

**BAR
STANDARDS
BOARD**

REGULATING BARRISTERS

Review of the Standard of Proof Applied in Professional Misconduct Proceedings

Consultation Paper

May 2017

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

About this consultation paper

Who is it for?

This consultation will be of interest to consumers of legal services, members of the Bar, and bodies and individuals involved in regulatory disciplinary systems.

What is its purpose?

The current standard of proof used in disciplinary proceedings for professional misconduct brought against those regulated by the BSB, including barristers, authorised bodies and, in some circumstances, their employees, is the criminal standard (satisfied “so as to be sure” or “beyond a reasonable doubt”). We are inviting views on whether we should amend our regulatory arrangements to allow the civil standard to be applied (“on the balance of probabilities” or “more likely than not”), in line with other professional regulators.

How long will the consultation run for?

The consultation will run from **2 May 2017 to 21 July 2017**.

How to respond to this consultation

Responses should be sent to Jake Armes, Projects and Operational Support Officer:

- by email to: JArmes@BarStandardsBoard.org.uk; or,
- by post to: **Jake Armes**
Professional Conduct Department
Bar Standards Board
289 – 293 High Holborn
London WC1V 7HZ

Responses can also be provided by telephone by prior arrangement. Please contact Jake Armes at the addresses above or on **0207 611 1444** to arrange a suitable time. You are welcome to address all or some of the issues set out in this paper and provide observations on issues not specifically covered by the questions.

We will summarise the responses received and will publish the summary document on our website. If you do not want your response or a summary of it published, please make this clear to us when you reply.

Background

The current regulatory position

1. Under the Legal Services Act 2007 (“the LSA”) the Bar Standards Board (BSB), the regulatory arm of the General Council of the Bar (“Bar Council”), is responsible for regulating barristers called to the Bar and other authorised individuals and bodies (entities) in the public interest.
2. One of the BSB’s functions is to investigate and respond to potential breaches of the BSB Handbook (the Handbook). The BSB’s Professional Conduct Committee (PCC) is empowered to carry out these functions under Part 5, Section A of the Handbook (the Complaints Regulations 2014)¹.
3. Under regulation E37 of the Complaints Regulations, following an investigation, the PCC may determine whether the conduct under investigation constituted a breach of the Handbook on the balance of probabilities. It may choose to deal with such a breach by way of administrative sanctions, discussed further below.
4. However, if the PCC considers that a potential breach is not appropriate for disposal by way of the imposition of an administrative sanction, it must refer the complaint to disciplinary action - provided that it is satisfied both that there is a reasonable prospect of a finding of professional misconduct being made and that it is in the public interest to make the referral. In determining whether there is a reasonable prospect of success, the PCC takes into account the standard of proof applied to determine whether professional misconduct has occurred ie we need to believe that we could prove the case beyond reasonable doubt. If the necessary conditions are met, the resulting disciplinary action can either be taken under the Determination by Consent procedure (the professional misconduct charges are determined by the PCC on the papers with the consent of the relevant person) or, more commonly, in front of a Disciplinary Tribunal.
5. The Bar’s independent Disciplinary Tribunals are organised and administered by the Bar Tribunals and Adjudication Service (BTAS). Regulation E143 of The Disciplinary Tribunals Regulations 2014 (Part 5, Section B of the BSB Handbook) provides that “*The Tribunal must apply the criminal standard of proof when*

¹ The Executive is also empowered to take some decisions under authorities granted in writing by the PCC: https://www.barstandardsboard.org.uk/media/1699756/150810_-_p09_-_authorisations_under_part_5_-_live_updated_september_2015_policy.pdf

deciding charges of professional misconduct and in deciding whether the disqualification condition has been established”.

6. The question for consideration in this consultation paper is whether or not the criminal standard of proof, which requires the Tribunal and the PCC to be satisfied so as to be sure that charges of professional misconduct have been proven, should be replaced by the civil standard of proof, which would require the Tribunal and the PCC to find the charges proven on the balance of probabilities.

The historical background

7. The use of the criminal standard of proof in relation to professional misconduct allegations was relatively common among comparable professions prior to 2008. However, the Shipman enquiry in 2008/9 encouraged the medical professions to consider whether the use of the criminal standard remained appropriate in the public interest and proposals were put forward by the Law Commission in 2012 to impose the civil standard via legislation. In the event, the proposed legislative provision was not introduced but, in any event, all the medical professions that had previously applied the criminal standard had moved to the civil standard by 2010.
8. Since the inception of the LSA, all other legal regulators have moved to the civil standard if they had not previously been applying it. The result is that the Bar Standards Board, and the Royal College of Veterinary Surgeons are now the only professional regulators in England and Wales applying the criminal standard when determining charges of professional misconduct.
9. The Solicitors Disciplinary Tribunal (SDT) also applies the criminal standard, however, it should be noted that the SDT is not deemed under the Legal Services Act to be an “approved regulator”. The approved regulator for solicitors is the Law Society and the Law Society has, under the LSA, delegated all responsibility for regulation of the solicitors’ profession to the Solicitors Regulation Authority (SRA). The SRA has moved to applying the civil standard to any issues of misconduct that it has jurisdiction to deal with and the application of this standard is enshrined in its regulatory arrangements². However, the SDT (constituted as a Statutory Tribunal under Section 46 of The Solicitors Act 1974) operates independently of the SRA and is not subject to the SRA’s regulatory arrangements. The SDT continues to apply the criminal standard when determining issues of professional misconduct and considers itself bound by case law to do so (see paragraphs 13 -20 below).

² SRA Disciplinary Procedure Rules 2011, Rule 7.7

10. The prevailing view amongst both the non-legal and legal professions is that the civil standard is the appropriate standard to apply in disciplinary proceedings³. This view is endorsed by the Legal Services Board (LSB) as the oversight regulator for the legal professions. The LSB issued a paper in March 2014 titled '*Regulatory sanctions and appeals processes; An assessment of the current arrangements*⁴' in which it recommended the application of the civil standard across all legal regulators. The recommendation was based on the "*strong public protection arguments*" as cited in a Law Commission consultation paper⁵ covering the standard of proof applied in the medical professions. However, in the LSB report, the LSB indicated the standard of proof applied by individual regulators remains a matter for each regulator to take forward and it recognised that achieving uniformity would take time and involve primary or secondary legislation or precedent-setting judicial decisions. These comments were taken as a reference to the position of the SDT and the relevant extant case law which is rehearsed at paragraphs 13 to 20 below.
11. The BSB considered in 2011 whether a move to the civil standard would be appropriate. A Working Group consisting primarily of members of the PCC was tasked with considering the relevant issues and presenting recommendations to the Board. In the event, the Working Group was divided as to what to recommend and left the issue open to the Board to consider. At that stage, the Board was of the view that the civil standard appeared to be more appropriate than the criminal standard but it was not prepared to make a unilateral move to change the standard of proof unless the SDT was also minded to do the same. There was also, at that stage, the prospect of potential cases being brought in front of the courts that might consider the issue of the relevant standard of proof to apply within the legal professions. In the event, no such cases have materialised in the last five years. However, the recent judgment in the case of *The Solicitors Regulation Authority v Solicitors Disciplinary Tribunal* [2016] EWHC 2862 (Admin) (which is referred to in the rest of this paper as the "Arslan judgment") has provided an indication of the direction of travel should the issue come to be determined by the courts (see paragraphs 17-19 below).
12. In light of the Arslan judgment, the Board of the BSB recently revisited the issue of the appropriate standard of proof to apply to professional misconduct proceedings. While the Board remained of the view that, in principle, the civil standard is probably more appropriate in the public interest, it felt that it could not take a decision without first seeking public views on the issue.

³ For an example of the civil standard being used by a non-medical regulator see the Financial Conduct Authority (FCA) or the Institute and Faculty of Actuaries (IFoA)

⁴ The full paper can be found at:

http://www.legalservicesboard.org.uk/projects/thematic_review/pdf/20140306_LSB_Assessment_Of_Current_Arrangements_For_Sanctions_And_Appeals.pdf

⁵ Law Commission, "*Regulation of Health Care Professionals / Regulation of Social Care Professionals in England*", (LCCP 202), Para 9.65, http://www.lawcom.gov.uk/wp-content/uploads/2015/03/cp202_regulation_of_healthcare_professionals_consultation.pdf

Relevant case law

13. There is a line of case authorities which address the issue of the standard of proof that should be applied to disciplinary proceedings against legal professionals for professional misconduct. This line exclusively arises from disciplinary cases involving solicitors. It should also be noted that the cases were decided prior to the introduction of the LSA. The leading cases are: *Re a Solicitor [1993] QB 69*; and *Campbell v Hamlet [2005] UKPC 19*.
14. In *Re a Solicitor [1993] QB 69*, the SDT had applied the civil standard of proof in the case of a solicitor who had been struck off in Australia because she had been found to have perjured herself in divorce proceedings. The Divisional Court held that this was wrong, but did not specifically hold that the criminal standard was applicable in all cases, limiting the judgment to cases where “*what is alleged is tantamount to a criminal offence*”⁶.
15. While *Re a Solicitor [1993] QB 69* directly concerned the standard of proof to be applied in relation to solicitors, the judgment also considered the Bar’s Code of Conduct and stated that “*It would be anomalous if the two branches of the profession were to apply different standards in their disciplinary proceedings*”⁷.
16. In *Campbell v Hamlet [2005] UKPC 19*, an appeal by a Trinidadian lawyer who had been accused of obtaining the purchase price of a property and then neither conveying the property nor returning the money to the purchaser, the Privy Council extended the position further and stated “*that the criminal standard of proof is the correct standard to be applied in all disciplinary proceedings concerning the legal profession, their Lordships entertain no doubt*”⁸.
17. More recently, the comments in the Arslan judgment suggested that the courts are of the view that there is a need to revisit the question of the standard of proof to be applied. However, the Arslan judgment did not directly address the issue of the standard of proof that Disciplinary Tribunals should apply to first instance cases of professional misconduct, as the case involved an appeal against a decision of the SRA. The main issue in the case in relation to the standard of proof was whether the SDT should apply the same standard of proof as used by the SRA when making the original decision, or whether it should apply the criminal standard in line with its normal practice. While the case did not address the fundamental issue of the appropriate standard of proof to apply to professional misconduct allegations, the judges made some, non-binding, comments about the issue.

⁶ Lord Lane CJ at page 81 of *Re a Solicitor [1993] QB 69*.

⁷ Lord Lane CJ at page 82 of *Re a Solicitor [1993] QB 69*.

⁸ Lord Lane CJ at paragraph 16 of *Campbell v Hamlet [2005] UKPC 19*.

18. Legatt J declined to give a concluded view in relation to the appropriate standard of proof to be applied but stated as follows:

"I [...] see considerable force in the point that the climate and approach to professional regulation and discipline have changed since Re a Solicitor was decided. Persuasive as [counsel's] submissions were, however, I would decline the invitation to express a concluded view on the question [of the standard of proof] in the present case. To do so would require us to decide whether a previous decision of this court and a decision of the Privy Council should not now be followed. Those authorities do seem to me ripe for reconsideration. But not in a case where the Tribunal was not undertaking a primary fact-finding role so that the question of what standard of proof is appropriate in that situation does not arise. In these circumstances, any views that we express on the point could only amount to obiter dicta and would have no binding force. As the former President of the Queen's Bench Division, Sir Anthony May, said when rejecting a previous attempt by [counsel] on behalf of the SRA to argue this point in a case where it did not affect the decision:

"The court is not in the business of conducting academic seminars, because decisions which develop the law need to do so in cases where the point at issue matters.""⁹

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

"I agree with the cogent analysis of this case in all its aspects. In that regard, I emphasise the observations of Leggatt J in relation to the standard of proof in these cases and underline the need for a re-evaluation of the approach to disciplinary measures intended to protect the public. Notwithstanding [counsel's] encouragement to do so, to go further than the confines of this case would not have been appropriate."¹⁰

20. In light of these judicial comments, the BSB considers that the time has come to take a firm decision either way as to the appropriate standard of proof to apply to professional misconduct proceedings. The Board intends to consider the way forward on this issue later in 2017 or in early 2018. In order to inform the Board's consideration, we want to seek wider views about the issue.

⁹ Legatt J at paragraph 49 of *The Solicitors Regulation Authority v Solicitors Disciplinary Tribunal* [2016] EWHC 2862 (Admin).

¹⁰ Sir Brian Leveson P at paragraph 73 of *The Solicitors Regulation Authority v Solicitors Disciplinary Tribunal* [2016] EWHC 2862 (Admin).

The Bar Standards Board's ability to change the standard of proof

21. The BSB, as an "Approved Regulator" under the Legal Services Act 2007, is able to change the standard of proof applied without primary or secondary legislation or a precedent-setting judicial decision. Our position is different to that of the SDT, in that the SDT is not subject to any specific written requirement to apply the criminal standard of proof and is therefore reliant on case law for its source of the authority as to the appropriate standard of proof to apply. In contrast, the Bar has always stipulated in its rules the standard of proof applicable to professional misconduct and is free to amend the relevant regulation (E143 of the Disciplinary Tribunal Regulation) as long as the LSB approves the change.

Issues

22. In seeking views on the issue of whether to change the standard of proof, the BSB considers that the matters outlined in the paragraphs below are relevant to the consideration of the issue.

The public interest

23. Under the LSA the BSB, as far as is reasonably practicable, is required to act in a way which is compatible with the regulatory objectives¹¹. The regulatory objectives include "protecting and promoting the public interest"¹². The received wisdom within the professional regulatory sphere is that the application of the civil standard is more appropriate for protecting the public than the application of the criminal standard. The BSB is not aware of any clear empirical studies to support this proposition. However, we recognise that it is not necessarily in the public interest for barristers to be able to avoid a disciplinary sanction when it is more likely than not that they are guilty of professional misconduct but a Tribunal cannot be "sure" of this. This position is likely to be perceived by the public as working in the interests of the profession and not in the interests of the public or consumers.

24. We are also conscious that the Law Commission reporting on the position in relation to the healthcare professions in 2012 was confident that the civil standard was the appropriate one to apply to protect the public. In the response to a 2012 consultation the Commission stated "*It is not acceptable that a registrant who is*

¹¹ See section 28 of the LSA.

¹² See section 1 of the LSA.

*more likely than not to be a danger to the public should be allowed to continue practising because a panel is not certain that he or she is a danger*¹³.

Current regulatory practice

25. Almost every other professional regulator, except for the veterinary surgeons, now applies the civil standard of proof to professional misconduct allegations. This suggests that the BSB is out of step with the large majority of the professional regulatory community. It also begs the question as to why barristers, and in some circumstances solicitors as discussed, should be accorded what might appear to be preferential treatment as compared to other professions practising in the England and Wales.
26. The historic position is, to a large extent, based on case law, but as Legatt J commented in the Arslan judgment “*the climate and approach to professional regulation and discipline have changed since Re a Solicitor was decided*”¹⁴.

Equality Impact Assessment

27. We have undertaken an initial equality screening of the impact of any change in the standard of proof. The screening did not identify any adverse impacts in relation to any of the protected groups under the Equality Act 2010. However, the issue of equality impacts will be revisited in light of the views expressed in the responses to this consultation.

Consultation questions

- Q1: Do you consider, in principle, that the BSB should change its regulatory arrangements to allow for the civil standard to be applied to allegations of professional misconduct?**
- Q2: If your answer to (1) above is “yes”, do you consider that the BSB should only change the standard of proof if and when the Solicitors Disciplinary Tribunal also does so?**
- Q3: Do you consider that a change in the standard of proof could create any adverse impacts for any of those with protected characteristics under the Equality Act?**

¹³ Law Commission, “*Regulation of Health Care Professionals; Regulation of Social Care Professionals in England Report*”, (LC 345), Para 9.61, http://www.lawcom.gov.uk/wp-content/uploads/2015/03/lc345_regulation_of_healthcare_professionals.pdf

¹⁴ Legatt J at paragraph 49 of *The Solicitors Regulation Authority v Solicitors Disciplinary Tribunal* [2016] EWHC 2862 (Admin).