, this can only be a speculative assumption, as we do not have the detailed information to make a firm deduction.

2.37 *Litigants in person:* complaints from litigants in person continued to rise in 2018/19. While figures had been declining from a previous high point of 80 complaints in 2011/12, in 2017/18 the trend reversed and 77 complaints were received from litigants in person. In 2018/19 the reversal continued, with 95 complaints made by litigants in person. Such complaints formed more than a quarter of all external complaints received in 2018/19.

2.38 As in previous years, the majority of the complaints from litigants in person

related to concerns about barristers making misleading/false statements or otherwise misleading the court, or about a barrister's rudeness or misbehaviour, either in or out of court. Further, most complaints submitted by litigants in person were closed at the initial assessment stage (91%), mainly because many of their concerns did not reveal any breaches of the professional obligations and stemmed from the complainants not fully understanding how the court system operates, or the role of barristers.

2.39 *Legal Ombudsman referrals:* the number of referrals received from the Legal Ombudsman remained low. Only eight were received, the same number that was recorded in 2017/18 and which was the lowest number recorded in the last seven years. Most of the complaints we opened following a Legal Ombudsman referral related to failures to co-operate with the Legal Ombudsman. The continued low number of such complaints as compared to earlier years remains positive and indicates that the



levels of co-operation of the profession with the Ombudsman remain good.

2.40 On the other hand, the BSB made 116 formal referrals to the Legal Ombudsman in relation to complaints that were submitted to us but should have been directed to the Legal Ombudsman. This is a considerable rise in the number of referrals to the Legal Ombudsman that we have made in previous years (for example, 56 in 2017/18). It may be that the Legal Ombudsman’s public statements about lengthy backlogs in investigating claims discouraged complainants from approaching that service directly.

2.41 **Subject matter of external complaints:** Table 4 shows the most common categories of breaches of the Handbook (referred to internally as ‘aspects’) about which external complaints are made. These categories cover nearly 90% of complaints received. The figures show that there were some changes in the subject matter of external complaints in 2018/19 as compared to previous years, although it was too early to treat these as “trends”. Nevertheless, they give an indication of the issues that give rise to concerns.

2.42 *Concerns about misleading:* concerns about all forms of misleading (misleading the court, misleading other persons or misleading in statements/submissions) continued to be the largest subject matter category and complaints about these issues increased in 2018/19 to 170 from 159 in 2017/18⁷. The majority of these (117) alleged that barristers made misleading or false/unfounded statements or submissions, an increase from 98 in the previous year. 151 (89%) of the total allegations about misleading were dismissed on initial assessment, including 45 that were made by litigants in person.

2.43 The specific subject matter of these concerns differed quite widely. Examples include concerns: that a barrister discredited a witness and put forward false evidence; that a barrister made a statement of truth that contradicted an earlier statement the barrister had made; and that a barrister failed to draw an investigator’s attention to witness credibility issues.

2.44 As is the case generally with complaints made by litigants in person and by criminal defendants, a large number of the concerns under this heading stem

Table 3		Complaints opened – annual comparison 2014/15 to 2018/19				
Complaint Source	2014/15	2015/16	2016/17	2017/18	2018/19	
External	282	261	253	304	359	
Internal	142	132	111	171	120	
Total	424	393	364	475	479	

⁷ A complaint can have multiple aspects, so the number of aspects is larger than the number of individual complaints.

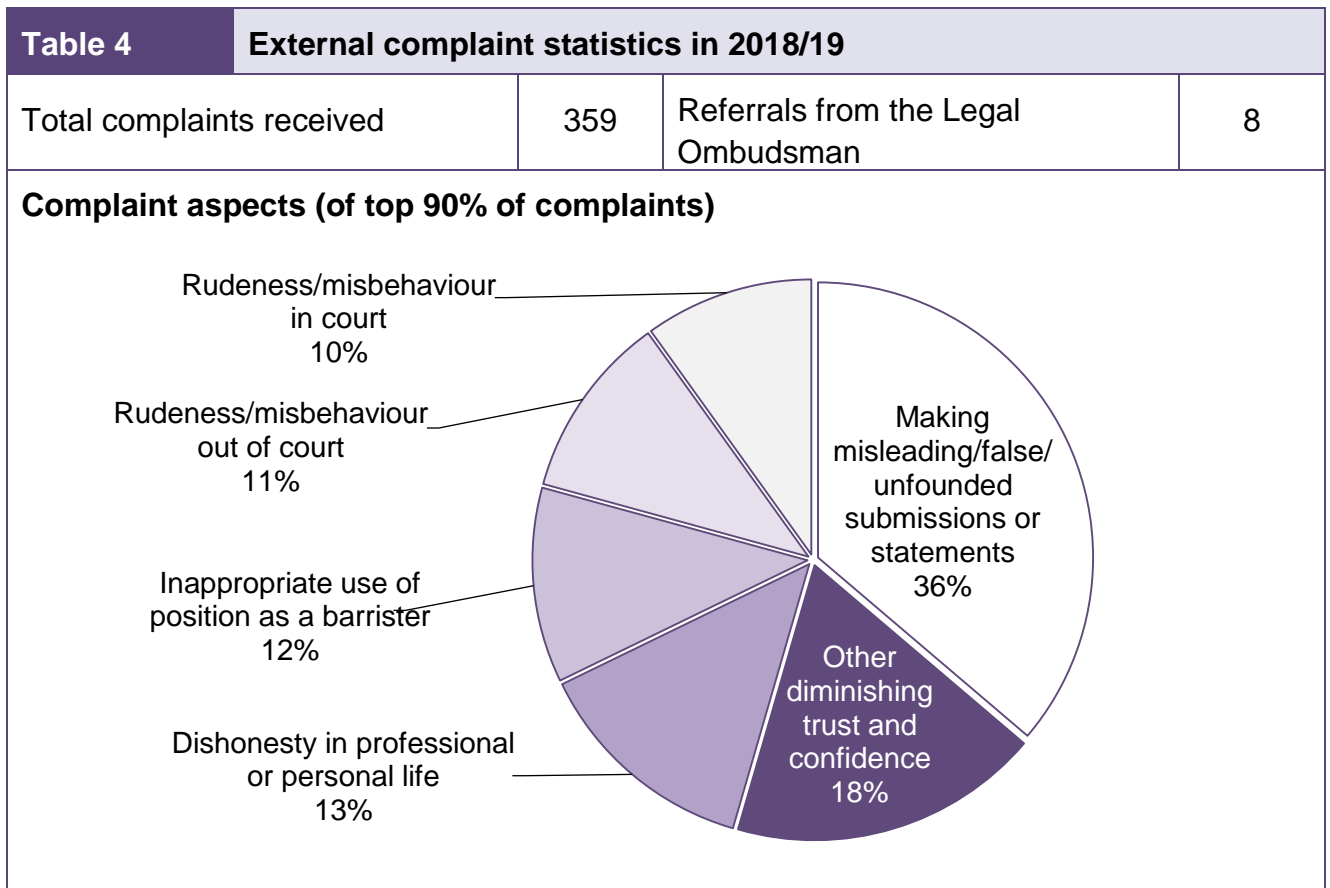
from an apparent lack of understanding of, or confusion about, the barrister's role in adversarial proceedings. We have commented on this in previous reports and recognised that we needed to provide more information to the public on the role of a barrister in proceedings. More detailed information is now included in our new website, which was launched on 15 October 2019.

2.45 *Rudeness and misbehaviour*: complaints in this area increased again in 2018/19 with 67 being received compared with 53 in 2017/18. A high proportion of these allegations were raised by litigants in person (51%). Examples of the conduct complained of include: a barrister calling a witness a liar; sending rude and unprofessional emails to their client who was concerned about the conduct of his case; and making spurious allegations

about a witness while behaving aggressively.

2.46 Nearly half of these complaints were made in the context of contentious family court proceedings. As in previous years, many of the complainants in this category were unhappy with statements or allegations about them that were put forward in submissions by their former partner's barrister, or they felt that they had been pressured into accepting an outcome they did not want by the barrister on the other side. Most of the allegations in this category (59, 88%) were dismissed on initial assessment, including 32 out of the 34 such allegations made by litigants in person.

2.47 These high rates of dismissal of complaints are understandable, given the widespread issues with low levels of understanding of court proceedings and



the barrister’s role within them. Nevertheless, it is an area of concern that we are trying to address through better and more comprehensive information on our website.

2.48 Discrimination complaints remained fairly static at 18, compared to 16 in 2017/18 and, as in previous years, they were nearly all dismissed at the initial assessment stage due to lack of evidence. Harassment and victimisation complaints fell from eleven to two.

2.49 In last year’s report, we commented that our IT systems did not effectively support the identification of reports/complaints about sexual harassment. Our new Case Management System, which we started using in October 2019, ensures that these can be properly recorded. Part of the difficulty was that a report or complaint can have multiple potential aspects, of which only the primary one or two are recorded. In the case of sexual harassment, these complaints were often recorded as something other than

‘harassment’ to best capture the precise nature of the allegations – e.g. ‘inappropriate use of position as a barrister’ or ‘failure to act appropriately towards a pupil’. This is why the number of sexual harassment reports (nine) referred to in paragraph 2.11 above does not accord with the number of ‘harassment and victimisation’ complaints (two) referred to above.

2.50 We did not want to stop recording the most accurate reflection of the potential breach in question but also wanted to ensure that we captured any cases that involved some level of sexual harassment. We were, in 2018/19, therefore keeping manual records of sexual harassment reports/complaints.

2.51 There were other external complaint subject areas in which changes were seen in 2018/19, although the numbers involved are too low to suggest trends. For example, complaints of inappropriate use of position as a barrister increased to 37 (nine from litigants in person) from 19

Aspect	2017/18	%	2018/19	%
Failing to renew practising certificate	43	25%	39	33%
Holding out as a barrister when not authorised to do so	7	4%	38	32%
Failure to obtain practising certificate	30	18%	16	13%
Criminal conviction other than drink driving	6	4%	16	13%
Making misleading/false/unfounded submissions or statements	7	4%	8	7%
Other diminishing trust and confidence	5	3%	8	7%
Performing reserved legal activities when not authorised to do so	9	5%	6	5%
Conducting litigation when not authorised to do so	2	1%	5	4%

in 2017/18, 32 of which were dismissed. Complaints of inappropriate drafting of documents increased from nine in 2017/18 to 27 (16 from litigants in person), 26 of which were dismissed without an investigation.

Internal Complaints

2.52 As noted above, the significant increase seen in external complaints was balanced by a significant decrease in the number of internal complaints raised in 2018/19. In 2018/19 we opened 120 internal complaints, compared to 170 in 2017/18. This was a return to the levels seen in 2015/16 (134) and 2016/17 (112), indicating that the internal complaint figures from 2017/18 were an outlier.

2.53 **Subject matter of internal complaints:** The decrease in internal complaints was evenly spread throughout the complaint categories. Of the 120 internal complaints, 56% related to non-compliance with practising requirements, a similar proportion to the previous two years.

Outcome of complaints at the initial assessment stage

2.54 In 2018/19, the proportion of complaints dismissed at the initial assessment stage increased substantially. A total of 320⁸ (66%) complaints were dismissed at the initial assessment stage, up by 9% on 2017/18 when 57% were closed at the initial assessment stage. The latter is itself a considerable increase from the 47% in 2016/17.

2.55 As stated above, the primary reason for closing complaints at this early stage was due to there being insufficient or no evidence of a potential breach of the Handbook. Indeed, 256 complaints (53% of all concluded complaints) were dismissed at the initial assessment stage due to the lack of any evidence of a potential breach, compared with 191 (41%) in 2017/18.

2.56 The general trend of high numbers of complaints being dismissed at the initial assessment stage indicates that a considerable proportion of the concerns raised with us are not about professional conduct. It will always be the case that the public will turn to the regulator to try to resolve issues of concern, even if we have no powers to resolve them. We are attempting, through our modernisation programme, to reframe our relationship

Case study

We received a complaint from a Litigant in Person, who alleged that a barrister sought to mislead the court by putting forward false evidence. The complainant asserted that the evidence in question was false, because it contradicted their own evidence. Because we did not have any evidence to suggest that the barrister knew that the evidence that he put forward in court was incorrect, the complaint was dismissed. We explained to the complainant that often in a court case, there will be conflicting evidence. We also explained the barrister's duty in putting forward their client's case and that the court ultimately decides what evidence should be believed.

⁸ This includes 317 external and 3 internal complaints. The latter covered internal complaints that were raised but later withdrawn for various reasons.

with the public so that they can better understand our role. Moving away from the terminology of complaints is a central part of this and we hope by doing so we will manage better the public expectations of us as well as assist them with understanding our role and function.

Entities

2.57 The BSB began authorising and regulating entities in April 2015. As at November 2019, 139 entities had been authorised by the BSB, with 123 currently in operation. No complaints have been received about any of these entities.

Stage 2 and 3 – Investigation and decision

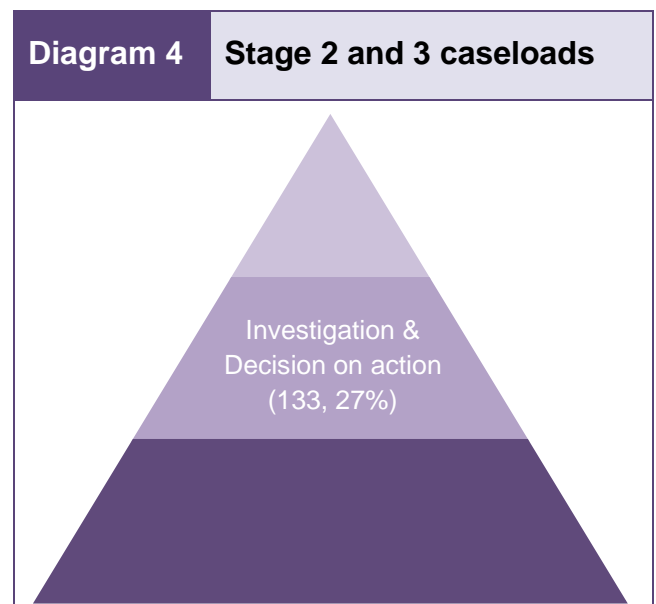
2.58 The investigation, enforcement and disciplinary processes covered in the rest of this section have not changed substantially since 15 October 2019, except that decisions that were previously taken by the PCC are now taken by panels of the BSB’s new Independent Decision-making Body and the staff decisions are taken under delegated authority from the Commissioner. Also, the distinction between internal and external complaints no longer exists (see paragraph 1.22).

2.59 In 2018/19, there was a significant drop in the number of cases referred to investigation. This reflects the increase referred to above in the number of cases dismissed at the initial assessment stage (see paragraph 2.54). 146 new cases were referred to formal investigation. Added to the number of cases outstanding from 2017/18, the overall

number of live investigations in 2018/19 was 166. This is a drop of 33 in the number of the overall cases referred to investigation in 2017/18 (199).

2.60 At the end of an investigation, the case is reviewed, and a decision taken as to what action, if any, should be taken. In some cases, the investigation shows that no breach of the Handbook has occurred or there is insufficient evidence of a breach and the case will be dismissed. In others, where the breach is supported by the evidence, the risk may nevertheless be considered too low to warrant regulatory action. In the remaining cases a decision will be taken as to whether the risk (seriousness of the conduct) is one that warrants the imposition of an administrative sanction or referral to disciplinary action. Such decisions were either taken by staff under delegated authority from the PCC or by the PCC at a meeting⁹.

2.61 Administrative sanctions (warnings and fines) are not disciplinary in nature and



⁹ The PCC was replaced by the new Independent Decision-making Body on 15 October 2019.

are not disciplinary findings. They are imposed where there is evidence of a breach of the Handbook on the balance of probabilities and the breach is not sufficiently serious to amount to professional misconduct.

2.62 In 2018/19, the number of cases concluded at the investigation stage went down. A total of 133 cases (27% of all concluded complaints) were closed at the investigation stage, down from the 152 cases (33%) closed at the investigation stage in 2017/18, but a similar proportion to those closed at this stage in 2016/17.

2.63 **Dismissals:** the proportion and number of cases dismissed after an investigation remained similar to previous years. Around half (69) of post-investigation decision were dismissals, 36 of which were the result of staff decisions. The number of dismissals was similar to 2017/18 when 74 were dismissed at this stage. Of the 69 cases dismissed in 2018/19, most (61) cases were dismissed after the assessment of the evidence obtained during the investigation indicated that there was either no evidence or insufficient evidence to establish that a breach occurred.

2.64 Of the remaining eight dismissals, five were dismissed but with advice being given about causes of concern falling short of a breach. The other three cases were dismissed in circumstances where, although there was evidence of a breach of the Handbook, it was not in the public interest to take regulatory action. In addition, six cases were withdrawn where further enquiries revealed that the complaint had been opened in error.

2.65 **Administrative sanctions:** fewer administrative sanctions were imposed in 2018/19 than in 2017/18 - 57 cases were the subject of administrative sanctions (12% of all cases closed), 50 of which were warnings. The figures for 2017/18 were 71 and 15%. This decrease in administrative sanctions imposed was both a result of the overall decrease in cases referred for investigation and also the decrease in practising certificate cases, as the majority of administrative sanctions are imposed for practising certificate or authorisation breaches.

2.66 **Referrals to disciplinary action:** despite the low number of referrals to investigation, the number of referrals to disciplinary action went up in 2018/19. A total of 50 new cases were referred to some form of disciplinary action in 2018/19: 40 to a Disciplinary Tribunal

Case study

We received a complaint from a party to a case in the Upper Tribunal. The complainant said that the barrister acting for the other side had made reference to discreditable actions by the complainant in the course of the Upper Tribunal hearing, when the barrister did not have reasonable grounds to do this. We investigated the complaint, which included obtaining the barrister's comments and obtained the judgments of the hearing both at the Upper Tribunal and the Court of Appeal. Considering all the evidence, the Professional Conduct Committee noted that there had been no criticism of the barrister for advancing the arguments he had argued and, along with the other evidence, there was no evidence that the barrister had made such references without grounds to do so. The complaint was dismissed.

and 10 to the Determination by Consent (DBC) procedure – see page 26 below. This compares to 37 such referrals in 2017/18, which was the lowest since 2012/13. Early figures for 2019/20 indicate that the trend for referrals to disciplinary action continues to rise. These statistics are due, in part, to the time lag between receipt of complaints and their ultimate referral to disciplinary action. Therefore, the trends seen in the early stages in 2017/18 may not show up in the investigation/referral decisions until the next year.

2.67 **Decisions post-investigation:** a high proportion of post-investigation decisions were taken by staff under delegated authority from the PCC. In 2018/19 this proportion of such decisions dropped to 65% as compared to the high in 2017/18 of 76% (although this is comparable to the 69% seen in 2016/17).

Requests for Review

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

been dismissed at the initial assessment stage and only rarely following an investigation.

2.69 In 2018/19, we received 52 requests for review (15% of applicable complaints), resulting in one case being reopened following a decision to dismiss. This involved a decision to dismiss the complaint at the initial assessment stage, and it was reopened after new evidence was provided.

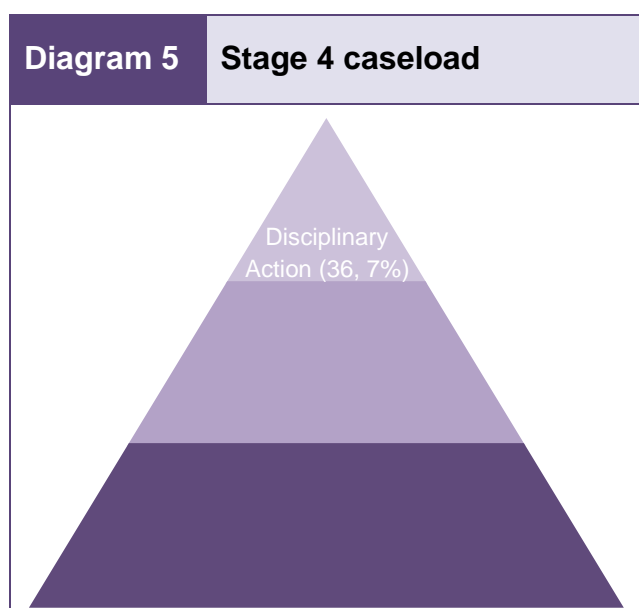
2.70 The 2018/19 figures for requests for reviews was similar to the 2017/18 figures of 51 requests for review (17% of applicable complaints), which resulted in two complaints being reopened. This demonstrates that our staff decision-making regime is consistently robust and stands up to scrutiny (see also Part 3 – paragraph 4.3 below).

Table 6		Complaint outcomes 2018/19	
Outcome	#	%	
Closed without investigation	320	65%	
Closed after investigation (No enforcement action)	76	16%	
Administrative sanction	57	12%	
Referred to disciplinary action	36	7%	

Stage 4 - Disciplinary action

2.71 Cases that are referred to disciplinary action are those where the conduct is assessed as being serious and poses the greatest risk to the regulatory objectives based on a risk assessment. A decision to take disciplinary action was made where it was determined that: an administrative sanction was not appropriate; there was a reasonable prospect of proving professional misconduct to the criminal standard of proof¹⁰; and that it was in the public interest for us to take disciplinary action.

2.72 Disciplinary action takes two forms: Determination by Consent (DBC) and Disciplinary Tribunal. DBC is an entirely consensual process reserved for lower level professional misconduct which would not attract a sanction greater than a fine and where the facts are not in dispute. Decisions on DBC cases were made by the PCC on the papers¹¹. All other cases of professional misconduct are heard in front of independent disciplinary tribunals convened by the



Bar Tribunals and Adjudications Service (BTAS).

2.73 DBC procedure provides for a swifter resolution to a case, with fewer resources required than in a similar case referred to a disciplinary tribunal and less stress for the barrister. The limited powers of sanction offer a level of certainty as to the outcome.

2.74 In 2018/19, there was a decrease in the number of cases closed following disciplinary action, which continued the decreasing trend seen in the last three

Case study

We received a report from an unregistered barrister who told us that, in helping out a friend with a case on a pro bono basis, he had carried out reserved legal activities without realising it. Subsequently, we received a letter from the solicitors acting for the other side to the barrister's friend, raising similar concerns. The reserved legal activities carried out included issuing proceedings and serving documents. The unregistered barrister had also used the title 'barrister' in correspondence. We obtained further evidence and determined that there was evidence of a breach. However, after considering the context of how this breach had occurred, along with the facts of the barrister's self-report and that it was a one-off incident set against many years of practice, we took the view that an administrative sanction was a proportionate regulatory response.

¹⁰ The standard of proof was amended in the 2019/20 year.

¹¹ DBC decisions are now taken by the IDB

years. This trend is, in part, a consequence of the previous year on year decline in complaints, a trend which has now reversed. The decrease in cases closed reflects a decrease in Disciplinary Tribunal cases, as DBC cases have remained fairly static.

2.75 36¹² cases were closed at the disciplinary action stage in 2018/19: nine by DBC and 27 during disciplinary tribunal proceedings, although not all reached a final hearing. This represents

Determination by Consent

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

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

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

If the barrister rejects the findings and sentence, then the matter will proceed to a Disciplinary Tribunal.

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

7% of all case closures in 2017/18. This is a decrease from last year's 10% (47 cases), which was itself a decrease from 2016/17.

2.76 **DBC:** as noted above, nine DBC cases were closed in 2018/19, consistent with previous levels: 8 were closed in 2017/8, 9 in 2016/17 and 11 in 2015/16. As with last year, all DBC cases closed arose from internal complaints and all of these resulted in a disciplinary finding. Two of the DBC cases related to criminal convictions for drink driving, two related to possession of drugs, two related to unregistered barristers who had been the subject of regulatory action for conduct as solicitors, two related to convictions for VAT and Housing Act offences respectively, and one related to supplying legal services without proper instructions.

2.77 **Disciplinary Tribunals:** 27 tribunal cases were concluded in 2018/19, which is a significant decrease from previous years – 39 were concluded in 2017/18. However, the number of 'live' cases at tribunal stage in 2018/19 went up significantly. There were 43 'live' cases at tribunal stage at the end of 2018/19, compared with 27 at the end of 2017/18.

2.78 It is apparent that disciplinary tribunal cases are "banking up". While it is not taking, overall, substantially longer on average to conclude tribunal cases, the number waiting to be heard is increasing and therefore it is likely that it will take longer in 2019/20 to bring tribunal cases to a conclusion. This is potentially due to increasing case complexity (for instance, we have seen an increase in 'linked' cases at tribunals, i.e. cases with

¹² This number does not necessarily represent the total number of hearings, as cases can be heard together.

multiple barristers or multiple complainants) and an increase in barristers being represented before the Tribunal and contesting the allegations against them.

2.79 Of the 27 tribunal cases that were concluded in 2018/19, 25 cases were fully determined by a tribunal and 21 resulted in one or more charges being proved: an uphold rate of 84%, which is similar to previous years.

2.80 **Disciplinary sanctions:** table 7¹³ shows the sanctions imposed following a disciplinary finding in 2018/19, either by DBC or by a Disciplinary Tribunal. In line with previous years the most common sanction was a fine, which was imposed on 67% of barristers appearing before a tribunal, an increase from 58% last year. The percentage of barristers who are being reprimanded has been increasing over the past three years, now at 59% compared to 48% last year.

2.81 In line with the reduced number of decisions, we have also seen a reduction in the number of barristers suspended (four, compared to eight in 2017/18) and disbarred (four, compared to six in 2017/18). One of the disbarments related to sending misleading emails to the barrister's client about the progress of his case. The other three disbarments followed convictions: one for a bomb hoax; one for conspiracy to defraud; and one for sexual offences.

2.82 **Recovery of fines:** a total of £49,500 in fines were imposed in 2018/19: £46,850 in disciplinary fines and £2,650 in administrative sanction fines. The levels of disciplinary fines were considerably higher than those imposed in 2017/18, which totalled £21,170, despite the same number of barristers (18) facing fines each year. This is primarily the result of several high-level fines imposed by Disciplinary Tribunals – the highest single fine imposed in 2018/19 was £8,000 (one barrister had fines totalling

Sentence	2017/18		2018/19	
	Barristers	%	Barristers	%
Disbarred	6	19%	4	15%
Suspended	8	26%	4	15%
Fined	18	58%	18	67%
Reprimanded	15	48%	16	59%
Advised as to Future Conduct	0	0%	1	4%
Prohibited from Accepting Public Access Instructions	1	3%	2	7%
Other	1	3%	1	4%

¹³ The number of sanctions imposed is higher than the total number of cases, as multiple sanctions can be imposed in relation to one case.

£15,000 imposed for several charges), compared to £3,000 last year (when one barrister had fines totalling £5,000 imposed). It is too early to tell if the 2018/19 trend is the result of individual cases being more serious, or tribunal panels treating breaches more seriously.

- 2.83 Of the 22 fines due to be paid in 2018/19, three were paid within the time allowed and a further 14 were paid in full, albeit late. We continue to chase the eight outstanding fines. Non-compliance with the payment of fines is therefore running at over 35%. However, the BSB has no express power to enforce the payment of fines and pursuing remedies via the court's residual powers is not generally cost effective. Therefore, where there is non-compliance, we try to work with the barrister to achieve payment including allowing payment by instalments. If, after concerted attempts, it is not possible to obtain full payment, we will usually take action for failure to comply with a Disciplinary Tribunal order, which can result in a sanction far more severe than the original fine.

Appeals

- 2.84 Where administrative sanctions have been imposed, or findings of professional misconduct have been made by a Disciplinary Tribunal, barristers have the right to appeal against the findings and/or the sentence imposed. Appeals against administrative sanctions are heard by an Appeal Panel convened by BTAS, whereas appeals against Disciplinary Tribunal outcomes are made to the High Court. The total number of new appeals received this year (ten) is similar to the previous year's figure of 11 appeals.
- 2.85 **Administrative sanction appeals:** one appeal was received against the imposition of an administrative sanction in 2018/19. This was a similar figure to previous years, with the exception of 2017/18. The appeal, against a warning imposed by the PCC, has since been decided and was successful. This was on the basis that the PCC had not provided sufficient reasons in its decision to demonstrate why the imposition of an administrative sanction was necessary when a Legal Ombudsman resolution had already been reached for the same conduct.

Case study

The BSB received a complaint from a claimant in a civil case, alleging that the barrister representing the respondent had not attended court. The barrister had asked her clerk to seek an adjournment on the grounds of her ill health. However, the barrister's website entry listed her as being at another professional function. The barrister also self-reported this incident to the BSB. The PCC referred the matter to a five-person Disciplinary Tribunal. At the hearing, the barrister admitted charges relating to a failure to act with honesty and integrity, as well as behaving in a way which was likely to diminish the trust and confidence which the public placed in the profession. The Tribunal, having considered all the circumstances of the case and the barrister's mitigation, imposed a suspension for a three-month period.

- 2.86 **Disciplinary Tribunal appeals:** nine new appeals were lodged in the High Court against disciplinary tribunal decisions in 2018/19, a slightly higher number than last year.
- 2.87 **Tribunal appeal outcomes:** ten appeals were decided during the year and five were left outstanding at the end of 2018/19. Of the ten decided appeals, two (20%) were partially successful, six (60%) were dismissed and two were discontinued. The two partially successful appeals were by barristers challenging both the findings of professional misconduct as well as the sanctions imposed. In both cases, the challenge against the finding was unsuccessful but the barristers obtained a reduction in the sanction imposed.

Legal action

- 2.88 In addition to the right of appeal, barristers can also exercise their right to challenge decisions made by the BSB, or by a Disciplinary Tribunal, by way of judicial review proceedings. Challenge by way of judicial review is also available to complainants. Claims against the BSB are also occasionally lodged in the Employment Tribunal and civil courts.
- 2.89 At the start of 2018/19, there were two existing discrimination claims – one remitted to the High Court by the Supreme Court and one before the Employment Tribunal.
- 2.90 The Supreme Court case is the same case that was referred to in the 2016/17 and 2017/18 enforcement reports and there was no substantive progress made on this matter during the 2018/19 year.
- 2.91 There was also a further, but separate, Employment Tribunal matter outstanding

at the beginning of 2018/19, which related to allegations made against a large number of public bodies. This was dismissed against the BSB during the year following the BSB's representations as to jurisdiction and a general civil restraint order was made against the applicant.

- 2.92 Also, during 2018/19, another applicant sought to appeal an Employment Tribunal matter that had been struck out in 2017/18, but the application was dismissed for being out of time.
- 2.93 Finally, one litigation arose from a drafting error in the BSB Handbook that prevented the PCC from taking certain decisions. We did not oppose the claim and it was settled by consent.
- 2.94 This means that we started 2019/20 with the lowest level of outstanding litigation cases for almost a decade – only the two discrimination matters that we had started the year with.

Fitness to Practise

- 2.95 The BSB Fitness to Practise (FTP) procedures refers to our mechanism for addressing health concerns that may impact temporarily on a barrister's ability to continue practising. The FTP procedure is not disciplinary, albeit that it may ultimately result in a barrister being subject to a suspension from practice. It is rare that the BSB receives reports related solely to fitness to practise issues that do not also involve conduct issues, although we always consider carefully whether or not to pursue the conduct issues as well as the fitness to practise issues.
- 2.96 In 2018/19 we logged five FTP cases, compared to four opened in 2017/18.

2.97 One of the FTP cases logged in 2018/19 arose after concerns were identified by the BSB during a conduct investigation. In three of the remaining cases, we took the decision not to initiate a conduct investigation in parallel to the FTP investigation, although there were potential conduct concerns identified. At the end of 2018/19, one FTP case remained open, two had proceeded to a fitness to practise hearing and two were closed following information being provided by the barrister. It would be inappropriate to comment on the detail of these matters, given the low numbers.

2.98 It is not possible to draw any conclusions from the five FTP cases. We will continue to keep a close eye on any changes in the future to ensure that it is reflected in the BSB's overall assessment of risk.

Part 2: How well did we perform

- 3.1 The BSB continued in 2018/19 to use a number of mechanisms to monitor the performance of the enforcement system to ensure that we handled complaints and enforcement action fairly, consistently and with reasonable speed. The primary mechanism was the monitoring of performance against key performance indicators and service standards. This section of the report outlines the results of this performance monitoring. It concentrates on the year end results, but performance against the indicators was reviewed monthly by the PCD managers and quarterly by the BSB's Planning, Resources and Performance Committee (PRP).
- 3.2 In addition to monitoring performance against the indicators, the PCD's work was subject to other quality assurance mechanisms, such as regular reviews by a sub-Committee of the PCC of staff

decisions taken in a sample of cases. We also continued to focus on continuous improvement by reviewing outcomes of cases for indications of systemic and quality issues that needed to be addressed. Details of the outcomes from these other assurance mechanisms can be found in Part 3 of this report, "Continuous Performance".

Performance Indicators

- 3.3 The BSB is committed to dealing with concerns about the conduct of barristers in a prompt manner. During 2018/19, the PCD remained subject to three operational performance indicators (OPIs) which were used to track how long it took us to assess and investigate complaints. They were combined to produce an over-arching corporate Key Performance Indicator (KPI). 2018/19 was the last full year in which this KPI, and the associated OPIs, were used to monitor performance.

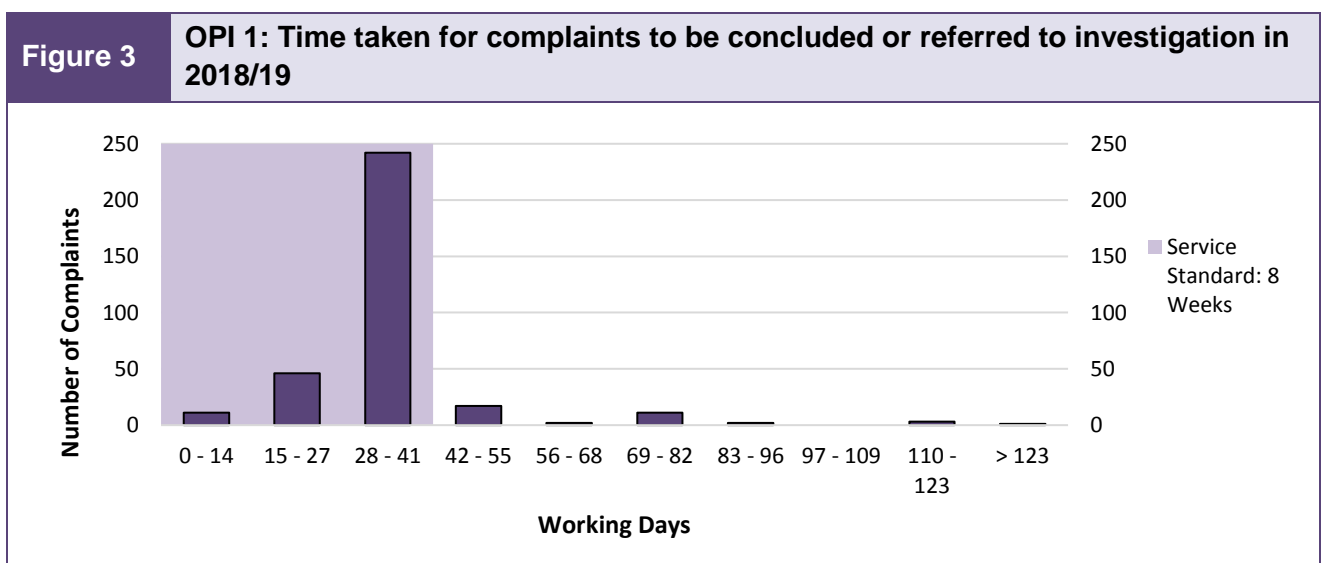
Table 8		KPI performance in 2018/19	
Indicator	Description	Performance	Target
KPI	The percentage of complaints concluded or referred to disciplinary action within service standards	81.6%	80%
OPI 1	The percentage of complaints concluded or referred to investigation within 8 weeks	89.6%	80%
OPI 2	The percentage of external complaints concluded or referred to disciplinary action within 8 months following investigation	49.1%	80%
OPI 3	The percentage of internal complaints concluded or referred to disciplinary action within 5 months following investigation	72.3%	80%

This report describes the complaints system as it was in 2018-19. It does not necessarily reflect the enforcement system that replaced it on 15 October 2019.

- 3.4 New KPIs were introduced on 15 October 2019 to reflect the changes to the enforcement system (see paragraphs 1.21–1.27 above) and to address issues that had been revealed in recent years regarding the efficacy of the previous indicators (see paragraph 3.14 below).
- 3.5 The KPI and the OPIs used in 2018/19 are set out in Table 8, along with our performance against them for the year. Our KPI target for the year was to conclude or refer to disciplinary action 80% of cases within our service standards (i.e. eight weeks for the initial assessment of complaints, five months for concluding internal complaint investigations and eight months for concluding external complaint investigations).
- 3.6 In 2018/19 we once again met the KPI target of 80% with a year-end outturn of 81.6%. This was lower than the 84.1% outturn in 2017/18, but remained high in comparison to earlier years, being the second highest yearly performance against the KPI since 2013/14. As explained in more detail below, performance against the individual OPIs varied significantly and the KPI was only

met due to the high performance in relation to OPI1 (initial assessment of complaints).

- 3.7 **Outcome against the OPIs:** performance in relation to each of the underlying operational indicators varied widely. Our aim was to try to complete 80% of initial assessments of complaints within eight weeks (OPI1); 80% of investigations of external complaints within eight months of receipt of a complaint (OPI2); and 80% of investigations of internal complaints within five months (OPI3).
- 3.8 In relation to OPI1, performance was extremely good with nearly 90% (89.6%) of initial assessments being completed within the 8-week period, as compared to 84.1% in 2017/18. The Assessment Team is to be commended for this performance which was achieved despite the substantial increase in the number of external complaints received and the team carrying vacancies in the year.
- 3.9 However, the target of 80% was missed in relation to both OPI2 and OPI3, which monitored the time taken to investigate external and internal complaints respectively, including referral of any

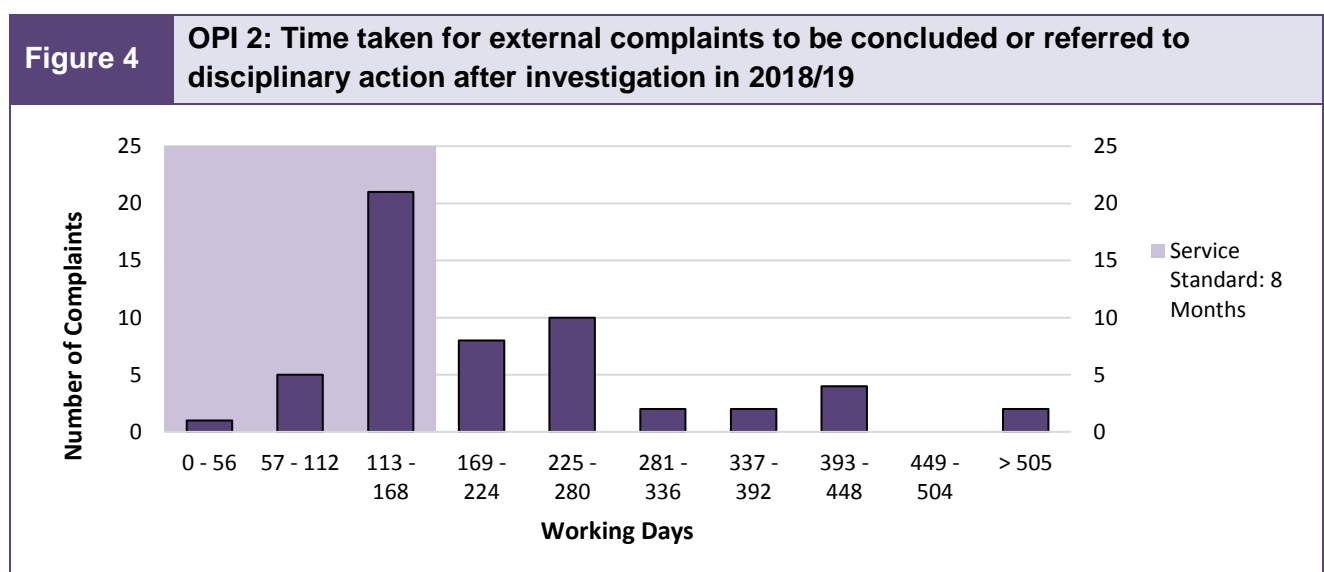


relevant matters to the PCC and taking decisions to impose administrative sanctions. We only managed to complete 49% (49.1%) of external complaint investigations within the eight months allowed (OPI2) and just over 72% (72.3%) of internal complaint investigations within the five months allowed (OPI3). These are significant reductions on the performance in 2017/18, when the outturn was 70% and 86% respectively.

- 3.10 Figures 3 to 5 illustrate how long it took us to assess and investigate complaints in 2018/19.
- 3.11 The results are disappointing and detailed attention has been given by the PCD and the PRP as to why the target in relation to investigation of external complaints particularly (OPI2) was missed in so many cases.
- 3.12 As mentioned in the Enforcement Report for 2017/18, the performance indicators were set in 2013/14 at a time when the approach to investigations was quite different. Improvements in the way investigations are conducted, increases in the number of those subject to

investigation being legally represented and a rise in the number of challenges to the process (mainly unsuccessful) have all led to investigations of both internal and external complaints taking longer to complete. The increase in cases at the tribunal stage (see paragraphs 2.77-2.78) also had an impact: this work can be more resource intensive, which in turn affects the resources available to progress investigations.

- 3.13 Performance in relation to OPI3 was also down, although not to such a great extent. Analysis of this performance indicated that the shorter timescale allowed for investigation of internal complaints might no longer be justified. The original rationale for the shorter timescale was the absence of a complainant in the process and the nature of internal complaints, which in the past related mainly to relatively straightforward matters such as breaches of practising requirements or failure to complete CPD. However, increasingly internal complaints included some of the most serious and complex matters arising from the serious misconduct reporting obligations. Such



cases took longer to investigate and were more akin to the investigation of external complaints.

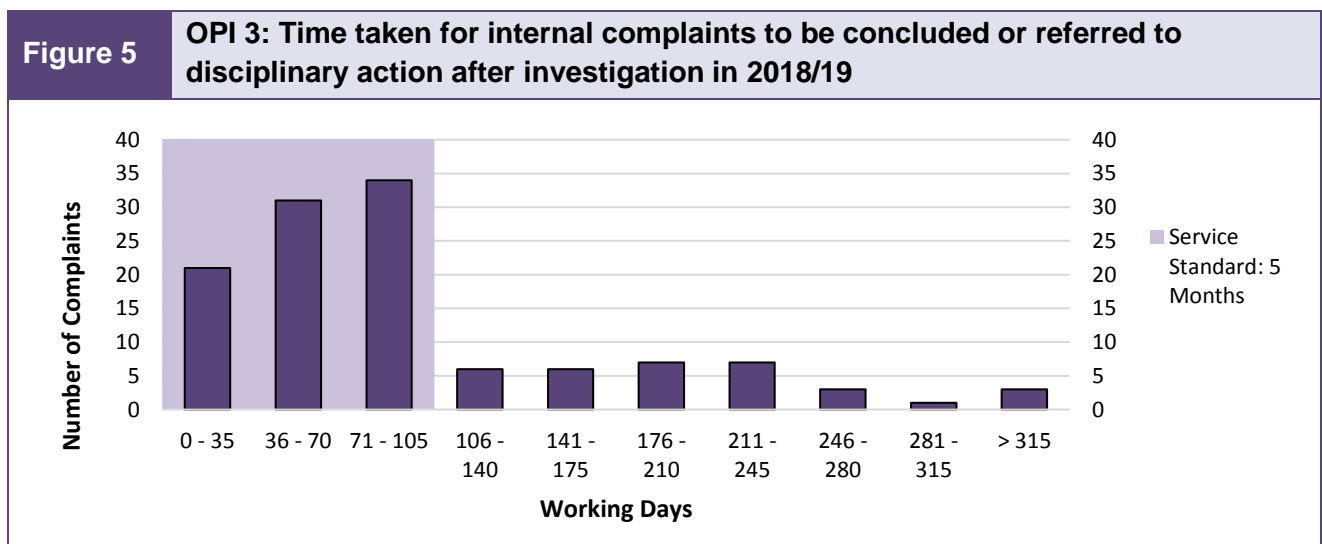
3.14 It was recognised in 2017/18 that the performance indicators needed to be reviewed, but they were maintained in 2018/19 pending the introduction of changes to the enforcement system which were introduced in October 2019. As noted above, revised performance indicators have been developed to monitor the new system. The KPIs now monitor the initial assessment of “reports” and the investigation of allegations of breaches of the Handbook separately. Also, under the new decision-making arrangements, the distinction between internal and external “complaints” has been removed. Therefore, all investigations arising from reports of concerns about conduct are subject to a single KPI and the time period allowed for completion of investigations has been amended to take into account the systemic changes in the approach to investigations outlined above.

3.15 One other factor that contributed to the low performance against OPI2 was

understaffing in the Investigations and Hearings Team due to staff turnover, long-term sickness and high levels of maternity leave. A detailed review of the staffing position concluded that these issues, which had been present in the staffing profile for several years, were not temporary but represented “steady state”. Therefore, the BSB has increased by one the staff complement of the renamed Investigations and Enforcement Team. This, combined with the revised KPIs, should assist with ensuring more timely completion of investigations against more realistic targets.

Disciplinary action – service standards

3.16 In 2018/19, as in previous years, we did not have formal performance indicators in relation to completion of cases referred to disciplinary action. Nevertheless, we continued to monitor the time taken to conclude Determination by Consent (DBC) and Disciplinary Tribunal cases against internal service standards for these stages.



3.17 Our aim was to conclude DBC cases within three months of the date of the referral to the process following investigation. The service standards for the completion of tribunal proceedings, following referral, differed according to whether the proceedings related to an internal or external complaint and whether they were in front of a three or five-person tribunal panel. Table 9 shows the relevant service standards and compares those figures to the completion of the Determination by Consent and Disciplinary Tribunal stages in 2018/19.

3.18 **DBC:** performance in relation to completion of DBC cases, by percentage, decreased from 88% of cases being concluded within the service standard of 93 days in 2017/18, to 78% in 2018/19. However, the number of cases concluded within the target was similar in both years: 7 out of 9 in 2018/19 and 7 out of 8 in 2017/18. In the two cases that fell outside the service standard, the delays were due to internal issues arising from staffing (see

paragraph 3.15 above) and not the process itself. The statistics therefore continue to demonstrate that the DBC process is generally, as intended, a swifter means of dealing with less serious cases of professional conduct which do not warrant a sanction more severe than a fine.

3.19 **Disciplinary Tribunals:** the progress of tribunal cases is, to a large extent, outside the BSB’s direct control and is always subject to unpredictable delays arising from issues such as defence challenges and applications to adjourn. However, the number of cases at the Disciplinary Tribunal stage in 2018/19 increased significantly, which impacted on performance. This was a consequence, in large part, of the longer investigation times that created a “bunching” of cases referred to disciplinary action in 2018/19. Further, as we have commented on in previous annual reports, disciplinary casework continues to be increasingly litigious and this is a significant factor in the length of

Table 9		Disciplinary action stages completed within service standards 2018/19					
Stage	Type	Service Standard (SS)		2017/18		2018/19	
		(Days)	(Months)	Cases	% within SS	Cases	% within SS
Determination by Consent	Internal	93	3	8	88%	9	78%
Three-person Disciplinary Tribunal	Internal	86	2.8	12	8%	3	0%
Three-person Disciplinary Tribunal	External	166	5.4	11	27%	9	78%
Five-person Disciplinary Tribunal	Both	197	6.4	13	62%	13	54%

time it takes to conclude cases. However, the effects of the staffing issues described at paragraph 3.15 above had also been impacting for several years on performance in concluding tribunal proceedings. The increase in staff should assist with speeding up the progress of cases but the unpredictable nature of proceedings will continue to impact on our ability to conclude cases in the timescale we would like.

3.20 **3-person Disciplinary Tribunals:** these Tribunals hear cases where the conduct, if proved, is unlikely to result in a sanction greater than a 12-month suspension. The time taken to conclude proceedings in front of 3-person Disciplinary Tribunals differed according to the type of complaint that gave rise to the proceedings. In relation to the proceedings arising from external complaints, performance in percentage terms improved dramatically even though a similar number of cases were concluded in the year as in 2017/18. 78% of proceedings were concluded in the 166 days allowed (7 out of 9 cases) as compared to 27% in 2017/18 (3 out of 11 cases).

3.21 While no 3-person Disciplinary Tribunal proceedings arising from internal complaints were concluded within the service standard, there were only three such cases in the year compared to 12 in 2017/18 (when only one case was concluded within the service standard). Again, it was recognised that the shorter service standard for tribunal proceedings arising from internal complaints, set in 2013/14, was not necessarily realistic or achievable given the change in the nature of internal complaints (see

paragraph 3.13). However, the different standard is no longer relevant now that the distinction between internal and external complaints has been removed.

3.22 **5-person Disciplinary Tribunals:** these Tribunals hear the most serious cases and, unlike 3-person Tribunals, can impose suspensions longer than 12 months and can disbar a barrister. Performance in percentage terms has gone down (54% of cases concluded in the service standard of 197 days as compared to 62% in 2017/18). However, the numbers were fairly similar with 7 out of 13 cases being concluded within the standard in 2018/19 and 8 out of 12 in 2017/18. As the end to end times outlined in paragraph 3.30 below indicate, it is not taking substantially longer to conclude tribunal proceedings than in 2017/18.

3.23 The time taken to conclude disciplinary proceedings remains an area of concern, but close monitoring indicates that in most cases there are no clear avoidable areas of delay that would cause us to change the underlying processes. The introduction of revised Disciplinary Tribunal Regulations in November 2017 has assisted to some extent in streamlining the processes and is a factor in the improved performance in concluding 3-person Tribunal proceedings arising from external complaints.

End-to-end times

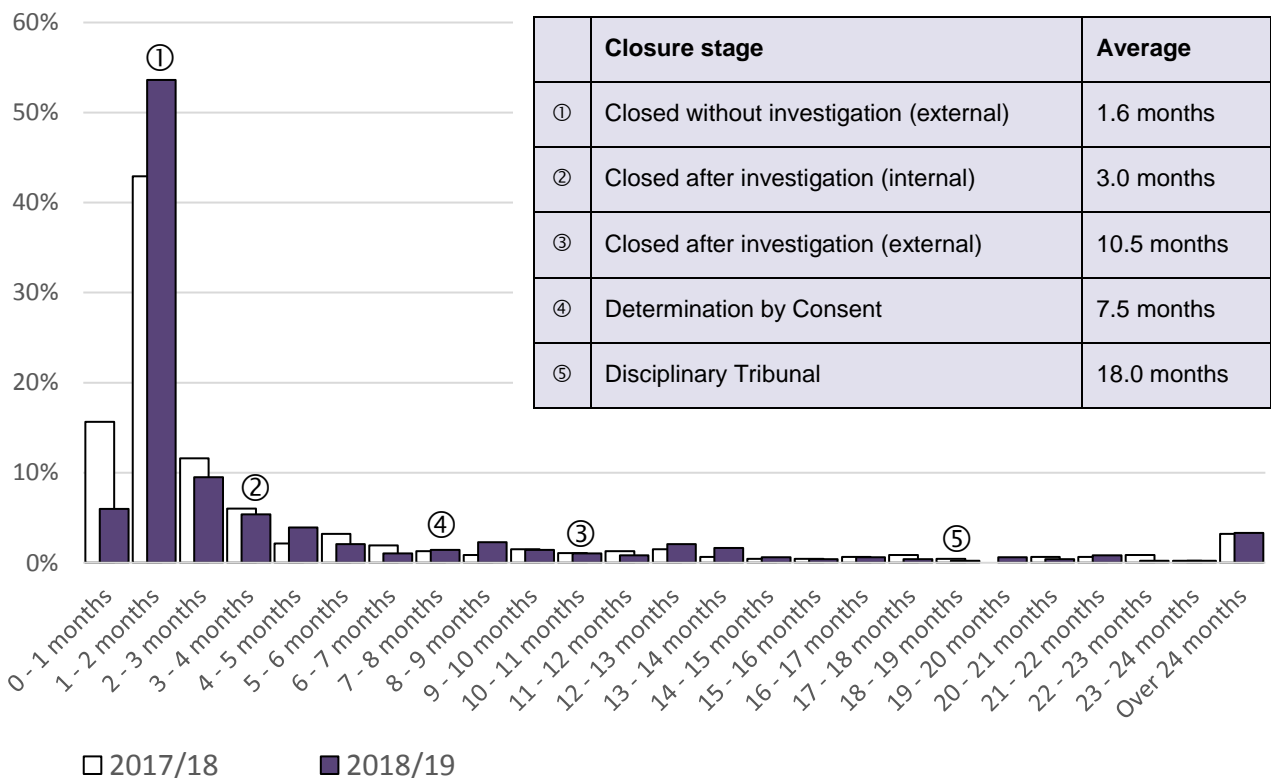
3.24 The performance indicators and service standards described above excluded any periods when a case was put on hold by the BSB or was formally adjourned by a Tribunal. The time periods used in the KPIs and OPIs therefore do not represent the full time it took to close a case from the date it was opened to the date it was concluded (end to end times). Our reason for excluding these periods in performance monitoring is because the events that cause a case to be put on hold or adjourned are generally out of our control. Including such periods in the performance monitoring statistics would not provide an accurate reflection of our performance in progressing cases. The reasons for putting cases on hold or adjourning them relate, in nearly all

cases, regardless of the stage, to: the ill-health of the barrister; and/or ongoing court or other proceedings, the outcome of which is directly relevant to the regulatory issues under consideration.

3.25 Further, the statistics in relation to the performance indicators are fairly crude and show whether cases fell within or outside the indicator, even if this was only by a matter of days. In contrast, end to end times provide a full picture of how long it is taking us to close cases at all the stages and it is important that we also monitor these.

3.26 Figure 6 illustrates how long it took to close cases in 2018/19 from opening to final closure: whether this was at the initial assessment, investigation or disciplinary action stages. Also marked

Figure 6 End-to-end times for complaints closed in 2018/19



on the chart are the average times taken for the different outcomes.

- 3.27 Overall, the average time to conclude cases of all types remained the same as in 2017/18 at 1.8 months. We therefore maintained the reduction of 60% in overall end to end times as compared to the three years before 2017/18 despite the changes in performance against the OPIs as set out above at paragraphs 3.7-3.15. The percentage of cases closed within three months remained steady at 69%, compared to 70.1% in 2017/18.
- 3.28 The end to end times for most stages increased in 2018/19 and this is a reflection of the performance against the OPIs as described above at paragraphs 3.7-3.15 as well as the other issues referred to in this section regarding performance. Inevitably, where stages are taking longer to complete, even without adjournments, the end to end times will go up.
- 3.29 The average end to end time for initial assessments (“closed without investigation”) remains at 1.6 months, the same as in 2017/18 and 2016/17.
- 3.30 In all other areas the average end to end times increased in 2018/19. The average end to end time for internal complaint investigations went up by one month to three months as compared to 2017/18. The end to end times for external complaint investigations and conclusion of DBC cases both went up by two months. Investigations of external complaints went up to 10.5 months from 8.5 months in 2017/18 and DBC cases took on average 7.5 months to complete as compared to 5.4 months in 2017/18.

Also, the average time to complete all types of tribunal proceedings increased slightly from 17.9 months to 18 months.

- 3.31 Analysis of these end to end times show that in some areas the increase was due to more lengthy adjournments but in others it was due to the increase in time it took to complete investigations. For example: the average “adjournment time” in relation to assessing external complaints went up from 1.6 months in 2017/18 to 2.5 months in 2018/19. In contrast, the corresponding average in relation to external investigations decreased substantially, from 8.5 months in 2017/18 to 4.5 months in 2018/19. This indicates that the increases in the time taken to investigate are not due to the length of time cases are put on hold or adjourned, but to the increase in the time taken to investigate the complaints. The reasons for this, and the action taken to address this increase in time taken, are explained above (see paragraphs 3.9-3.15).
- 3.32 The number of long running cases (two years or over in age) remained almost static as compared to 2017/18 with 17 cases falling into this category as compared to 16 in 2017/18. This demonstrates that the enforcement system is continuing to maintain the efficiency gains seen in 2017/18 when there was a reduction in such cases of 50% as compared to 2016/17 and 68% as compared to 2015/16¹⁴.
- 3.33 The picture in relation to end to end times is a complex one, but overall, they have increased. This is an issue of concern but the reasons for it have been identified and action taken where

¹⁴ The number of long running cases in 2015/16 was 50 and in 2016/17 it was 34.

relevant e.g. increasing the staff complement in the Investigations and Hearings Team (now the Investigations and Enforcement Team).

Part 3: Continuous improvement

- 4.1 We regularly review our procedures following the conclusion of cases, particularly those that result in tribunal hearings, judicial reviews and appeals. Any lessons that we can learn from these cases are fed back into the system to ensure continuous improvement.
- 4.2 In addition, the Quality Review Sub-Committee (QRSC) of the PCC – a three-member panel with a lay chair – carried out spot-checks of a percentage of staff decisions taken under the authorisations given by PCC. This included decisions to: dismiss complaints; impose administrative sanctions; and refer some complaints to disciplinary action. To ensure that the quality of the staff decision making remained high the QRSC assessed the timeliness, thoroughness, transparency and accessibility of PCD decision-making along with the decision itself.
- 4.3 The QRSC reviewed 10% of the decisions made by PCD staff each quarter. In 2018/19 reviews were carried out on relevant cases decided during the first three quarters of the year¹⁵. A total of 23 cases were reviewed and the QRSC agreed with the decisions taken by staff in all these cases. In particular, the QRSC panel provided positive feedback for staff on the content of dismissal letters, which we had been monitoring closely to ensure they were appropriate and sufficiently detailed. For example, they commented that: *“The decision letters are generally very good - helpful and comprehensive”* and *“There*
- are also some sensitive dismissal letters which recognise the complainant's point of view but explain why we cannot help.”*
- 4.4 **Lessons to Learn log:** we maintain a central ‘Lessons to Learn’ log which is available to all staff and captures any issues arising from casework at any stage of the process or on review, including issues arising from tribunal cases and High Court appeal judgments. The log is reviewed regularly by senior staff, and action points are identified and taken forward. Such issues in 2018/19 included: improvements to the content of dismissal letters; ensuring clarity about which issues were referred by the assessment team for investigation; improvements in ensuring witness availability at tribunals; ensuring any changes to initial tribunal hearing bundles were properly recorded; ensuring tribunal panels were aware of the restrictions around imposing a sanction of immediate suspension; and removing redundant processes relating to Determination by Consent publication notices.
- 4.5 The lessons to learn log also provides an ongoing mechanism for identifying issues for inclusion in regular newsletters to stakeholders. In the past, such newsletters were sent to PCC members and to members of the prosecution panel. Reader feedback indicated that these newsletters were widely read and were an effective means of communication to assist with keeping participants in the enforcement system up to date. We therefore intend to continue producing them for relevant audiences.

¹⁵ In view of the planned changes to the complaints process, no QRSC reviews took place in the 2019 calendar year.

4.6 **Training:** We also used, and continue to use, performance and feedback information to inform our internal staff training programme. This programme is designed to ensure the maintenance, updating and development of legal knowledge and associated skills for those taking enforcement and other regulatory decisions. In 2018/19 the training programme covered areas including: judicial review, insolvency, working with vulnerable witnesses, social media platforms and external specialist training on clear drafting and communication skills.

Casework lessons

- 4.7 A range of issues arising from cases led to changes and improvements or revealed wider matters that the BSB needed to consider. These lessons can arise from appeal judgments from the High Court, judgments of the independent Disciplinary Tribunal and Appeal Panels, or from matters identified during the normal course of casework. They range from administrative improvements to more substantive matters such as making changes to ensure KPIs are met. Some examples of the lessons revealed in 2018/19 are listed below.
- 4.8 A barrister appealed an administrative sanction that we had imposed and sought a waiver of the fee for their appeal. After reconsidering the request for a waiver, which we had initially refused in line with our existing policy, we waived the fee and amended the policy.
- 4.9 During the year several legal challenges were heard in relation to a jurisdictional gap that had temporarily appeared.

These arose following the amendment of a definition in Part 6 of the BSB Handbook, which had an unintended impact on our ability to take enforcement action in certain cases. The issue was rectified, and we have introduced improvements in our systems to ensure that future Handbook amendments are closely reviewed for any potential wider impacts.

- 4.10 Improvements were also made in 2018/19 to our approach to communicating our service standards to barristers and complainants. These included amending our template documents to include explanations of our standard timeframes for providing responses to correspondence and also taking steps to ensure that staff promptly updated barristers and complainants if, for whatever reason, staff were unable to meet the timeframes they had previously indicated they would.
- 4.11 Other improvements were also made in response to issues that were identified in relation to the preparation and maintenance of bundles prepared for disciplinary hearings and appeals, and in the disclosure of documents.

Wider issues for the BSB and the Bar

- 4.12 **Litigants in person:** as observed above, the number of litigants in person raising complaints is increasing year on year. However, the majority of these complaints do not in fact reflect professional conduct that is in breach of the BSB Handbook. Rather they are symptomatic of a lack of consumer understanding about the role of barristers and of the growing number of litigants in

person in the legal system, particularly as a result of reductions in legal aid funding and eligibility. One of the BSB's three strategic aims for 2019-2022 is "advancing access to justice in a changing market". Under this heading, the BSB will continue to contribute to public legal education to enable the public to have better access to information about the legal sector, barristers and the services that they provide. Steps taken in this regard include the recent complete redesign of the BSB website to make it easier to use and understand.

- 4.13 **The internet and social media:** As set out in previous reports, the number of complaints relating to barristers' use of social media is increasing. These complaints often raise issues about the boundary between a barrister's professional life and personal life, the interaction with freedom of expression and our regulatory role in this area. We have published guidance for the Bar regarding the use of social media, which we keep under review. We also continue to take successful regulatory and disciplinary action where barristers' communications on social media diminish the trust and confidence which the public places in the profession (Core Duty 5). In 2019/20 to date, there have already been three disciplinary tribunal hearings relating to the use of social media by barristers.
- 4.14 **Harassment and bullying:** social media complaints generally amount to allegations of harassment and bullying arising from a barrister acting in their non-professional life. The BSB's Code of

Conduct covers conduct in all spheres. We are committed to taking action to address unacceptable behaviour whenever it occurs but particularly in the work place, and also particularly in relation to sexual harassment and bullying. We fully recognise the issues and barriers in relation to reporting such conduct. We are working with the profession and others to find ways that we can assist members of the profession to report such matters to us. We are committed to taking action to try to eliminate the behaviours and assist in changing some of the cultures at the Bar.

- 4.15 In May 2018, the BSB published a report entitled "Women at the Bar: Research exploring solutions to promote gender equality"¹⁶. This research found that more than two in five women at the Bar had experienced discrimination, and a similar proportion had experienced harassment. The research also noted that a large majority of respondents who had experienced discrimination and harassment did not report that treatment. The most common reasons for not reporting were concerns about the impact on their career; fears that reporting would not achieve anything; and attitudes at the Bar towards harassment and discrimination.
- 4.16 In line with this latter finding, we have not seen the increase in complaints that might have been expected, or that other professional regulators have reported seeing.
- 4.17 Since January 2019, the BSB has been running a pilot harassment support

¹⁶ <https://www.barstandardsboard.org.uk/uploads/assets/118b1db5-d15f-4e53-a214b0e71622f9aa/womenatthebarreportv4.pdf>

scheme¹⁷, under which specific waivers from the rC66 Handbook duty to report serious misconduct are granted on an interim basis, to allow the Bar to provide formal confidential support services to those who may have experienced sexual harassment or bullying. As at September 2019, six such waivers had been approved and early indications are that they are yet to see significant use.

¹⁷ <https://www.barstandardsboard.org.uk/uploads/assets/dbbdd80a-4686-4a1a-922a3c3fc8a11f19/Pilot-Harassment-Support-Schemes-Waivers.pdf>

Part 4: Wider work of the PCD

- 5.1 The PCD's primary function was to consider concerns about the conduct of barristers and take enforcement action where appropriate. This work informed and supported the wider work of the BSB particularly in relation to identifying risks to the regulatory objectives. However, the PCD also engaged in wider work related to the enforcement functions. This section of the report provides a summary of this wider work carried out in 2018/19.

Disciplinary history checks

- 5.2 During 2018/19, the PCD was responsible for answering enquiries, both internally and externally, about disciplinary findings made against those we regulate. Such enquiries are usually made by the Bar Council's Records Team for the purpose of issuing Certificates of Good Standing. However, we also provided information to: the Judicial Appointments Commission (for use in processing applications for judicial office); the Queen's Counsel Appointments body (in relation to applications for Silk) and the Inns of Court (in relation to appointments of pupil supervisors)¹⁸.
- 5.3 Disciplinary checks were carried out by the PCD's Operational Support Team (OST) and in 2018/19 they completed a total of 1,186 disciplinary history checks: an increase of 200 on the number carried out in 2017/18. This included 237 in relation to Queen's Counsel applications, 100 for Certificates of Good Standing and 652 in relation to judicial applications

(an increase of 379 as compared to 2017/18). In all cases, the deadlines for providing the information were met.

Data Protection Act enquiries

- 5.4 Processing complaints and disciplinary cases inevitably involves the PCD holding personal data about individuals. Trained staff in the PCD and OST were responsible for responding to requests under the Data Protection Act from individuals asking for access to this personal data (subject access requests (SARs)). Such requests were handled by trained staff in the PCD's Operational Support Team.
- 5.5 The introduction of the GDPR in May 2018 led to an increase in SARs in 2018/19, with the number doubling as compared to 2017/18. In 2017/18, we received six SARs and in 2018/19 we received 13. Eight were from barristers who were the subject of complaint(s) or disciplinary proceedings and five were from complainants. The time limit for responding to SARs reduced from 40 to 30 days when the GDPR came into force and meeting the revised deadline can be challenging. However, we met the 30-day time limit in relation to all but two of these requests. The deadline was extended, as allowed for under the regulations, in these two cases by five and 14 days respectively due to the volume of personal data involved.

Projects

Standard of Proof

- 5.6 On 1 April 2019, the BSB started applying the civil standard of proof

¹⁸ From 1 April 2019 Authorised Education and Training Organisations (AETOs) took on the function of appointing pupil supervisors and the PCD's responsibility for carrying out checks ceased.

(balance of probabilities) to allegations of professional misconduct arising from conduct occurring on or after that date. While this change came into force after the end of the reporting year, preparations for it were carried out during the year. The application to the Legal Services Board for approval of the change to the standard of proof was approved in October 2018. Thereafter, we updated all relevant guidance and provided training for staff and the PCC members in the application of the new standard. A similar exercise was carried out by the Bar Tribunals and Adjudication Service to ensure Disciplinary Tribunal panel members were prepared for the change.

Publication of findings

- 5.7 We continued in 2018/19 to work on producing a revised disciplinary findings publication policy. We concluded our research into the approach taken by other professional regulators, the result of which showed that approaches to publication, and publication lengths, varied across the professions. We then developed proposals for a revised BSB policy, including reducing most of the publication periods and limiting the extent to which findings would remain in the public domain (i.e. would cease being available on request). This work was carried out in 2018/19 but the proposals and revised policy were not formally approved by the Board until 18 July 2019, following a roundtable consultation meeting with key stakeholders and consumer groups. The

revised policy came into force on 16 September 2019¹⁹.

Modernising Regulatory Decision-Making

- 5.8 A significant amount of the PCD's wider work in 2018/19 arose from planned major changes to the BSB's regulatory decision-making processes which had been in development since 2015. A public consultation on modernising our regulatory decision making²⁰ was carried out from March–May 2018 and the Board formally approved the changes in July 2018²¹. Thereafter intensive implementation work was carried out to prepare for the changes, including: developing a new risk assessment methodology; recruiting the membership of the Independent Decision-making Body to replace the PCC; drafting revised regulations; and the development of a new case management system.
- 5.9 The original intention was that the new arrangements would come into force on 31 March 2019, but the development of the case management system took longer than expected. As referred to elsewhere in this report, the changes came into effect on 15 October 2019.
- 5.10 A summary of the changes relevant to the enforcement system is set out in the Introduction to this report.

Legal Support Project

- 5.11 In 2018/19, we also carried out work on producing proposals to implement the Board's decision to commence remunerating those who represent the BSB at Disciplinary Tribunals and other

¹⁹ [The policy can be found on our website.](#)

²⁰ See footnote 1.

²¹ See footnote 1.

hearings. The BSB was using a panel of individual barristers to carry out this work, who offered their services free of charge (pro bono). The panel provided us, and previously the Bar Council, with excellent service over the last 20 years. However, it was no longer considered appropriate to rely on the good will of individual barristers, with the available time, to perform such an important regulatory function, particularly with the increasing complexity of disciplinary cases.

5.12 In order to implement the Board's decision to commence remunerating those who represent us at hearings, a new approach was developed in 2018/19 for accessing these services. In future, rather than using a group of individuals, the BSB decided to appoint one or more chambers with relevant expertise in regulatory and disciplinary law to provide representation services at all levels of seniority.

5.13 This new approach was agreed in 2018/19 but the project continued into 2019/20 to allow for implementation. A recruitment exercise to appoint suitable chambers to our new "Tribunal Representation Panel" (TRP) started in September 2019 and concluded in November. The new arrangements commenced on 1 January 2020, when the current pro bono Prosecution Panel was disbanded and 11 Kings Bench Walk became, for the time being, the sole chambers on the TRP.

Conclusions

- 6.1 This final full year report on the BSB's enforcement work in its current format, demonstrates that 2018/19 was yet another busy and challenging year for both the PCD and the PCC. A considerable amount of time was devoted by the PCD to assisting with the development and implementation of the changes arising from our programme to modernise our regulatory decision-making processes. This was against a background of staff vacancies in the Assessment Team and understaffing in the Investigations and Hearings team, which have now been addressed.
- 6.2 In 2017/18 we reported that the overall picture was of increasing efficiency and, in many respects, this remained the cases in 2018/19. However, the picture was more mixed, with improvements in some areas and reductions in performance in others.
- 6.3 We saw a substantial rise in receipt of external complaints, continuing the rising trend from 2017/18 (up by 18% following an increase of 19% in 2017/18). However, we also saw a significant reduction in internal complaints – down by 30%. The nature of our initial assessments of complaints also changed significantly with a far greater number being dismissed because they were assessed as not revealing a potential breach of the Handbook - only 36% of initial assessments required a full risk assessment in relation to an identified potential breach of the Handbook (compared to 50% in 2017/18 and 63% in 2015/16).
- 6.4 This ongoing rise in the proportion of complaints dismissed at the initial assessment stage is likely to be due to the improvements in our risk-based approach to regulation and assessing issues presented to us. We focus our resources on those issues that present the greatest risk to our regulatory objectives: the effect of this approach is that we no longer take forward minor breaches of the professional obligations. However, we retain the information and take it into account when assessing the risk presented by potential further breaches by the individual and also use it to inform the development of our risk outlook.
- 6.5 In 2018/19, the sources and subject matters of complaints we received or opened remained similar to the profiles seen in previous years.
- 6.6 Complaints from litigants in person again increased, which is a reflection of the increasing numbers of such litigants in the court system. As commented on in previous reports, such complaints usually arise from a lack of understanding of the adversarial nature of litigation and thereby the role played by barristers on the opposing side in presenting their client's case.
- 6.7 This lack of understanding by those involved in litigation, whether represented or not, is also reflected in the high number of complaints we continue to receive about barristers misleading the court or making false/unfounded statements. The overwhelming majority of these complaints (90%) were dismissed at the initial assessment stage. In most cases, this was because the barrister had not done anything other than present their

- client's case in line with their professional obligations.
- 6.8 We hope that the launch of our new website in October 2019, which contains more detailed information about the role of barristers, will promote greater understanding of what to expect in contentious litigation.
- 6.9 In relation to our performance, extremes also emerged, with the highest level of performance in relation to completion of initial assessments seen since the corporate KPI was introduced in 2013/14, but the lowest level of performance in relation to the completion of investigations of external complaints. Nevertheless, the corporate KPI was met for the third year running. This achievement was solely due to the high performance in relation to completing initial assessments for which the former PCD Assessment Team is to be commended.
- 6.10 The trend in disciplinary cases also continued to go down in 2018/19 – there were fewer cases referred to disciplinary action and fewer cases being heard by Disciplinary Tribunals. Indeed, at 27 hearings, this was the lowest number of Tribunal hearings in many years. To some extent this low number is due to longer investigation times, which means that it takes more time for cases to reach the Tribunal stage. The fact that the end to end time for concluding Disciplinary Tribunal cases has not increased substantially indicates that tribunal proceedings are being conducted relatively swiftly.
- 6.11 At the end of 2018/19 a relatively high number of cases were awaiting tribunal hearing (43) and therefore the prediction for 2019/20 is a substantial increase in the number of hearings.
- 6.12 It remains the case that the number of complaints/reports we handle, and the level of disciplinary action we take, as compared to the population of those called to the Bar, is extremely low. It is therefore dangerous to draw any firm conclusions from the statistics in this report, or previous ones, regarding trends in the general behaviour of members of the Bar.
- 6.13 In some cases, the levels of complaints reflect misunderstanding of the professional requirements, as indicated above. However, in others, they reflect systematic issues within the regulated community regarding reporting of concerns. An example of the latter is the very low number of reports in relation to harassment of any type including sexual harassment. The BSB's research regarding the level of women at the Bar who experience such behaviour shows that the level of unreported behaviour is very high. Our complaints statistics are therefore in no way indicative of the prevalence of such conduct in the profession.
- 6.14 We are committed to assisting the profession to stamp out such behaviour and our pilot waiver scheme, which allows barristers to seek support from other barristers without the reporting obligations being engaged, is an example of this. We have also listened to feedback from barristers on their experience of reporting harassment to us and are incorporating changes in our approach to reflect this feedback. A dedicated project on addressing reporting harassment at the Bar is

ongoing and we are working with stakeholders, such as the Bar Council, to ensure a joined up and supportive approach.

- 6.15 Another important issue for members of the Bar is their use of social media and the distinction between conduct in professional and non-professional life. The number of complaints we deal with about barristers' conduct on social media is small but increasing. Given the public nature of social media, the lines between non-professional and professional life are becoming more blurred. We will take action where we consider a barrister has breached their professional obligations by their use of social media regardless of whether this use is in their professional or non-professional life. 2018/19 saw us bringing proceedings against three barristers for their inappropriate use of social media and 2019/20 is likely to see this number increase.
- 6.16 However, overall, the outcomes of disciplinary action do not indicate any particular trends in conduct at the Bar. The number of cases where findings of professional conduct are made is low as compared to the size of the regulated community and there are no common themes in relation to them.
- 6.17 In our previous reports we have included action points for the next reporting year. However, such action points are not appropriate to include in this final report of the work of the PCD and PCC given that both the department and the committee have been disbanded under the new arrangements introduced on 15 October 2019. The main emphasis for 2019/20 across the regulatory decision-making functions will be to ensure the

new arrangements have bedded in and the enforcement system is operating effectively in line with those arrangements and the revised regulations.

Sara Jagger

Director of Legal and Enforcement

Aidan Christie QC

Former Chair of the Professional Conduct Committee (until October 2019)

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