

# BAR STANDARDS BOARD

REGULATING BARRISTERS

## Standard of Proof Consultation – BSB Response

### Introduction

1. In July 2017 the Bar Standards Board (BSB) closed its consultation on “The Review of the Standard of Proof applied in Professional Misconduct Proceedings” (the Consultation)<sup>1</sup>. This report summarises the responses received and sets out our views on the consultation responses as well as our decision on the central issue of whether the BSB should change the standard of proof from the criminal standard to the civil standard.
2. Under the Legal Services Act 2007 (“the LSA”) the BSB, the regulatory arm of the General Council of the Bar (the Bar Council), is responsible for regulating barristers called to the Bar and other authorised individuals and bodies (entities) in the public interest.
3. One of our functions is to investigate and consider potential breaches of the BSB Handbook (the Handbook). Where the breaches of the Handbook are serious and are considered to amount to professional misconduct, we refer the matters to disciplinary action normally in front of an independent Disciplinary Tribunal convened by the Bar Tribunals and Adjudication Service (BTAS). In determining whether allegations of professional misconduct are proved, the Disciplinary Tribunal is required, under regulation E143 of The Disciplinary Tribunals Regulations 2014 (Part 5, Section B of the BSB Handbook), to apply the criminal standard of proof ie the Tribunal must be satisfied beyond reasonable doubt that the charges are proved.
4. The purpose of the consultation was to seek views on whether we should change the standard of proof applied to professional misconduct allegations and move to using the civil standard of proof ie the Tribunal would need to find the charges proved on the balance of probabilities, that is, the facts supporting the charges are more likely than not to have occurred. Such a move would bring us in line with nearly all other professional regulators who apply the civil standard.

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<sup>1</sup> Bar Standards Board, Review of the Standard of Proof Applied in Professional Misconduct Proceedings, May 2017, [https://www.barstandardsboard.org.uk/media/1830289/sop\\_consultation\\_paper.pdf](https://www.barstandardsboard.org.uk/media/1830289/sop_consultation_paper.pdf)

5. The consultation ran for 12 weeks from 2 May 2017 to 21 July 2017 and posed three questions:
- 1) Do you consider, in principle, that the BSB should change its regulatory arrangements to allow for the civil standard to be applied to allegations of professional misconduct?
  - 2) If your answer to (1) above is “yes”, do you consider that the BSB should only change the standard of proof if and when the Solicitors Disciplinary Tribunal also does so?
  - 3) Do you consider that a change in the standard of proof could create any adverse impacts for any of those with protected characteristics under the Equality Act 2010?

## Responses to the consultation

6. The BSB received 101 responses to the consultation and we are very grateful to all those who took the time to provide their views on such an important issue.
7. Responses were received from the following:
- Individual members of the profession (80)
  - One chambers clerk
  - 2 Harcourt Buildings Chambers (a specialist criminal chambers)
  - The Bar Council – the Bar’s representative body
  - Inns of Court (3) – The Honourable Societies of the Inner Temple, Gray’s Inn and Middle Temple
  - A member of the judiciary
  - Academics (5)
  - Bar associations (2) – the Criminal Bar Association (CBA) and the Commercial Bar Association (COMBAR)
  - Legal Regulators (2) – the Cost Lawyers Standards Board (CLSB) and the Solicitors Regulatory Authority(SRA)
  - Other professional regulators (2) – the General Medical Council (GMC) and the Institute of Chartered Accountants in England and Wales (ICAEW)
  - The Legal Services Consumer Panel (LSCP)
  - The Campaign Against Antisemitism (CAA)
  - The Solicitors Disciplinary Tribunal (SDT)
8. Many responses from individual barristers (approximately 45%) came from those practising in the fields of criminal and family law.

9. The SDT expressly stated that it would not be providing a response to questions one and three and Middle Temple felt unable to speak on behalf of the whole Inn due to divergent views but said it had encouraged its members to submit individual responses.
10. Both the Bar Council and COMBAR indicated that their members were evenly split in relation to Question one. The Bar Council therefore included in its response the views for and against a change as well as the shared views expressed by both sides. COMBAR endorsed and adopted the views set out in the Bar Council response. Therefore, throughout this paper, the views of the Bar Council (and COMBAR) are set out according to whether they reflect the views of those who were for a change, those who were against or were shared views.
11. The CBA, which formally does not favour a change, also included in its response the minority view in favour of a change.
12. All other respondents expressed a clear view in relation to question one: some merely answered “yes” or “no” to the question while others provided detailed reasons for their answers. Most responses did not address questions two and three.

## **Question 1: Should the BSB change its regulatory arrangements to allow for the civil standard of proof to be applied to allegations of professional misconduct?**

### **Overview of responses**

13. Given the binary nature of question one, it was inevitable that most responses fell on one side or the other: those who were against changing the standard of proof and those that were for making a change. There were a handful of responses from individual barristers that indicated a middle road or hybrid option might be found by applying a different standard according to the seriousness of the breach of the Handbook: in most cases these responses referred to retaining the criminal standard for cases of dishonesty or where an allegation is akin to a criminal offence but applying the lower standard for other types of breaches.
14. The respondents that were against making a change came almost exclusively from the profession or those representing it. They consisted of: approximately 70 individual barristers; the chambers clerk; 2 Harcourt Buildings Chambers; the Bar Council and COMBAR (when expressing arguments against a change); and, Inner Temple. Two academics, who indicated they had qualified as barristers, also considered that we should not make the change. Most views were couched in robust terms with many saying that they were strongly opposed to any change.

15. The respondents who were for making a change came not only from the profession and its representatives but also from individuals and groups outside the profession. The number of individual barristers who were for a change was considerably fewer than those against, at around 12. The other responses favouring a change came from: The Bar Council and COMBAR (when expressing arguments in favour of a change); Gray's Inn; a member of the judiciary; two academics (one of whom is also a barrister); four regulators (the SRA, the CDSL; the GMC; the ICAEW); a consumer organisation (the LSCP); and, a campaigning group (the CAA).
16. There was a significant level of consistency and range in the arguments presented both for and against a change. They can be divided into five main areas:
  - i. Public interest, protection and confidence
  - ii. The impacts on the profession
  - iii. The legal position
  - iv. Regulatory best practice
  - v. Evidence base to support the change
17. Each of these areas are considered below with the arguments for and against a change presented separately followed by our response. Inevitably some views fall within more than one area. The response of the Bar Council has been particularly helpful in setting out the arguments as it provided views from both stand points: these covered and mirrored nearly all the views expressed by other respondents whether inside or outside the profession and therefore are quoted relatively extensively in this paper.

## **Public interest, protection and confidence**

18. The Bar Council, in expressing the shared views of its membership, made it clear that it considered it is of the utmost importance that the high standards of the Bar, for which it is renowned, are upheld robustly and effective safeguards are in place to prevent the small minority of barristers who pose a demonstrable risk to the public, and do not meet the high ethical standards of the Bar, from practising. This view was echoed by many other respondents regardless of whether they were for or against a change.

### ***Against changing the standard of proof***

19. Those against a change to the civil standard were generally of the view that the criminal standard provides sufficient and adequate safeguards to protect the public and maintain public confidence, particularly when combined with the avenues available within the civil system to obtain redress (eg via actions for negligence). Many responses referred to the lack of empirical evidence presented by us to

demonstrate that the public is not sufficiently protected by using the criminal standard or that its use is reducing public confidence (see also paragraphs 58 to 59 below).

20. Many of those against a change expressed strong concerns about the potential negative impacts on the behaviour of some sections of the Bar that could flow from a change as a direct consequence of the potential increased exposure to unfounded complaints. Views were expressed that these negative impacts would act against the effective administration of justice and the against the public interest and therefore represent a reason for maintaining the criminal standard. Such detriment could arise from barristers taking a more defensive, risk-averse and over-protective approach to dealing with both clients and opponents, particularly litigants in person. Further examples of such behavioural changes included: reduced compliance with the cab rank rule; reduced willingness to take on public access work; a reluctance to engage with clients or litigants in person; and, a reduction in those willing to enter publicly funded areas of practice (see also paragraphs 32 to 35 below). The Bar Council (when expressing arguments against a change), described these issues as a having a “chilling effect” on those already practising at the publicly funded Bar as well as those contemplating a career in such areas (see also paragraph 49 below).
21. Views were also expressed that lowering the standard could, again because of potential increased exposure to complaints, cause practitioners to take a different approach in court and thereby compromise their overriding duty to the court. Similar concerns were raised about those working under public access, potentially avoiding taking on “difficult” clients who may be more liable to complain.
22. The Bar Council’s comment on these issues (when expressing arguments against a change) reflected views expressed by other respondents:

*“None of these potential impacts serves the interests of justice or protects the public. These wider “public protection” implications need to be weighed against the proposition that a lower standard of proof will benefit clients and the public.”*
23. Concerns were also raised that a change to the civil standard would undermine the seriousness of professional misconduct proceedings and thereby reduce public confidence.
24. Some respondents expressed the view that the public interest varies from profession to profession based on the risk posed by practitioners. The argument appears to be that because barristers do not work in the same life and death environment as doctors, or others in some of the medical professions, the risk to the public posed by barristers is lower. Therefore, while the civil standard might be appropriate for doctors to protect the public, the Bar should be afforded the greater protection of the criminal standard.

## *For changing the standard of proof*

25. Those in favour of making a change to the civil standard referred to the overriding importance of public protection as the guiding principle of regulation and the view that the civil standard provided the best protection for the public. Most of those who favoured change expressed this view, in various forms, as an argument for moving to the civil standard. For example, the ICAEW said:

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

26. The LSCP uniquely raised the issue of ‘silent sufferers’ (consumers who had a complaint, but did nothing about it). They noted that *“the proportion of ‘silent sufferers’ increased from 35% in 2016 to 49% in 2017”*, highlighting the importance of increasing public confidence in professional regulation.

27. Amongst others, the LSCP, individual barristers and the Bar Council raised concerns about public perception. The Bar Council response (when expressing arguments in favour of a change, reflected these views in saying:

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

28. The Campaign Against Antisemitism commented:

*“We believe that the public should also be confident that barristers are more likely to be sound practitioners than otherwise, and to that end we agree with the Law Commission<sup>2</sup>. We believe that using the balance of probabilities gives barristers adequate protection whilst ensuring that misconduct proceedings are able to protect the public from unscrupulous practitioners.”*

29. Many of those who supported a change also referred, with varying degrees of concern, to their view that it was unjustifiable that a barrister could escape sanction

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<sup>2</sup>“It is not acceptable that a registrant who is more likely than not to be a danger to the public should be allowed to continue practising because a panel is not certain that he or she is a danger.” 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/wpcontent/uploads/2015/03/lc345\\_regulation\\_of\\_healthcare\\_professionals.pdf](http://www.lawcom.gov.uk/wpcontent/uploads/2015/03/lc345_regulation_of_healthcare_professionals.pdf)

where a tribunal was satisfied that it was more likely than not that misconduct had occurred. Indeed, the Bar Council response indicated that those barristers in support of a change were “*dismayed*” at such a prospect. Some responses (including Gray’s Inn, the GMC and the LSCP) specifically referred to, and endorsed, the Law Commission’s conclusion<sup>3</sup>, in 2012, that such a situation was not acceptable (in relation to medical practitioners).

30. Gray’s Inn also pointed to the regulatory objectives under which the BSB operates which include “protecting and promoting the public interest” and “protecting and promoting the interests of consumers”. It commented that:

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

31. In supporting a change to the civil standard, one member of the judiciary pointed out “*that the purpose of professional discipline is the protection of the public which, in this context, includes the proper functioning of the justice system in the public interest.*”
32. Some respondents in favour of the change noted the relative unfairness compared with other proceedings. This view is effectively summarised by one respondent who said:

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

33. Concerns were also raised that public perception of the use of the criminal standard could be viewed as “protectionism” and working in the profession’s interest rather than the interests of the wider public.
34. In general, the views expressed in favour of changing the standard indicated that the public interest should outweigh the interests of the profession and the potential impact on individual practitioners.

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<sup>3</sup> Law Commission, “*Regulation of Health Care Professionals; Regulation of Social Care Professionals in England Report*”, (LC 345), [http://www.lawcom.gov.uk/wp-content/uploads/2015/03/lc345\\_regulation\\_of\\_healthcare\\_professionals.pdf](http://www.lawcom.gov.uk/wp-content/uploads/2015/03/lc345_regulation_of_healthcare_professionals.pdf)

## ***BSB Response***

35. We fully endorse the view expressed by many that the standards of the profession must be upheld and that those who represent a risk to the public should be prevented from practising. It is clear that the divergence in views centres on whether the civil or criminal standard represents the best or sufficient protection for the public and consumers. In considering this issue, we have taken into account our statutory obligation to act in the public interest.
36. We acknowledge the concerns raised by many respondents against a change about the lack of empirical evidence to support the view that the public would be better protected by the civil standard (see also paragraphs 96 to 109 below). We also acknowledge that there is no clear evidence to demonstrate that the public are calling for a change or there is a lack confidence in the disciplinary system.
37. The empirical evidence that is being called for was also not available when other professions made the change: instead, they relied on the logical conclusion that the civil standard provides greater protection as indicated in the 2012 Law Commission report<sup>4</sup>. It is also of note that those who are against a change point to the potential for an increase in disciplinary action and findings: but this would seem to support the view that a change would provide better public protection. If it is accepted by all that a consequence of a change to the standard of proof is that more members of the profession may potentially be sanctioned for serious failures to abide by their professional obligations, it would be difficult for us to maintain that this is not in the public interest.
38. Overall, we take the view, as expressed by some in favour of change, that it is self-evident that the civil standard provides better public protection given that it allows for sanctions to be imposed where it is more likely than not there has been a serious breach of an individual's professional obligations. In principle, it seems difficult to argue against this without a clear justification for saying that the criminal standard provides better protection. We do not consider that such a clear justification exists.
39. The view that the criminal standard provides sufficient and adequate protection when combined with civil remedies available, appear not to take into account that the role of a professional regulator is not to resolve individual concerns but to uphold and maintain, in the public interest, the standards of the profession. Our view is that the ability to bring successful disciplinary action is crucial to doing this and stands apart from any avenues that might be available to an aggrieved person to obtain personal redress. Indeed, by removing the approved regulators' power to provide redress, the LSA drew a clear line between the function of regulation and redress mechanisms.

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<sup>4</sup> Law Commission, "Regulation of Health Care Professionals; Regulation of Social Care Professionals in England Report", (LC 345), [http://www.lawcom.gov.uk/wp-content/uploads/2015/03/lc345\\_regulation\\_of\\_healthcare\\_professionals.pdf](http://www.lawcom.gov.uk/wp-content/uploads/2015/03/lc345_regulation_of_healthcare_professionals.pdf)

40. It is difficult to assess whether the detrimental impacts put forward by many of those who were against a change will occur. They are a cause for concern which we have taken into account when considering the issues. Our view is that it would be almost impossible to carry out reliable research in this area prior to making a change as behavioural impacts are notoriously difficult to assess. However, given the checks and balances in the complaints and disciplinary system to “weed” out unfounded complaints (see paragraphs 46 to 49 and 58 to 63 below), it would be extremely disappointing if a profession that prides itself on its integrity and relies on its reputation, were to react to a change in the standard of proof by making such significant behavioural changes. Further, some of the anticipated behavioural changes presented by those against, a change amount to breaches of the BSB Handbook. Therefore, rather than acting to reduce potential exposure to disciplinary action flowing from a change to the standard of proof, we are of the view that they are more likely to increase that exposure.
41. This leads to the fundamental issue which goes to the heart of the public interest question: whether it is right for members of the Bar to avoid disciplinary sanctions where the evidence, on balance, proves that they are guilty of serious failures to meet the standards expected? It should be borne in mind that not all breaches of the BSB Handbook will result in disciplinary action. Some breaches may present such a low risk that we do not consider action to be necessary. Others may warrant the imposition of a non-disciplinary administrative sanction: decisions on which are already determined on the civil standard. It is only the most serious breaches that attract disciplinary action and therefore will be affected by a change in the standard of proof.
42. Any action we take in relation to serious breaches of the BSB Handbook needs to be put in the context of the wider regulatory and justice system. In relation to the latter, it is our view that the Bar is no different to those who are exposed to the potential devastating consequences of decisions taken in a range of civil proceedings in the courts. Such proceedings can cover behaviour that would amount to a criminal offence, regardless of whether the offence has previously been proved in the criminal courts. Clients of barristers, particularly those working at the family Bar, are exposed to devastating and life changing decisions taken on the civil standard. However, if their barrister is accused of serious breaches of their professional obligations, they are currently afforded the higher protection of the criminal standard. We do not think this is right. Further, we have taken into account the impact on the justice system of practitioners who pose a serious risk being able to continue to operate within the system when it is more likely than not they have committed serious breaches of the Code of Conduct.
43. In relation to the view that the public interest varies from profession to profession based on the risk posed by practitioners. There can be no doubt that different professions present different types of risk to the public but ranking the impact of

those risks to determine the appropriate standard of proof to apply is not, in our view, a reasonable approach and is unlikely to inspire public confidence. In theory, it would mean that those professions which pose a “lower” risk to the public would apply the (higher) criminal standard and the “higher” risk professions would use the (lower) civil standard. The reality is that other professional regulators apply the civil standard because they consider it is in the public interest to do so, not because they have made a subjective assessment of the risk which their profession poses to the public as compared with other professions. There are many professions which apply the civil standard where the activities of their members could be perceived as posing a lower risk than that which the Bar presents.

44. We are not convinced by the view that a change in the standard of proof would undermine the seriousness of disciplinary proceedings and therefore impact on public confidence. There is no evidence that other professions that have moved from the criminal to civil standard have suffered from a reduction in public confidence in their regulatory regimes. It would also seem illogical that members of the public who may experience their complaints more readily being “upheld” would have reduced confidence in the system: the logical conclusion is that the public reaction would be increased confidence.
45. In conclusion, we accept that there is no empirical evidence to support the proposition that the civil standard provides a better protection for the public and will increase public confidence. However, given the consensus outside the profession that it is self-evident that the public interest is better protected by the civil standard combined with the support within the profession for this view, we consider that it would be difficult to justify taking a different stance. While there are legitimate arguments against a change to the civil standard based on public interest, and these have been taken into account, they do not provide a strong, or necessarily logically coherent, basis to conclude that the public interest would best be served by retaining the criminal standard.

## **The impacts on the profession**

### ***Against changing the standard of proof***

46. Strong concerns were expressed by many of those who were against a change about the impact on individual practitioners and the way in which a change might affect their approach to their work. Some of these concerns are rehearsed above in relation to the public interest. The concerns centred on the unique position and vulnerability of those practising at the Bar in an adversarial system where the outcome can only be a winner and a loser and where barristers owe an overriding duty to the court. The views expressed indicated a wide spread view that this leaves barristers more exposed than other professions to unfounded complaints arising from clients’

dissatisfaction with the outcome of cases who may “*misconceive losing with incompetent advocacy*”.

47. Many responses pointed out that barristers, particularly family and criminal practitioners and those working in publicly aided areas, do not have the support of a solicitor in court or at conferences and they often deal with clients on their own. These circumstances, place barristers in a difficult position when trying to defend themselves against unfounded complaints where it may be one person’s word against another. Indeed, the CBA stated in its response that:

*“The main argument in favour of retaining the criminal standard, when other professions have moved away from it, [is] that barristers – and criminal barristers most acutely – are unusually vulnerable to groundless and malicious complaints”.*

48. The Bar Council’s response on these issues (when expressing arguments against a change) succinctly sums up the many views expressed in the responses about the vulnerability of barristers to unfounded complaints:

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

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

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

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

49. The view of many criminal and family practitioners who are against a change is that the criminal standard provides an important protection against unfounded complaints and a move to the civil standard would only encourage such complaints leaving barristers even more exposed and vulnerable to false claims. This in turn could, as the Bar Council put it (when expressing arguments against a change), which was echoed by others, have a “*chilling effect on interaction with clients and deter imaginative or innovative approaches to advocacy*” and “*may deter barristers from entering into these areas of practice*”.
50. The Bar Council was (when expressing arguments against a change), as were others, particularly concerned about the impact on barristers acting under public access instructions who are also vulnerable to complaints and feature disproportionately in the complaints received by the Legal Ombudsman (41% of complaints received by the Ombudsman in 2016/17). The view is that a change to the civil standard could act as an additional disincentive to barristers to undertake public access work. This would run contrary to the public interest given the stated aim of the Competition and Markets Authority and the Legal Services Board of increasing accessibility to legal services.
51. Many members of the profession, and the Bar Council (when expressing arguments against a change), raised concerns that the process of professional misconduct proceedings, as well as a finding of professional misconduct, has a disproportionate reputational impact on barristers due to the self-employed nature of the profession: a change in the standard of proof may exacerbate these impacts. Again, the Bar Council response summed up the views expressed on this issue:

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

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

52. Many barristers considered that it was wrong for a barrister's livelihood to be taken away based on a finding that they "*probably did something wrong*" and such action should only be taken where there is certainty that serious professional misconduct has occurred.

### ***For changing the standard of proof***

53. Most of the responses in a favour of change did not expressly refer to the issues set out above although one barrister commented that the barristers are not uniquely vulnerable to complaints. The Bar Council's response indicated that those in favour of a change do not see any strong justification for treating barristers differently from other professions (see also paragraphs 66 to 67).
54. Some respondents were of the view that the impact of a change may not be as great as might be feared. The Bar Council commented that those it spoke to who were in favour of a change were mostly of the view that changing or retaining the standard of proof would make little difference to the outcome in the vast majority of cases.
55. Many responses in favour of a change, put forward the view that it is not justifiable to dismiss a complaint where a tribunal considers it more likely than not that that barrister is guilty of professional misconduct.
56. Pre-empting some of the objections that might be put forward to a change, one barrister noted:

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

57. Another respondent noted: "*a lower standard of proof does not equate to a lower standard of scrutiny of the evidence*".

### ***BSB Response***

58. We recognise that there is serious, and perhaps understandable, concern that changing the standard of proof, could leave the Bar vulnerable to "unfounded", "groundless" or "malicious" complaints. However, it is a moot point whether the Bar is more vulnerable to unfounded complaints than other professions as there are no comparative studies in this area. Nevertheless, given that approximately 40% of

complaints made to us each year from external sources are dismissed without investigation, it is clear that a significant proportion of complaints about the conduct of barristers are unfounded. There can also be no doubt that many of the complaints which are dismissed arise from dissatisfaction with the outcome of a case and/or a lack of understanding of the barrister's role in an adversarial system.

59. In theory, an increase in unfounded complaints is a possibility and we have taken this into account. But in practice it would seem unlikely that the public will have the level of understanding of the complexity of the legal complaints systems for the standard of proof used within our disciplinary system to be a fundamental motivating factor in the initial decision to make a complaint. Nevertheless, it must be accepted that increased public confidence in our disciplinary system may encourage more complaints: if they are founded, we consider that it can only be in the public interest that they are taken forward to ensure standards at the Bar are maintained.
60. Given the checks and balances already present in the complaints systems operated by the Legal Ombudsman and us, if there is an increase in unfounded complaints, it is unlikely that they will progress through these systems to the point where the standard of proof becomes relevant and disciplinary proceedings are a potential reality.
61. In relation to client (as opposed to non-client) complaints from any area of the Bar, if a change to the standard of proof was made, it would still be the case that all such complaints must first be considered by the Legal Ombudsman: conduct complaints from clients cannot be made direct to us and must be referred by the Legal Ombudsman. These requirements are set out in the Complaints Regulations<sup>5</sup> and there is no intention to alter them. The standard of proof the BSB uses has no bearing on the way the Legal Ombudsman handles complaints or on its decisions to refer conduct matters to us. Indeed, while the Ombudsman does not expressly apply a standard of proof when considering complaints, the approach it takes is very similar to the application of the civil standard.
62. When referring issues of conduct to us, the test for doing so is whether the Legal Ombudsman considers the complaint "discloses any alleged misconduct".<sup>6</sup> Again, the standard of proof the BSB's applies is not relevant to this decision. The statistics show that a relatively low number of complaints made to the Ombudsman result in a conduct referral to us. In 2016, according to the Ombudsman's figures, only 30 conduct referrals were made by the Ombudsman (less than 6% of the total complaints about barristers received by the Legal Ombudsman). As there is no intention to alter the way in which client complaints are handled, it is difficult to see how a change to the standard of proof will impact on the number of unfounded client complaints we handle.

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<sup>5</sup> BSB Handbook, Part 5.A, The Complaints Regulations, rE13 – rE16

<sup>6</sup> Legal Ombudsman Scheme Rules, 5.59, <http://www.legalombudsman.org.uk/downloads/documents/publications/Scheme-Rules.pdf>

63. The position in relation to “non-client” complaints, including those from litigants in person, is different, because these are made direct to the BSB. However, all complaints, including those referred from the Legal Ombudsman, are subject to an initial assessment. The standard of proof is not relevant at this stage: the test for referral to a formal investigation is whether the complaint discloses a potential breach of the BSB Handbook. Over the last three years, on average, 40% of complaints were dismissed at this stage which included 80% of complaints from litigants in person. It is difficult to see how a change in the standard of proof would affect these statistics in any significant way.
64. The point in the system when the disciplinary standard of proof becomes relevant is following a formal investigation where there is evidence of a breach of the BSB Handbook and it is considered that the matter is so serious that it cannot be dealt with by way of an administrative sanction. Complaints are not referred to disciplinary action unless it is considered there is sufficient evidence to support the allegations (and the other regulatory tests are met). It is rarely the case that charges are based purely on one person’s word against another in the absence of supporting evidence. Further, the civil standard of proof is already applied when imposing administrative sanctions for less serious breaches.
65. We accept that a change to the standard of proof, may result in more matters being referred to disciplinary action and more disciplinary findings. However, it is highly unlikely that any increase will be significant in the context of the Bar: less than 0.7% of the practising Bar is subject to disciplinary action each year. It should also be borne in mind that referrals to disciplinary action are not only subject to a reasonable prospects test but must also be in the public interest. This brings us full circle back to the issue of public interest and whether it is right that barristers should escape disciplinary action where it is more likely than not that a serious breach of their professional obligations has occurred. Barristers who are acting in accordance with the standards expected of them as set out in the BSB Handbook, will not be affected by a change in the standard of proof: those who are not may be more exposed to the prospect of disciplinary action.
66. Given the nature of self-employed practice at the Bar, it goes without saying that a barrister’s reputation is fundamental to their ability to maintain and attract business. The view from those who are against a change is that disciplinary proceedings have a disproportionate reputational impact on barristers as compared to other professions. While it is accepted that the self-employed Bar is in a different position to other professions that operate in the main in an employed context, the Bar is by no means unique. Many dentists, pharmacists and GPs are self-employed and face very similar reputational issues, but all are subject to the civil standard of proof in disciplinary proceedings. The lack of third party witnesses to incidents and the inability to keep copious notes of conversations is also not unique to the Bar: GPs

and many other medical professionals rarely have third party witnesses to their interactions with patients or the time to take detailed notes of interactions.

67. We therefore do not see any clear or legitimate justification for barristers being treated differently from other professions nor do we consider the profession is uniquely vulnerable to unfounded complaints.
68. In conclusion, the fears of the Bar, particularly those practising in criminal and family law, about the impact of a change to the standard of proof on the profession, are important factors to weigh in the balance. However, we do not consider they are sufficient to undermine the public interest justifications for a change. It may be that there will be an increase in complaints. If those complaints are founded, then it must be in the public interest for us to act where it is more likely than not that a serious breach of a barrister's professional obligations has occurred. If a complaint is unfounded then, given the BSB's robust assessment and investigation procedures which are monitored by a range of assurance mechanisms, the profession can be confident that they will not face disciplinary action as a result of complaints that are not supported by evidence.

## The Legal Position

### *Against changing the standard of proof*

69. Most of those against changing the standard of proof did not refer to the relevant case law in their responses but the handful of individual barristers that did were clear that the law requires the criminal standard to applied in relation to allegations of professional misconduct against lawyers.
70. The Bar Council (when expressing arguments against a change) acknowledged that the case law is not a decisive factor and that the BSB may choose of its own volition to amend the standard of proof. It referred to the caselaw as set out in the consultation paper but also referred to the case of *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1 which was relatively recently before the Supreme Court of New Zealand. In that case the majority of the court ruled in favour of a change to the civil standard. However, as the Bar Council pointed out, the Chief Justice dissented on the basis that the higher standard of proof protects against errors in decision making and that fairness requires that where substantial penalties may be imposed the higher standard is applied.
71. A number of barristers referred to the non-binding judicial comments made on the standard of proof in *The Solicitors Regulatory Authority v Solicitors Disciplinary Tribunal* [2016] EWHC 2862 (*Admin*) which were referred to by us in the consultation paper as a factor in the decision to revisit the issue. The judicial comments indicated that the time is ripe for reconsideration of the line of authorities that stipulate the

criminal standard of proof should be applied in misconduct proceedings against lawyers. Those that referred to this issue (whether or not in favour of a change) considered it wrong to determine the issue based on the perception of judges' views and that non-binding judicial comments should not be used as an impetus for change. Some of those that referred to the case law were also of the view that nothing had changed since the last relevant case on the standard of proof was decided (2005).

72. Some responses referred to the nature of professional misconduct proceedings, stating that they are quasi-criminal in nature and therefore the criminal standard was appropriate. Respondents also referred to concern that barristers could be found guilty of conduct that was dishonest, or akin to a crime, on the civil standard and viewed this as inappropriate. Some also considered it wrong for a barrister acquitted of a crime to be exposed to the risk of misconduct proceedings for the same behaviour but on a lower standard of proof.

### ***For changing the standard of proof***

73. Very few of those in favour of a change to the civil standard mentioned the case law but a number were of the view that misconduct proceedings are civil in nature and therefore the civil standard should be applied. This view was also expressed by the Bar Council (when expressing arguments in favour of a change) who pointed out that, while disciplinary proceedings can lead to distress and severe outcomes, they are not brought to deliver punishment but to regulate the profession and so protect clients and the public.

74. Gray's Inn commented that using the civil standard in disciplinary proceedings is:

*“analogous to the position in civil proceedings where allegations of criminal conduct do not require the criminal standard of proof even though the allegations are of rape, assault, dishonesty or dealing in drugs...with no heightened threshold to account for the gravity of the allegations or consequences on the individual.”*

75. A member of the judiciary made the following point:

*“... that there is a rule in the civil law of evidence which states that the more serious an allegation the more cogent the evidence which will be required in order to prove that it is probably true.”*

76. The CLSB also commented that *“to apply a criminal law standard of proof where that alleged is not a criminal activity does not seem appropriate”*.

77. With regards to case law, the GMC referred to the case of *Bhatt v General Medical Council* [2011] EWHC 783 (Admin). This was an appeal against a decision to remove

a GP from the register. The case centred around the issue of whether it is appropriate to bring disciplinary proceedings against a professional following acquittal at a criminal trial. The case also reaffirmed that the principle of applying the civil standard of proof in medical regulation was correct.

### ***BSB Response***

78. We accept that the recent judicial comments on the standard of proof applied to lawyers do not provide a basis in themselves for changing the standard of proof or that they should be definitive of the way forward particularly as the relevant comments were obiter (non-binding). Nevertheless, it is important not to dismiss the indications given by two senior judges who clearly consider that the time is right to revisit the issue of whether the criminal standard is the right one to apply in disciplinary proceedings against solicitors and by extension to proceedings against the Bar.
79. As stated above, the Bar Council cited an additional case<sup>7</sup> that was not referred to in the consultation paper, as did the GMC<sup>8</sup>. Neither take the legal position further forward as the comments in the former supporting the criminal standard of proof for legal professionals were also not binding and the latter confirmed that the civil standard was the right standard to apply to disciplinary proceedings against doctors.
80. With regards to the ‘quasi-criminal’ nature of disciplinary proceedings, it is not uncommon for civil claims to be brought for matters that amount to criminal offences or indeed to be instigated where a criminal prosecution has previously failed. It is a moot point whether disciplinary proceedings are quasi criminal or civil in nature, but neither view is determinative of the appropriate standard to apply.
81. Nevertheless, in making a change to the civil standard, the BSB would continue to take a rigorous approach to the assessment of evidence. We already take the approach that the more serious an allegation the more cogent the evidence needs to be to prove the charge: a change to the civil standard will not impact on this.
82. With regards to the position that nothing has changed since the last relevant case on the standard of proof was decided, we are of the view that this is factually inaccurate. The LSA has intervened and, contrary to the line of the cases on the standard of proof, all other legal professions have moved to the civil standard including the solicitors’ profession in relation to misconduct matters dealt with by the SRA. We are operating in a very different regulatory climate to that which pertained over a decade ago as the recent judicial comments indicated.

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<sup>7</sup> *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1

<sup>8</sup> *Bhatt v General Medical Council* [2011] EWHC 783 (Admin)

83. In our view, the case law is of limited assistance in determining the way forward. The BSB is free to make a change to the standard of proof without reference to the case law. Further, we consider it is inappropriate, as a public interest regulator, to wait an unspecified amount of time for the appellate courts to consider the issue of the appropriate standard of proof to apply. Six years have already passed since we first reviewed the issue of the standard of proof and no progress via the courts has been made in that time.

## Current Regulatory Practice

### *Against changing the standard of proof*

84. In relation to the position of other professions, the Bar Council (when expressing arguments against a change) stated that in its response that “*The Bar cannot and should not be compared with other professions who offer different services, practise in very different ways and deal with different levels of risk*”. This was a sentiment that was echoed in a significant number of individual barristers’ responses.

85. The responses in this area repeatedly stated that barristers are not comparable to medical professionals due to the increased risk posed by medical professional failures. The response from 2 Harcourt Building’s summarises the views of many on this issue:

*“There is a distinction between the legal profession and the medical profession. Public protection is a key component of the medical profession. Direct physical harm can result from interventions or omissions by medical practitioners in a multitude of ways, not least as a result of medication errors, handling, wound management or surgery. Other forms of harm can also result, such emotional, psychiatric or financial. The same concerns do not arise on a regular basis in the legal profession. The risk of harm to the public is a good reason for the civil standard to apply in the medical profession, but it does not require the BSB to follow suit.”*

86. A number of barristers were of the view that while consistency with other professions may be desirable it should not be the determinative factor as not all regulatory contexts are alike. As the Bar Council put it “*what may be right for one jurisdiction or one profession will not necessarily be right for another.*”

87. Many others considered that the fact that other professions apply the civil standard, and the Bar is in the minority in applying the criminal standard, was not a reason of itself for change. As one barrister put it “*everyone else is doing it is not a good argument*” and another commented “*just because something is popular does not make it right*”. The Bar Council, in its general comments, recognised that adopting the civil standard would join with regulators and other jurisdictions but it “*was not*

*persuaded that we should adopt a change merely because others have done so*". Many barristers considered it was wrong to compare barristers to doctors who are generally salaried and have the protection of an employer.

### ***For changing the standard of proof***

88. The Bar Council in its response expressing the views in favour of a change, recognised that the wider regulatory landscape is now different and the current standard in Bar disciplinary tribunals has become out of step with the regulatory norm. It did not see any strong justification for treating the Bar differently from the medical profession and highlighted that both professions perform roles that are important to the public interest and where the protection of that interest is paramount.
89. A number of those in favour of a change commented that solicitors and barristers are out of line with other professions. Several pointed to the fact that the Judicial Conduct Investigation Office applies the civil standard when considering allegations of misconduct against judges. The SRA also referred to this in saying:

*"The civil standard is also used widely by other regulators including all the health professions regulators, Accountancy and Actuarial Discipline Board, General Institute of Public Finance and Accountancy, General Teaching Council for Scotland and the Royal Institution of Chartered Surveyors. Disciplinary matters around the conduct of judges are also dealt with using the civil standard of proof. Internationally, most states in America have adopted the Model Rules for Lawyer Disciplinary Enforcement, which use a civil standard of proof. Disciplinary cases by the Upper Canada Law Society and the Australian Health Practitioner Regulation Agency are determined to the civil standard. Only the Bar, solicitors and veterinary surgeons continue to use the criminal standard."*

90. The CLSB pointed out that it is an approved regulator under the LSA and applies the civil standard at all stages of its enforcement process. It also commented that making the change to the civil standard would bring the Bar in line with other regulated legal professionals. The Bar Council (when expressing arguments in favour a change) commented that there is no strong justification for treating the Bar differently and Gray's Inn questioned *"why [should] the standard of proof in professional misconduct proceedings against a barrister [...] be different than for a doctor or other professional facing identical proceedings? Allegations of dishonesty or sexual assault are equally fatal to the careers of all"*.
91. An academic and a barrister, commented that *"the Bar should not allow an individual to continue in practice only because of the operation of a higher standard of proof than that applied in other professions"*.

## ***BSB Response***

92. The BSB is clearly out of step with current regulatory practice and other regulators in applying the criminal standard. This is an issue of significant concern. However, we accept, as some respondents pointed out, the mere fact that most other regulators apply the civil standard of proof does not of itself make it appropriate for the Bar to do so. If we were of the view that a genuine and justifiable basis exists for the Bar to be treated differently, then we not shy away from the maintaining the current position.
93. However, there do not appear to be any legitimate, objectively justifiable, arguments for the Bar to be treated differently as a matter of principle. Ultimately, the question of current regulatory practice largely comes down to the same public interest and risk-based issues that have been rehearsed above, which are not repeated here. They are set out at paragraphs 18 to 45 above.
94. Our view is that the lower risks posed by the Bar as compared with some medical professionals, do not lead to a logical conclusion that the criminal standard is more appropriate for the Bar. This risk-based comparison loses force when many other professionals who are subject to the civil standard arguably pose less of a direct risk to the public than barristers. As stated above and endorsed by many who are supportive of a change to the civil standard, objectively there is no clear difference between the Bar and other professions that would justify a different standard of proof for professional conduct proceedings. Indeed, in terms of doctors, as the Bar Council pointed out, there are significant similarities given that both professions perform public interest roles where the protection of the public is paramount.
95. In conclusions, we consider that there is insufficient justification (such as clear differences between the Bar and other professions) to warrant taking a different approach to the standard of proof from almost all other professional regulators.

## **Evidence to support a change**

### ***Against changing the standard of proof***

96. A significant number of responses from those who are against a change, referred to the lack of empirical evidence presented by us to demonstrate a need for a change to the civil standard. Many commented that there is no evidence that the current system is not protecting the public or that there has been damage to the public confidence in the profession arising from the use of the criminal standard.
97. A number of barristers considered that no change should be made unless, and until, clear evidence is available to support such a move. The Bar Council (when expressing general views, rather than a view for or against a change in the standard of proof) again summed up the views in this area by saying:

*“There must be careful scrutiny of the evidence of a need for change within our own jurisdiction and within our profession, of the rationale for making any change, and of the benefits, disadvantages and ramifications of doing so. Before any change is brought about, there must be a careful study of medium-to-long-term impact on the profession and those it serves.”*

98. The Bar Council was also of the view that we must explain the evidence which demonstrates the need for a change and explain the rationale. It noted that our consultation paper was presented from a position of principle which they assumed is why no analysis was included. However, it considered that the principle cannot be divorced from the practicalities or risk and implications of such a change. Therefore, an assessment of the impact on the number of cases being prosecuted by us before Tribunals needs to be made. “*Common sense*” would indicate an increase in such cases if the standard is lowered and the cost implications for the profession should be assessed. It also considered we should conduct research into the number of additional cases that would be brought in front of a Tribunal if the standard of proof was changed, into whether a change would dilute the impact of disciplinary findings, and the safeguards that would be put in place “*to meet the increased risk of marginal or unmerited cases being pursued*”<sup>9</sup>.

### ***For changing the standard of proof***

99. Those that favoured a change in the standard, did not raise any specific issues regarding the evidence available to support the change. One barrister, who previously sat on Bar Disciplinary Tribunal panels, commented that she had direct experience of situations where serious charges were dismissed due to the application of the criminal standard. The Bar Council (when expressing views in favour of change) also referred to one member of the Bar they had consulted with who had sat on BTAS panels giving an example of one case where the application of a different standard would have made a difference to the outcome.
100. As stated at paragraphs 28 to 29 above, a number of responses referred to and endorsed the conclusions of the Law Commission in 2012<sup>i</sup> when recommending that the medical professions change to the civil standard of proof. The SRA also cited the views expressed in the Insurance Task Force Report of 2016 that the criminal standard of proof is disproportionate and may limit the deterrent messages sent out.

### ***BSB Response***

101. We have always accepted that we cannot present empirical evidence to support a change in the standard of proof. As stated above, reliable research into whether the attitudes and behaviour of complainants and the members of the profession would

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<sup>9</sup> This statement was made by the Bar Council generally, not just those in favour or against a change in the standard of proof.

alter with the change in the standard of proof would be hard to carry out. It would not necessarily provide any data that would impact on our decision.

102. We gathered evidence back in 2011 in relation to decisions of the Professional Conduct Committee. This indicated that a change to the standard of proof would make no difference to the number of decisions taken to refer cases to disciplinary action. That evidence is clearly out of date and it would be wrong for us to rely on it six years later. The question is then whether further empirical research would be of any significant benefit. Clearly some respondents consider it would, but we consider that it would not for the reasons set out in the paragraphs below. It is also needs to be considered that if the issue came before the courts, a decision on the appropriate standard would be taken without reference to any future research.
103. There is some proxy empirical evidence available in relation to decisions taken on complaints arising from criminal and family cases and from litigants in person. This is set out under Question 3 below as it was gathered in relation diversity issues in our complaints system. It provides useful data on the impact of complaints in these practice areas and, to some extent, addresses the issues of unfounded complaints. Also, the statistics referred to elsewhere in this paper provide a further proxy evidence base that assists with addressing some of the issues raised.
104. In terms of other empirical studies that have been suggested we are not convinced that any such research could be carried out that would provide meaningful data that would fundamentally impact on our decision. Any research into the number of additional cases that might be brought in front of a Tribunal would not necessarily take our consideration further forward. Indeed, it would cut both ways: if the results suggested that more cases would be referred because of the change this would only strengthen the justifications given by many respondents that there is a public interest in making the change. On the other hand, were the results to suggest that the number of referrals would remain static they might indicate superficially that there is no need for a change, but this would not address the public perception or confidence issues.
105. The same issues apply to assessing the potential increase in the number of complaints. Once again this is unlikely to produce evidence that would impact on our decision. If the evidence indicates they could go up substantially then this is an indication that the public has increased confidence in our handling of complaints and provides evidence to support a change in the public interest. If they do not, this is not a reason for us to decide it is wrong in principle to change the standard of proof. The issue here is the robustness of our systems to weed out unfounded complaints and the standard of proof is only indirectly relevant to this.
106. The potential increased costs to the Bar is also an area in which it has been suggested further research should be carried out before making a decision. However,

we do not consider such research would take us further forward in our decision. Costs alone should not be a determinative factor, particularly if increased disciplinary action based on founded complaints is a consequence of the change (see also paragraph 59 above).

107. It is also unclear how research into whether a change would dilute the impact of disciplinary findings could be conducted in any meaningful and/or reliable way that would impact our decision.
108. We accept that the issue surrounding the nature of the safeguards that would be put in place to meet the increased risk of marginal or unmerited cases is an issue that goes directly to the decision to change the standard of proof. However, it relates more to the robustness of our decision-making processes and the cogency of the evidence required to prove a breach. A change in the standard of proof would not affect our ongoing commitment to maintaining robust decision-making processes and making continuous improvements in light of experience.
109. In conclusion, we do not consider that any meaningful or reliable empirical research could be conducted that would impact fundamentally on the decision whether to change the standard of proof. This is perhaps why other regulators did not carry out such research before deciding to make a change. To a large extent the decision to change the standard of proof is a decision of principle which is not susceptible to any meaningful number crunching. It is of course possible to try to carry out research, but our view is that the time and resources required are disproportionate given the limited benefit, if any, that could be achieved.

## **Question 2: Should the BSB only change the standard of proof if and when the Solicitors Disciplinary Tribunal also does so?**

110. Relatively few of those who responded to the consultation addressed this question (approximately 40 out of the 101). We are grateful to the Solicitors Disciplinary Tribunal (SDT) for their response on this question and present it here as context for the rest of this section:

*“The Tribunal would not wish its decisions to delay or accelerate the Bar Standard Board’s proper reflections on their own rules. The Tribunal will itself, as part of the exercise of bringing forward its proposed new rules, be consulting on the appropriate standard of proof to apply.”*

111. A number of those who thought that we should not change to the civil standard answered the question stating that although the question did not require them to do so, they wanted to give a view. A few barristers who were in principle against the change were of the view that we should act independently without reference to what the SDT may or may not do. The majority (approximately 10 out of 14) of those who

thought any change should not be made unless the SDT also changes, were also respondents who were against changing the standard of proof.

112. The Bar Council, COMBAR, Inner Temple and 11 individual barristers thought that we should not change unless the SDT also does so. The Bar Council's response on this issue reads:

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

113. This view was echoed by all those who gave reasons. One respondent commented that:

*"...it would be intolerable and grossly unfair if a situation could arise where a complaint is made about the overall conduct of proceedings by a legal 'team' involving one or more of both barristers and solicitors with each being judged by different standards of proof."*

114. Those that thought that we should act independently were 11 barristers and Gray's Inn as well as: a member of the judiciary, three academics, the SRA, the GMC, ICAEW, the LSCP and the CAA. The reasons given were wide ranging including: that the Bar should make its own decision; what the SDT does is irrelevant; the BSB should not delay making the change if it is the right thing to do; waiting undermines the public confidence; and the SDT lacks the power to reform itself but the BSB is free to do so. The LSCP said:

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

## **BSB Response**

115. It is apparent the majority view of those who responded to this question, is that the we not wait for the SDT to make decision on this issue.
116. We have noted the concerns that it would be anomalous to have the two main legal professions applying different standards of proof and we accept that anomalies could

occur. However, we have also taken into account that the present system already contains such anomalies. This is particularly so in the context of Alternative Business Structures where barristers can already work alongside accountants, legal executives, and solicitors all of whom are subject to the civil standard (save at the SDT). Accordingly, while some anomalies would be created by a change, at least until the SDT changes its standard of proof, others would be eliminated.

117. In conclusion, there is clear support for our taking a decision on the standard of proof independently of the SDT. It is our view that, since it is right for the standard of proof to be changed, the change should not await the outcome of the SDT's deliberations. We believe we should take the lead on this issue. The SDT will be consulting on the matter later in the year and, in any event, has made it clear that it would not want its decision to delay or accelerate our reflections on our own rules.

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

118. The majority of respondents either did not address question three or indicated that they did not think there would be any adverse impacts from the change without giving reasons. A number also indicated that they did not know.
119. 18 responses were received that included comments on potential issues although several covered issues that impact on the Bar generally as opposed to those with protected characteristics. The majority of issues raised related to potential impacts on barristers as opposed to the public or consumers. There were concerns that lowering the standard might impact on barristers with mental health problems who may be less able to defend themselves.
120. The Bar Council provided a detailed response to this question, for which we are grateful, which focused on Black and Minority Ethnic (BAME) and women barristers who may be disproportionately impacted by a change. Three other respondents also referred to the potential impact on women and BAME barristers and their views were captured in the Bar Council response which said, in part:

*“We understand anecdotally that women are over-represented in the field of family law and BAME barristers are over-represented in publicly funded work. These areas are thought to be those most exposed to complaints...”*

*If female or BAME barristers, because of their work in this area, are more likely to appear before the Bar's Disciplinary tribunal, and because of a change in the standard of proof, more likely to be suspended or disbarred, then the impact on diversity at the Bar should be a concern. The impact would be twofold; first there would be the actual impact on numbers of women and BAME barristers practising at*

*the Bar and secondly, it may act as a disincentive to people with such protected characteristics being attracted to and retained at the Bar. Both would have the effect of making the Bar less reflective of the population it serves.*

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

121. As the Bar Council pointed out in its response, we do not currently hold accurate data on the areas of practice of those working at the Bar. The Bar Council is of the view that we should not decide on the standard of proof until this information is available and can be analysed to determine whether any groups are adversely impacted by a change in the standard of proof.
122. The LSCP gave the following response which focuses on the increased protection a change would give to vulnerable consumers:

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

123. The SRA and the CAA both said that there was no reason to think there would be adverse impacts if the standard is applied uniformly and consistently.

### ***BSB Response***

124. It is not yet possible for us to make an effective assessment of the areas of practice that generate most complaints which reach the Tribunal stage. Accurate data on practice areas will be available from April 2018 when a requirement to provide it will be introduced as part of the Authorisation to Practise process.
125. However, the most recent data available in relation to ethnicity and gender in the complaints system “*2012-14 Complaints at the Bar: An analysis of ethnicity and gender*”<sup>10</sup> provides some useful data which shows a different picture to that which might be assumed. The report analysed all complaints about conduct received during the period and concluded that BAME barristers are not over-represented in the

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<sup>10</sup> Bar Standards Board, 2012-14 Complaints at the Bar: An analysis of ethnicity and gender  
[https://www.barstandardsboard.org.uk/media/1736344/complaints\\_at\\_the\\_bar\\_-\\_an\\_analysis\\_of\\_ethnicity\\_and\\_gender\\_2012-2014.pdf](https://www.barstandardsboard.org.uk/media/1736344/complaints_at_the_bar_-_an_analysis_of_ethnicity_and_gender_2012-2014.pdf)

complaints system and male barristers are more likely to be subject to complaint than female barristers as well as more likely to be the subject of a referral to disciplinary action.

126. The report also considered the likelihood of complaints being dismissed without investigation and the likelihood of complaints being referred to disciplinary action according to the type of complainant. The categories of complainant included those involved in criminal and family cases as well as complaints from litigants in person.
127. A factor of “1” was used as the benchmark and the results showed the following:
- a. Family cases complaints – were 3.69 times more likely to be dismissed without investigation and 0.2 less likely to be referred to disciplinary action.
  - b. Criminal cases complaints – were 3.96 times more likely to be dismissed without investigation and 0.2 times less likely to be referred to disciplinary action.
  - c. Complaints from litigants in person – were 2.47 times more likely to be dismissed without investigation and 0.25 less likely to be referred to disciplinary action.
128. The report also looked at the likelihood of being subject to a complaint according to specific types of practice area which included crime and family. However, given that the data on practice area was incomplete and potentially inaccurate, the report indicated that the analysis should be treated with caution. Nevertheless, it indicated that family practitioners were 1.41 times more likely to be subject to complaints and those working under public access 1.12 times more likely. However, there was no significant statistical effect in relation to criminal practitioners or those practising in immigration.
129. While these statistics are now three-years-old, since that time no significant change in the source of complaints has been seen and there is no reason to believe that the position described above has changed substantially.
130. In conclusion, the BSB is committed to ensuring that the disciplinary system operates fairly. We do not have evidence that would indicate that a change in the standard of proof would have an impact on those with protected characteristics. Nevertheless, we are by no means complacent and will continue to monitor the system for any indications of unfair treatment. The collection of data from the profession on areas of practice will assist with this going forward. However, the central issue here is not the standard of proof applied but whether our enforcement processes are operating effectively to ensure that there are no disparities in treatment of any person whether complainant or barrister. As a number of the respondents from both inside and

outside the profession pointed out, if the standard is applied consistently there is no reason to believe that a change to the civil standard will impact disproportionately on any protected group.

## Overall conclusion

131. We recognise that there are strong views within the profession that a change to the standard of proof will have a considerable negative impact not only on the public interest but also on the profession. However, these views are not shared across the profession which is split as to the right direction for us to take. They are also not shared by those outside the profession who consider that a change is essential in the public interest and is needed to maintain public confidence.
132. In concluding on the way forward, we have taken account of our statutory obligations and are clear that our decision must be based on the public interest and not, to the extent that they diverge, the interests of the profession. That said, we have had regard to the views of the profession and particularly those working in publicly funded areas. We accept that it may be that there will be an increase in complaints and this increase might fall more on the publicly funded Bar. However, the available evidence indicates that while those working in publicly funded areas might be slightly more exposed to the likelihood of conduct complaints, those complaints are more likely to be dismissed at an early stage and less likely to be the subject of disciplinary proceedings. Further, it seems unlikely that fears about unfounded complaints will materialise but if they do, the robust checks and balances already in place will prevent them reaching the stage where the standard of proof is relevant.
133. The most important issue for us is that we continue to maintain and improve our enforcement decision making functions. This, above all, will protect the Bar from unwarranted disciplinary action. If we maintain robust assessment and enforcement procedures, there is no reason to believe that those who act appropriately and according to their professional obligations will be subject to ill-founded disciplinary action because of a change to the standard of proof.
134. We recognise that the lack of empirical evidence to support a change to the standard of proof is an issue and one about which many at the Bar have concerns. However, we are satisfied this does not undermine the principled argument that, in the regulatory sphere, the civil standard provides better public protection than the criminal standard. It is difficult to know what type of empirical research would be of objective and practical benefit, given that the issues are about perception and confidence and not numbers. Other professions, including the SRA, did not carry out such research prior to making a change.
135. We have therefore decided, based on our statutory obligations that it would be in the public interest to change the standard of proof applied to professional misconduct

charges from the criminal to the civil standard. We have fully considered and debated, the issues and concerns raised in the consultation responses by those who are against a change. However, we do not consider they provide a sufficiently strong basis or justification for the BSB, as public interest regulator, to retain the criminal standard. In deciding to make the change, we note that nearly all respondents are agreed that we take the decision irrespective of what the SDT decides to do on the issue. We will therefore move ahead with pursuing unilateral change.

## Timing of the change

136. Having taken the decision to change the standard of proof, we see no reason why the change should not be made as soon as reasonably practicable.
137. To effect the change, an amendment would need to be the Disciplinary Tribunal Regulations contained in Part 5 of the BSB Handbook. The amendment, and any consequential changes would need to be approved by the Legal Services Board. Further, guidance and training for relevant staff and the Professional Conduct Committee as well as BTAS panels would need to be provided prior to any change. Given that we are currently proposing other fundamental changes to the enforcement decision making processes which, subject to consultation and operational readiness, are intended to come into effect on 1 April 2019, it would seem reasonable that any change to the standard of proof is introduced at the same time. This will provide the necessary time to prepare for the change and allow the profession to adjust.
138. We have taken the preliminary view that the change in the standard of proof will apply to conduct on or after the date of the introduction of the change. We are of the view that this will ensure fairness and a reasonable transition period.

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<sup>i</sup> 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/wpcontent/uploads/2015/03/lc345\\_regulation\\_of\\_healthcare\\_professionals.pdf](http://www.lawcom.gov.uk/wpcontent/uploads/2015/03/lc345_regulation_of_healthcare_professionals.pdf)