

**BAR  
STANDARDS  
BOARD**

REGULATING BARRISTERS

## **Enforcement**

**Annual Report 2017/18**

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Professional Conduct Committee  
Professional Conduct Department

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## Executive Summary

This report provides an overview of the Bar Standards Board's (BSB) work in enforcing the professional obligations of barristers and entities authorised by the BSB as set out in the BSB Handbook ("the Handbook") during 2017-18. Its key findings are as follows:

- a. The number of complaints opened increased significantly: up by 29% as compared to 2016/17 (475 compared to 367). This is the highest number of new complaints opened in one year since 2013/14.
- b. Throughput of cases increased: up by 8.5%. We worked on 679 formal complaint cases during the year as compared to 626 in 2016/17. Also, we closed 475 cases in 2017/18 up from 429 in 2016/17.
- c. The number of reports of serious misconduct under the reporting requirements in the Handbook increased by 21% (133 as compared to 110): with the increase coming from a higher number of reports of misconduct by others. But 44% of all reports of serious misconduct were assessed as not requiring regulatory action, indicating that the Bar is still erring on the side of caution when making reports.
- d. Reports/complaints of sexual harassment increased from none in 2016/17, to eight in 2017/18. Of those eight, three were external complaints and five were reports of misconduct. All the external complaints were investigated and two have resulted in referrals to disciplinary action and one is awaiting consideration by the PCC. Only one of the reports has resulted in us deciding to start a formal investigation.
- e. Complaints from litigants in person, having remained static for a couple of years, increased by 64% up from 47 in 2016/17 to 77. Most of these complaints were closed at the preliminary assessment stage (90%), mainly because they did not reveal any breaches of the Handbook and stemmed from the complainants not fully understanding how the court system operates or the role of barristers.
- f. Complaints about misleading the court and rudeness and misbehaviour have increased significantly (up from 121 to 159 and 22 to 53 respectively). Most of these complaints were dismissed at the initial assessment stage with the common theme being the lack of public understanding of the role of the barrister in adversarial proceedings.
- g. The proportion of complaints referred to disciplinary action reduced, with 47 cases (10%) resulting in referrals to disciplinary action as compared to 62 (17%) in 2016/17 (taking into account adjustments for multiple cases against one barrister). This reflects the lower number of complaints received in 2016/17 and greater use of administrative sanctions.
- h. The number of Disciplinary Tribunal cases heard reduced from 56 last year to 39 in the reporting period with an uphold rate (one of more charges proved) of 86%.

- i. The number of barristers disbarred went down substantially from 20 last year to six this. However, this is more in line with the general trend (the 2016/17 figure was unusually high).
- j. The corporate KPI of 80% of cases completed within the service standards, was exceeded with a yearend outturn of 84.1%: the highest performance since the current KPIs were introduced in 2013/14.
- k. End-to-end times for progressing cases (which includes periods of adjournment) has once again improved. The average time to conclude cases of all types reduced from 2.8 months in 2016/17 to 1.8 months this year. This is a reduction of 60% since 2014/15 when it took on average 4.4 months. Further, the percentage of cases closed within three months improved from 50.4% in 2016/17 to 70.1% in 2017/18.
- l. However, the average time taken to conclude investigations of external complaints has continued to increase (now 8.5 months as compared to 7.8 in 2016/17 and 7.3 in 2015/16).
- m. The time taken to conclude Disciplinary Tribunal cases has also increased: up by 2.8 months from 15.1 months last year to 17.9 months this year. This is disappointing, and we do not know all the factors leading to this, but we believe that this increase reflects the increasing complexity of disciplinary cases and the level of challenges to the processes.
- n. The percentage of long-running cases (two years or over) has reduced by 50% from 34 last year to 16.

## Introduction and overview of our work

- 1.1 This annual report provides an overview of the Bar Standards Board's (BSB) work, in the year from 1 April 2017 to 31 March 2018, on enforcing the professional obligations of barristers and entities authorised by the BSB as set out in the BSB Handbook ("the Handbook").
- 1.2 The work of enforcing the terms of the Handbook is carried out by the Professional Conduct Department (PCD) and the Professional Conduct Committee (PCC). We consider all information received which may indicate a breach of the Handbook<sup>1</sup>. Where we are satisfied there is sufficient evidence of a potential breach, we will carry out a formal investigation and, if appropriate, take enforcement action.

## Contents of the report

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

- 1.4 In last year's report we referred to the unusually large number of complaints relating to one barrister (referred to as 'Barrister B') which had been present in the system for a number of years and had had an impact on our ability to accurately assess underlying trends. All remaining cases relating to this barrister were finally closed in 2016/17. Therefore, we can now provide a more accurate picture of underlying trends.
- 1.5 In addition to the information contained in this report, all the key supporting raw data is published on our website in an accompanying Statistical Report for 2017/18.
- 1.6 In relation to the categorisation of cases as "Other", we worked to improve our categorisation since last year's report to produce more accurate reporting. We have made good progress as will be seen in the decrease in the external complaints<sup>2</sup> included in this category (down from 75 last year to 15 in 2017/18). However, this inevitably has had an impact on other figures. Therefore, some apparent trends identified in this report may merely be due to more accurate categorisation.

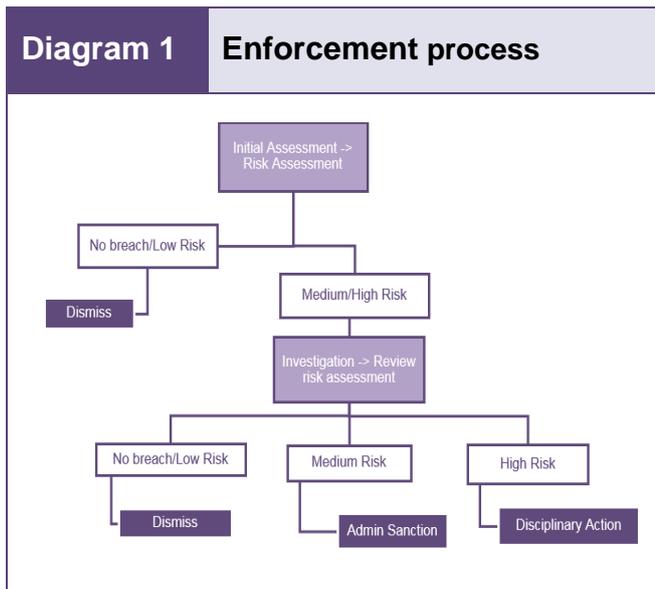
## Data sources

- 1.7 Our enforcement system is supported by a comprehensive Case Management System (CMS) in which all actions taken on information received are recorded. This allows us to track, monitor and assess the progress and outcomes of cases and provide the statistical information set out in this report.

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<sup>1</sup> Part 2 of the Handbook contains the Bar's Code of Conduct.

<sup>2</sup> We call **formal** complaints from external sources "external complaints" and information that we receive in any other way "pre-complaints" which may then be converted by the BSB into what we call "internal complaints".



1.8 Data was extracted in April 2018 covering data up to March 2018. It should be borne in mind that our data is dynamic, not static, and thus some information will have changed in the course of the year resulting in slight discrepancies between what was reported in the previous year's reports. Data changes may occur as a result of user clarification for better accurate recording, for example, the category of a case may be updated from 'Other' to 'Criminal' once the nature of the case becomes clear. Similarly, conversion rates for the current year will always differ to what is reported in the following year due to data changes. For instance, there will be a number of pre-complaints (information received that is not a formal complaint) opened in 2017/18 but neither converted to a complaint for investigation nor closed at the time this report is finalised (because they have been adjourned, for instance), but which will be converted in the future. For example,

there are now 41 converted pre-complaints from 2016/17 that had not been converted at the time of writing last year's annual report and thus were not counted in the figures for that report.

## Our approach to enforcement work

1.9 The BSB takes a risk-based approach to regulation which includes decisions on enforcement action. This means our resources are concentrated on those issues which present the greatest risks to the regulatory objectives.<sup>3</sup> Our Enforcement Strategy sets out our approach in more detail and all decisions are taken in accordance with this strategy.<sup>4</sup>

## Decision making structure

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

1.11 Diagram 1 shows in outline our enforcement process, more detail about which can be found in subsequent sections.

<sup>3</sup> The regulatory objectives are set out at section 1 of the Legal Services Act 2007.

<sup>4</sup> Our Enforcement Strategy is published on the BSB website: [https://www.barstandardsboard.org.uk/media/1710431/140106\\_-\\_enforcement\\_strategy\\_-\\_live\\_updated\\_october\\_2015\\_.pdf](https://www.barstandardsboard.org.uk/media/1710431/140106_-_enforcement_strategy_-_live_updated_october_2015_.pdf)

## Professional Conduct Department

- 1.12 The PCD consists of 27 staff divided into three teams.
- 1.13 The staff in the **Assessment Team** are responsible for the initial assessment of incoming information and complaints. They are authorised by the PCC to take decisions to refer cases for formal investigation or take no action on them. The team also provides advice and assistance to members of the public who make complaints via our telephone Information Line.
- 1.14 Formal investigations are carried out by staff in the **Investigations and Hearings Team**. Relevant staff in this team are authorised by the PCC, where appropriate, to impose administrative sanctions and, in some circumstances, refer cases to disciplinary action. Where disciplinary action is taken, it is this team that prepares and, with the support of our panel of prosecutors, presents cases to Disciplinary Tribunals.
- 1.15 **The Operational Support Team** provides essential departmental wide

support. This includes providing administrative support for the PCC as well as handling project work and assisting with maintaining relevant information systems. The Team also collates statistical data, provides management information and manages the finances of the department.

- 1.16 Finally, we have a full time Professional Support Lawyer whose role is to ensure that legal knowledge within the department remains up to date, an ongoing training programme is provided, lessons to learn are captured and continuous improvement monitored.

## Professional Conduct Committee

- 1.17 The PCC has the full range of powers to take decisions on enforcement action including imposing administrative sanctions, referring cases of professional misconduct to disciplinary action and, under the Determination by Consent procedure, adjudicating on charges of professional misconduct. The PCC also provides advice to the PCD staff where needed.

### Our aims and objectives

Our main aims are to:

- Act in the public interest;
- Protect the public and other consumers of legal services;
- Maintain the high standards of the Bar;
- Promote confidence in the complaints and disciplinary process; and
- Make sure that complaints about conduct are dealt with fairly, consistently and with reasonable speed.

Our objectives are to:

- Deal with complaints made against barristers promptly, thoroughly and fairly;
- Ensure appropriate action is taken against barristers who breach the BSB Handbook; and
- Be open, fair, transparent and accessible.

1.18 The PCC consists of 32 members; currently 15 lay and 17 barristers. It is divided into two teams and meets every three weeks to take decisions on complaints.

### **Disciplinary action**

1.19 Where the PCD or PCC decide there is sufficient evidence of a breach of the Handbook which is serious enough to amount to professional misconduct the matter will be referred to disciplinary action. Disciplinary action can either be taken under the Determination by Consent procedure (where charges are decided with the barrister's consent by the PCC) or by an independent Disciplinary Tribunal.

1.20 Disciplinary Tribunal panels are convened and administered by the Bar Tribunal and Adjudication Service (BTAS). The BSB's role is to bring charges of professional misconduct before the independent tribunal panels. In doing this, we are supported by a panel of practising barristers who assist us with the preparation of tribunal cases and represent us at hearings. The panel currently consists of 65 barristers who provide their services pro bono (i.e. without charge).

## Part 1: What we did

2.1 The BSB’s complaints procedure consists of four formal stages: initial assessment; investigation; decision on action; and disciplinary action. Prior to commencing the formal process, we also handle a large number of what we term “pre-complaints”. The paragraphs below outline the trends in information received, formal complaints registered, and the actions taken on cases during the year.

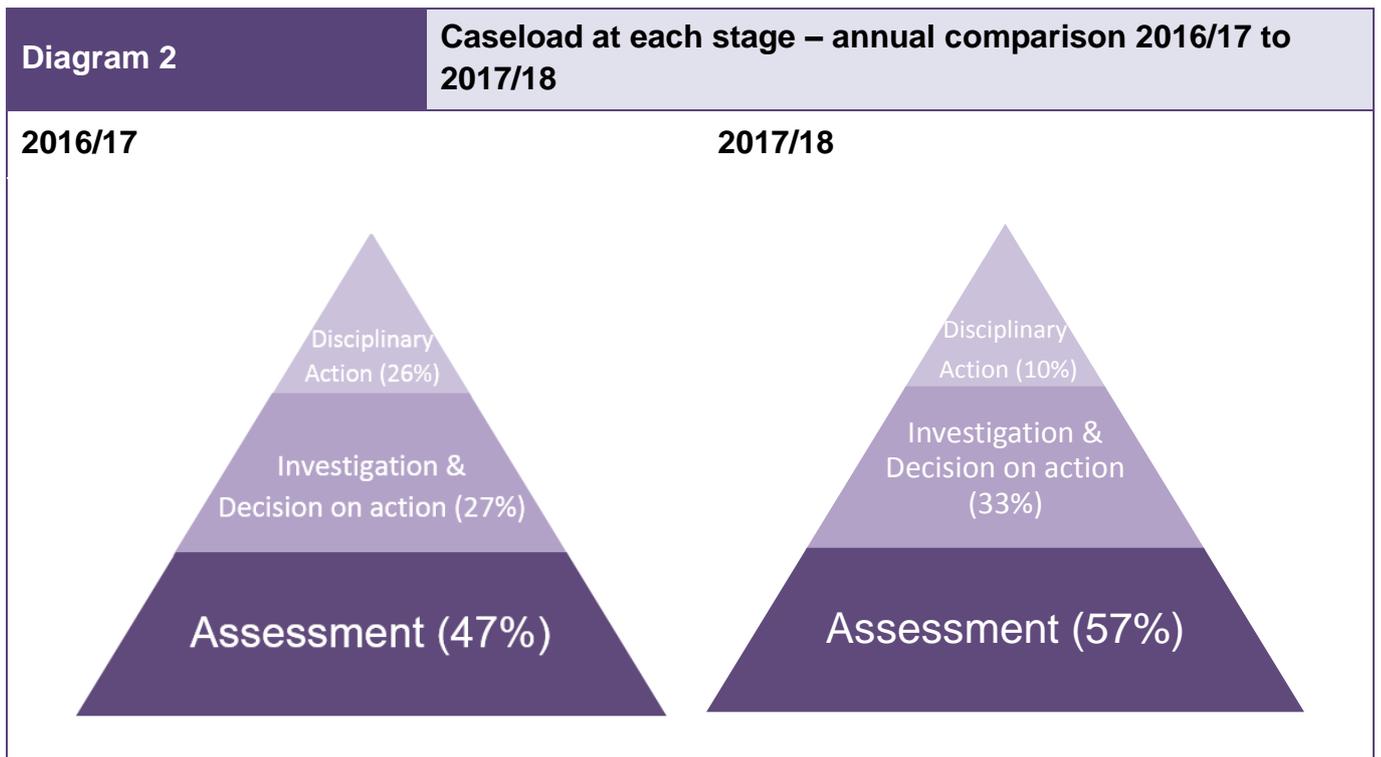
### Overall trends

2.2 After two years of year on year decreases in the number of new complaints opened, 2017/18 saw a significant increase in the total of new complaints: up by 29% as compared to 2016/17 and the highest number of new complaints opened in one year since 2013/14. More detailed analysis of this increase can be found at paragraphs 2.29-2.30.

2.3 Throughput of cases also increased by 8.5% from the previous year: in 2017/18 we worked on 679 formal complaint cases as compared to 626 in 2016/17. We closed 475 cases in 2017/18 as compared to 429 in 2016/17. Therefore, the number of cases open at the end of the year remained almost the same (197 in 2016/17 and 204 in 2017/18).

2.4 Overall, the picture is one of increased efficiency with more complaints received, more cases closed, targets, on the whole, being met and no significant backlogs arising in any area.

2.5 As diagram 2 shows, the number of cases at each stage of the process inevitably reduces as decisions are taken. However, there has also been a significant change in 2017/18 in relation to the proportion of complaints that result in formal disciplinary action. In 2017/18, only 10% of formal complaints resulted in disciplinary action which is a significant decrease as compared to 2016/17 when



the figure stood at 26%. However, these figures are affected both by the increased number of complaints in 2017/18 and by the impact of Barrister B's cases. Removing the latter brings the 2016/17 figure to 17%, that is 62 cases, as compared with 47 cases in 2017/18.

## Pre-complaints

2.6 Last year's enforcement report was the first time we included detailed information on 'pre-complaints' to provide a more comprehensive picture of the extent of our work. "Pre-complaint" is a term used to describe information received (other than formal complaints submitted by members of the public or others) which may indicate a breach of the Handbook has occurred. They fall into four broad categories:

- general enquiries received via our Information Line<sup>5</sup> or other means, which have resulted in a complaint form being sent to the enquirer or the matter being passed to the Legal Ombudsman;<sup>6</sup>
- reports of non-compliance with Handbook provisions from other sections of the organisation e.g.

failures to complete the authorisation to practise process as reported by the Bar Council's Records Team;

- reports from barristers in accordance with their reporting obligations e.g. reports of serious misconduct;
- information received from any other source (other than formal complaints) which may indicate a breach of the Handbook has occurred e.g. press reports.

2.7 All this incoming information is logged on our system as "pre-complaints". General enquiries may result in a completed complaint form being received and therefore the "pre-complaint" will be converted into a formal complaint and handled under our "external complaint" procedure (see paragraphs 2.41-2.61 below). Matters referred to the Legal Ombudsman will be closed. In all other cases, the information is subject to an initial assessment, including a risk-assessment, to determine whether regulatory action is required (see "Initial Assessment" section below for more information").

| <b>Table 1</b> |                       | <b>Pre-complaints – annual comparison 2015/16 to 2017/18</b> |                        |  |
|----------------|-----------------------|--|------------------------|--|
|                | <b>Pre-complaints</b> | <b>Pre-complaints converted</b>                              | <b>Conversion rate</b> |  |
| <b>2015/16</b> | 883                   | 205  | 23.2%                  |  |
| <b>2016/17</b> | 963                   | 232  | 24.1%                  |  |
| <b>2017/18</b> | 1024                  | 238  | 23.2%                  |  |

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

<sup>6</sup> Our regulations require that complaints from clients of barristers are first referred to the Legal Ombudsman.

- 2.8 In some cases, we may consider it appropriate to refer the issues of concern to a barrister's chambers or other bodies to address. In most cases, if there is evidence of a potential breach of the Handbook, and that breach represents a medium or high risk to the regulatory objectives, we will convert the pre-complaint to an internal complaint<sup>7</sup> and the matter will be referred for formal investigation.
- 2.9 In 2017/18, we logged 1,024 pre-complaints, an increase on the number logged in 2016/17 (963), and the highest level since we started keeping records of pre-complaints in 2014/15.<sup>8</sup> The rising trend shows the increasing number of enquiries the PCD handles which is not necessarily reflected in the number of formal complaints we deal with. There has also been an increase in general enquiries that do not lead to the logging of a pre-complaint.
- 2.10 The proportion of pre-complaints that we converted into formal complaints (23.2%, or 238 in 2017/18) has remained at roughly the same level over the last few years. Of these formal complaints, 22% arose from serious misconduct reports, which are discussed in more detail below.
- 2.11 In the paragraphs below, we set out in more detail the trends in relation to some areas of the "pre-complaints" we handle.

### **Serious misconduct reports**

- 2.12 Under the terms of the BSB Handbook, barristers are required to report their own serious misconduct (rC65.7) and also

serious misconduct by others (rC66). We have seen a year on year increase in such reports, although this seems to be led largely by an increase in reports of serious misconduct by others (rC66) rather than self-reports.

- 2.13 This year we received 133 serious misconduct reports as compared to 110 in 2016/17. Although the numbers are small, this represents a rise of 21% from last year and an increase of 38% as compared to 2015/16. It is therefore clear that barristers are taking seriously their duty to report serious misconduct.
- 2.14 Including reports outstanding from 2016/17, 66 (42%) were assessed during the year and converted into formal complaints. Self-reports for misconduct were converted into complaints at a higher rate (66%) than reports about others (27%), which is largely due to the fact that self-reports mostly related to convictions and practising certificate breaches, which are usually serious and objectively verifiable.
- 2.15 We have recognised that our current IT systems do not effectively support the identification of reports/complaints about sexual harassment and thereby affect reporting. We will be addressing this as part of our IT improvement programme. However, manual records have been kept since 2017, these indicate there has been a rise in the number of reports/complaints of sexual harassment. The numbers are extremely small but in 2016/17 we received no reports/complaints of sexual harassment but there were eight received in 2017/18

<sup>7</sup> Internal complaints are formal complaints raised by the Bar Standards Board of its own motion. We call **formal** complaints from external sources "external complaints" and information that we receive in any other way "pre-complaints" which may then be converted by the BSB into what we call "internal complaints"

<sup>8</sup> Prior to 2014/15, pre-complaints were logged in a different format than at present, so the data before that time is not comparable.

(of these, three were external complaints but five were reports of misconduct). All of the formal complaints were investigated and are either awaiting consideration by the PCC or have been referred to disciplinary action. However, of the five reports received, only one was investigated and the rest were not taken forward due to insufficient evidence of a breach.

### **Self-reports of serious misconduct**

- 2.16 In 2017/18 we received 57 self-reports of serious misconduct from barristers, a decrease compared to the 77 we received last year, but otherwise higher than other years. The drop is equally spread across all types of conduct reported and, given the very small numbers of reports as compared to the practising population, it is impossible to draw any firm conclusions from the decrease.
- 2.17 Almost a quarter of the self-reports (13) related to failure to obtain/renew a practising certificate, however this is still a decrease on the number submitted last year (21). Similarly, 11 of these related to criminal conviction matters compared to 16 last year. Others related to issues such as acting in excess of authority and client confidentiality.

### **Outcomes of the self-reports**

- 2.18 40 (66%) self-reports of serious misconduct received or remaining open in 2017/18, were converted to formal internal complaints as they revealed a potential breach of the Handbook. These primarily related to the matters mentioned above: six for criminal convictions for drink driving and 17 for failing to renew/obtain a practising certificate. Others covered a range of

matters including: four for failing to preserve client confidentiality, two for breach of confidentiality, two for rudeness/misbehaviour out of court and two for criminal convictions other than drink driving.

- 2.19 Of the 57 self-reports received in 2017/18, 23 were assessed as either not representing a breach or as being low risk and therefore closed with no further action taken. Seven of these were matters of more minor driving offences, four of which related to speeding. Others related to matters of conducting litigation/accepting instructions when not authorised to do so, inappropriate communication with client or others and inappropriate content on social media.

### **Reports of serious misconduct by others**

- 2.20 In 2017/18, we received 76 reports of serious misconduct by others, a significant increase from last year (33) and the highest since 2014/15: the first full year after the duty to report serious misconduct was incorporated into the Handbook. The types of conduct these reports related to, and which saw the biggest increase from the previous year included: inappropriate communications with client or others; dishonesty in professional or personal life; holding out as a barrister when not authorised to do so and making misleading/false/unfounded submissions or statements.

### **Outcomes of the reports**

- 2.21 26 (27%) reports of serious misconduct by others were converted in 2017/18 resulting in formal internal complaints being raised. This is an increase from last year, where only 15 reports were

converted to formal complaints. Nearly 40% of these related to matters of ethical behaviour: including four cases of dishonesty in professional or personal life (similar to last year) and three cases of rudeness/misbehaviour in court, compared to none last year. Nearly 20% of converted reports related to allegations of misleading or making unfounded statements. The remaining converted reports were evenly spread across other types of behaviour.

- 2.22 Of the 76 reports of serious misconduct by others, 35 were assessed as either not representing a breach or as being low risk and closed with no further action taken. Some aspects were less likely to be converted than others, possibly due to an incomplete understanding of the facts by the person reporting the misconduct. For example, of the eight reports that a barrister had inappropriately communicated with clients or others, none were converted into complaints. Of the seven reports of holding out as a barrister without authorisation, only one was converted. On the other hand, of the six reports relating to allegations of misleading or making unfounded statements, five were converted. Similarly, all three reports of rudeness/misbehaviour in court were converted into complaints.

### **General conclusions in relation to reporting of serious misconduct**

- 2.23 As commented on in last year's report, barristers are rightly erring on the side of caution when reporting issues of potential serious misconduct either by themselves or by others. This is to be welcomed as it is important that the BSB is alerted to all potential issues of serious

misconduct and is in a position to make an assessment as to whether regulatory action is necessary.

- 2.24 Once a report is made, the barrister's obligations under the Code are met and it becomes solely a matter for the BSB as to whether, and what, regulatory action is taken. For this reason, we keep reports confidential at the initial reporting stage and will only reveal relevant identities, if needed, in cases where we decide that consideration of regulatory action is necessary.
- 2.25 As the statistics show, overall, in 44% of cases we decided that no regulatory action was necessary. We will inform those who self-report of our decision on what action, if any, we have decided to take. However, our policy is not to inform those who make reports about others about the outcome of their report. This can cause frustration but is intended to mitigate the risk of the reporting system being misused or used to gain access to information on regulatory action that would not normally be available to third parties.

### **Fitness to Practise**

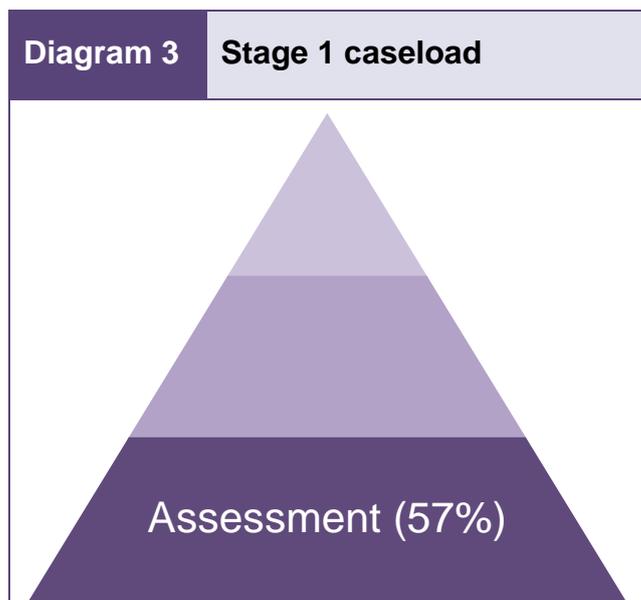
- 2.26 The BSB uses the term "Fitness to Practise" (FTP) to refer to our procedure for addressing health concerns that may impact temporarily on a barrister's ability to continue practising. The FTP procedure is not disciplinary, albeit that it may ultimately result in a barrister being subject to a suspension of their practising certificate. It is rare that the BSB receives reports related solely to fitness to practise issues that do not also involve conduct issues. Indeed, in 2017/18, we received no such reports (for further information on Fitness to

Practise issues – see paragraphs 2.112-2.114 below).

### Stage 1 – Initial Assessment of complaints

2.27 As mentioned above, at paragraph 2.1, the first stage of our process in deciding whether a concern that has been brought to our attention (either via a formal complaint or any other means), is to carry out an initial assessment to determine whether there is evidence of a potential breach of the Handbook that warrants formal investigation with a view to taking enforcement action.

2.28 The initial assessment carried out in relation to information that is submitted to us via formal complaints from external sources (“external complaints”) and information that we receive from any other source including reports (“pre-complaints” that may be converted into “internal complaints”) is very similar. The assessment involves a consideration of whether the available evidence reveals a potential breach of the Handbook. If so, a risk assessment is carried out to determine the level of risk to the regulatory objectives: low, medium or high. In most cases, a low level of risk will result in no action being taken but



medium and high-risk cases will be referred to formal investigation.

2.29 In 2017/18, we opened a total of 475 complaints, 171 internal and 304 external. This is a 29% increase from last year (367) and the highest number of complaints we have opened in one year since 2012/13 (491). However, the major increase is in relation to internal complaints, which are up by 53% as compared to 2016/17. As discussed below, a major reason for this increase is the rise in the number of barristers failing to obtain or renew their practising certificates.

2.30 External complaints received also increased but by a lesser figure of 19% from 2016/17. This included a significant

| <b>Table 2</b>          |                | <b>Complaints opened – annual comparison 2012/13 to 2017/18</b> |                |                |                |  |
|-------------------------|----------------|---|----------------|----------------|----------------|--|
| <b>Complaint Source</b> | <b>2013/14</b> | <b>2014/15</b>  | <b>2015/16</b> | <b>2016/17</b> | <b>2017/18</b> |  |
| External                | 300            | 297   | 300            | 255            | 304            |  |
| Internal                | 108            | 143   | 134            | 112            | 171            |  |
| <b>Total</b>            | <b>408</b>     | <b>440</b>  | <b>434</b>     | <b>367</b>     | <b>475</b>     |  |

rise of 64% in relation to complaints received from litigants in person (LiPs). The increased number of external complaints is consistent with levels seen in 2012/13-2015/16. This would suggest that the lower number of 2016/17 external complaints were an anomaly. Further, the figures for 2015/16 and 2014/15 (to a lesser extent) were themselves inflated by the increase in complaints regarding Barrister B. Accordingly, it would appear that the underlying trend in recent years in receipt/opening of complaints has been downwards, but this has now changed. Only time will tell whether the increase in 2017/18 will be a sustained trend.

#### **How do we assess risk?**

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

- *Firstly, a series of questions covering common areas of risk or possible risk to consumers of legal services and the public (such as whether the information relates to dishonesty on the part of the barrister). The answers are used to calculate a risk level;*
- *Secondly, a Case Officer will assess the case in context to determine whether the risk level calculated from the answers to the questionnaire is appropriate. If not, the risk level will be adjusted.*

2.31 More detailed consideration of the factors contributing to these figures is given below at paragraphs 2.41-2.61.

#### **Risk assessments (all cases)**

- 2.32 As previously indicated, if it is determined that the information received, either as an external complaint or a report, discloses a potential breach of the Handbook, then the matter is risk assessed.
- 2.33 The risk assessment is a tool used to assist us in determining whether and what the most proportionate form of regulatory action should be taking into account the outcomes set out in the Handbook and the regulatory objectives. The higher the assessment of risk at the initial assessment, the more likely it is that the case will be referred for investigation and potential enforcement action. A low risk level at the initial assessment stage will usually lead to no further action being taken or the matter, if appropriate, being referred elsewhere, such as to our Supervision Team, chambers or another body. A medium or high-risk level would normally result in a referral to formal investigation. Risk levels are reviewed at the end of any investigation, as well as at other points.
- 2.34 A total of 601 cases were subject to initial assessment in 2017/18. This includes pre-complaints that were received during 2016/17, but the initial assessment was carried out in 2017/18. This is a considerable increase from 2016/17, when 445 cases were subject to initial assessment, and reflects the increase in both pre-complaints and external complaints received. Given that nearly all of this assessment work was carried out within the agreed service

standards (see paragraph 3.7 below), it demonstrates increasing efficiency in case handling at the initial assessment stage.

2.35 Of the 601 assessments carried out, 300 did not require a risk assessment as no breach of the Handbook was revealed by the information/complaint, or the matter was over 12 months old and did not represent a risk to the regulatory objectives.

2.36 Of the 301 risk assessments carried out in 2017/18, 75 were assessed at the initial stage as being high risk and therefore referred to formal investigation. This equates to 25% of the total assessed complaints, compared with 29% (69 cases) in 2016/17. Many of these cases are still under investigation (35). Of the remaining 40: eight (20%) were dismissed after an investigation, six (15%) were subject to an administrative sanction following an investigation which indicated the original risk level was not as high as originally assessed; 20 (50%) were referred for disciplinary action, four (10%) were withdrawn or dismissed without investigation based on administrative discrepancies, and a further two were, at the end of the year, adjourned pending other action.

2.37 There was an increase in the number and proportion of cases that were assessed as medium risk, 98 (33%) compared to 66 (28%) last year. While 'low/no risk' cases remained at a similar proportion to the previous year, there was an increase in numbers (128 compared with 102).

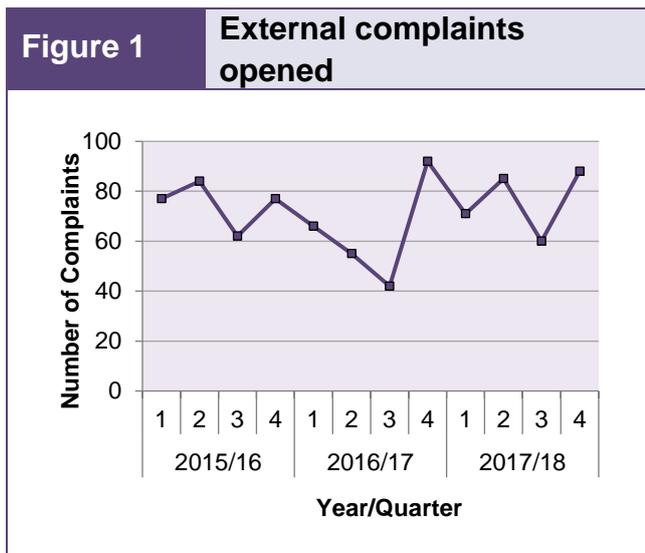
2.38 This change in risk profile suggests that the increase in internal complaints in 2017/18 was mostly from new medium

risk cases, along with a smaller number of low or no risk cases. This is in line with the observation above that the increase in internal cases largely related to practising requirement compliance cases, which are more likely to be treated as medium risk.

2.39 As will be seen (see paragraphs 2.76-2.79), taking a proportionate and risk-based approach to assessing complaints has led to an increase in administrative sanctions and less disciplinary action. This is also largely attributable to an increase in cases of non-compliance with practising requirements and other medium risk internal complaints.

2.40 In 2017/18, 37% of the risk assessments were subject to assessor adjustment (compared to 25% last year), the majority of which were reductions to a lower level following investigation. This demonstrates the dynamic nature of our risk-based system, which allows for appropriate adjustments to be made according to the circumstances presented and evidence obtained as a case is investigated. The BSB is currently developing and testing an improved risk assessment methodology, which will be introduced in 2019. This is designed to ensure a consistent approach to risk is taken in relation to decision making across the organisation.

|                     |             |           |
|---------------------|-------------|-----------|
| <b>Risk Profile</b> | High risk   | 25% [75]  |
|                     | Medium risk | 33% [98]  |
|                     | Low/no risk | 43% [128] |



### External Complaints

2.41 As noted above, we opened 304 external complaints in 2017/18, the highest in six years. Previously, since 2013/14, there had been a steady underlying trend of a year on year reduction in the receipt of external complaints (if the large number of complaints about Barrister B are removed). This trend appears to have reversed and early indications are that the increase in complaint numbers is continuing in to 2018/19. We have been unable to identify any specific reasons for this considerable increase in complaint numbers, although, as the

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

2.42 **Sources of external complaints:** the trends in relation to the various sources of external complaints remain similar to previous years with the main categories of complaints still arising from civil or family law cases. However, in 2017/18 we received 103 external complaints from civil law litigants, compared with 54 recorded in 2016/17. We received 61 complaints relating to family law, also an increase from last year (39).

2.43 This increase in complaints in relation to civil and family law could be a reflection of legal aid cuts. These are the area's most severely affected by the cuts and the areas that give rise to the greater numbers of complaints from litigants in person (LiPs).<sup>9</sup> However, this can only be a speculative assumption, as we do not have the detailed information to make a firm deduction.

2.44 There has also been an increase in complaints made by barristers<sup>10</sup> – 75 received compared to 18 last year. An increase in Employment Tribunal related complaints has also been seen, although

**Table 3** Complaints opened (excluding Barrister B) – annual comparison 2012/13 to 2017/18

| Complaint Source | 2013/14    | 2014/15    | 2015/16    | 2016/17    | 2017/18    |
|------------------|------------|------------|------------|------------|------------|
| External         | 291        | 282        | 261        | 253        | 304        |
| Internal         | 106        | 142        | 132        | 111        | 171        |
| <b>Total</b>     | <b>397</b> | <b>424</b> | <b>393</b> | <b>364</b> | <b>475</b> |

<sup>9</sup> A "litigant in person" is someone who represents themselves in court without a solicitor or barrister.

<sup>10</sup> These complaints do not include reports of serious misconduct which are raised as internal complaint

the numbers involved are still small (14 compared to last year's four complaints).

- 2.45 *Litigants in person* - we also record whether complaints are received from litigants in person. We saw a significant increase in complaints from litigants in person in 2011/12 (up from single figures to 80). Over subsequent years, the numbers gradually reduced but still remained significantly higher than the numbers seen before 2011/12, with 47 being received in 2016/17. We commented then that the reduction may have been an indication that the justice system and barristers were becoming more used to, and better able to deal with, the increased presence of litigants in person in the system. However, in 2017/18, the numbers were back up and we received 77 complaints from litigants in person (a quarter of all external complaints).
- 2.46 Most of these complaints related to concerns about barristers making misleading/false statements or otherwise misleading the court. Further, most complaints submitted by litigants in person were closed at the preliminary assessment stage (90%), mainly because many of the concerns did not reveal any breaches of the professional obligations and stemmed from the complainants not fully understanding how the court system operates, or the role of barristers. This information has been fed into the BSB's overall assessment of risks to the regulatory objectives and we will be considering how we can work with other stakeholders

to promote better public understanding of the legal system and our regulatory role.

- 2.47 *Legal Ombudsman referrals*: in contrast, the number of referrals received from the Legal Ombudsman this year was the lowest in the last seven years; with only eight referrals down from 14 last year, but well below the 60 referrals received the year before. The figure of 60 included referrals relating to Barrister B's non-compliance and so we would have expected to see some drop over the last two years in any event. Most of the complaints we open following a Legal Ombudsman referral relate to failures to co-operate with the Legal Ombudsman and therefore the fall in numbers is welcome and reflects well on the Bar. On the other hand, the BSB made 55 formal referrals to the Ombudsman in relation to complaints that were submitted to us but should have been directed to the Ombudsman because complaints by a client about the service received from their own barrister should generally be made to the Legal Ombudsman and not to the BSB.
- 2.48 Referrals to the Legal Ombudsman have fluctuated over the years (68 in 2016/17 and 51 in 2015/16). Nevertheless, the numbers indicate that we may need, in conjunction with the Ombudsman, to do more to raise public awareness of the channels for making complaints.
- 2.49 *Criminal proceedings*: complaints relating to criminal proceedings<sup>11</sup> continue to decline with 19 being received this year as compared to 21 in 2016/17 and 39 in 2015/16. Experience over the eight years the Legal Ombudsman has been in

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<sup>11</sup> This category includes complaints made by defendants and also those from other non-legal professionals involved in criminal proceedings, such as witnesses or family members.

existence, indicates that the large majority of client concerns relate to service issues, and not issues of professional conduct. Most of the complaints we did receive from defendants in criminal cases related to the prosecuting barrister allegedly misleading the court or making misleading statements. As with litigants in person, nearly all these complaints were closed at the initial assessment stage as they did not reveal any breaches of the professional obligations, and again stemmed from a lack of understanding of the role of the prosecutor.

**2.50 Subject matter of external complaints:**

Table 4 shows the most common categories of breaches of the Handbook about which external complaints are made. These categories cover nearly 90% of complaints received. The figures show that there have been some

changes in the subject matter of external complaints in the last year.

2.51 While not all allegations are assessed as revealing potential breaches of the Handbook or result in enforcement action, these data still provide some indication of the nature of the most common public concerns.

2.52 *Allegations about misleading:* allegations about all forms of misleading (the court, persons or statements/submissions) continue to be the largest subject matter category and complaints about these issues increased from 121 in 2016/17 to 159 in 2017/18. The increase comes in the main from a significant spike in complaints about barristers making misleading or false/unfounded statements or submissions: these went up by 80% from 55 to 99. However, 86 (85%) of these complaints were dismissed on initial assessment. This

| <b>Table 4</b>  |            | <b>External complaint statistics in 2017/18</b> |   |                  |            |   |     |                            |     |   |     |                                |     |                                    |     |                      |    |
|---|------------|---|---|------------------|------------|---|-----|----------------------------|-----|---|-----|--------------------------------|-----|------------------------------------|-----|----------------------|----|
| Total complaints received   | 304        | Referrals from the Legal Ombudsman              | 8 |                  |            |   |     |                            |     |   |     |                                |     |                                    |     |                      |    |
| <b>Complaint aspects (of top 90% of complaints)</b>   |            |   |   |                  |            |   |     |                            |     |   |     |                                |     |                                    |     |                      |    |
| <table border="1"> <caption>Complaint Aspects Data</caption> <thead> <tr> <th>Complaint Aspect</th> <th>Percentage</th> </tr> </thead> <tbody> <tr> <td>Making misleading/false/unfounded submissions or statements</td> <td>37%</td> </tr> <tr> <td>Other misleading the court</td> <td>18%</td> </tr> <tr> <td>Inappropriate communications with clients or others</td> <td>17%</td> </tr> <tr> <td>Rudeness/misbehaviour in court</td> <td>10%</td> </tr> <tr> <td>Rudeness/misbehaviour out of court</td> <td>10%</td> </tr> <tr> <td>Conspiracy/collusion</td> <td>8%</td> </tr> </tbody> </table> |            |   |   | Complaint Aspect | Percentage | Making misleading/false/unfounded submissions or statements | 37% | Other misleading the court | 18% | Inappropriate communications with clients or others | 17% | Rudeness/misbehaviour in court | 10% | Rudeness/misbehaviour out of court | 10% | Conspiracy/collusion | 8% |
| Complaint Aspect  | Percentage |   |   |                  |            |   |     |                            |     |   |     |                                |     |                                    |     |                      |    |
| Making misleading/false/unfounded submissions or statements   | 37%        |   |   |                  |            |   |     |                            |     |   |     |                                |     |                                    |     |                      |    |
| Other misleading the court  | 18%        |   |   |                  |            |   |     |                            |     |   |     |                                |     |                                    |     |                      |    |
| Inappropriate communications with clients or others   | 17%        |   |   |                  |            |   |     |                            |     |   |     |                                |     |                                    |     |                      |    |
| Rudeness/misbehaviour in court  | 10%        |   |   |                  |            |   |     |                            |     |   |     |                                |     |                                    |     |                      |    |
| Rudeness/misbehaviour out of court  | 10%        |   |   |                  |            |   |     |                            |     |   |     |                                |     |                                    |     |                      |    |
| Conspiracy/collusion  | 8%         |   |   |                  |            |   |     |                            |     |   |     |                                |     |                                    |     |                      |    |

includes 31 (35%) that were made by litigants in person and were closed without any action being taken. This is an increase in such complaints being made by litigants in person (11 in 2015/16 and 14 in 2016/17).

2.53 The specific subject matter of these complaints differs quite widely. Examples include an allegation of a prosecutor referring to previous criminal convictions that did not allegedly exist and an alleged reference in court to previous “without prejudice” communications. However, closer analysis of these complaints indicates that most of the complaints related to concerns about the submissions, either in court or in documentation, made by barristers on the other side on their client’s behalf. As is the case generally with complaints made by litigants in person and criminal defendants, the concerns stem from lack of understanding of a barrister’s role in adversarial proceedings.

2.54 This is entirely understandable given that the adversarial system requires opposing

cases to be presented for determination by a judge. This can be perceived as the opposing side presenting lies, inaccuracies and misleading statements.

2.55 *Rudeness and misbehaviour*: there has also been a significant increase in allegations of rudeness/misbehaviour in and out of court, with 53 such complaints opened in 2017/18, a considerable rise from the previous year (22). Examples include: defence counsel being allegedly unnecessarily aggressive in cross-examination; a barrister allegedly verbally abusing another by using foul language and being aggressive outside court; and opposing counsel being allegedly rude and mocking towards their opponent.

2.56 Again, a closer analysis reveals that many of these complaints were made in the context of contentious family court proceedings, and they often overlapped with allegations of misleading, discussed above. Most of the complainants in this category were unhappy with statements

| <b>Table 5</b>   |                | <b>Aspects opened for internal complaints – annual comparison 2016/17 to 2017/18</b> |                |          |  |
|--|----------------|--|----------------|----------|--|
| <b>Aspect</b>  | <b>2016/17</b> | <b>%</b>   | <b>2017/18</b> | <b>%</b> |  |
| Failing to renew practising certificate                            | 28             | 25%  | 43             | 25%      |  |
| Failure to obtain practising certificate                           | 26             | 23%  | 30             | 18%      |  |
| Dishonesty in professional or personal life                        | 6              | 5%   | 10             | 6%       |  |
| Other failing to comply with authorisation to practise regulations | 2              | 2%   | 9              | 5%       |  |
| Performing reserved legal activities when not authorised to do so  | 8              | 7%   | 9              | 5%       |  |
| Disciplinary finding by another body                               | 3              | 3%   | 8              | 5%       |  |
| Making misleading/false/unfounded submissions or statements        | 3              | 3%   | 7              | 4%       |  |
| Failing to preserve client confidentiality                         | 2              | 2%   | 6              | 4%       |  |

or allegations about them that were put forward in submissions by their former partner's barrister, or they felt that they have been pressured into accepting an outcome they did not want by the barrister. Again, it is understandable that complainants perceive that barristers on the other side are "personally" responsible for making submissions that appear to the complainants to amount to accusations that they are lying or directly criticise their case, in strong terms, as being without merit.

- 2.57 The majority of the complaints in this category (45 - 85%) were dismissed on initial assessment including all 14 complaints made by litigants in person. The upwards trend in these types of complaint is a potential matter of concern: it indicates that the public may increasingly be finding the inherently combative nature of the adversarial system is not one they necessarily relate to or fully understand.
- 2.58 Allegations of inappropriate communications with clients or others have also risen from 12 in 2015/16 to 45 in 2017/18. 34 of these were closed

without investigation. Of the ten such complaints raised by litigants in person, nine were closed without investigation and one is currently proceeding to a tribunal hearing.

- 2.59 While there were no significant decreases seen in any subject matters, there were several other subject matters which saw a significant rise since last year. For example, conspiracy/collusion complaints increased from two to 23 in 2017/18, all of which were dismissed. Ten of these complaints were from litigants in person, seven of which were raised by a single complainant.
- 2.60 Similarly, complaints of an inappropriate use of position as a barrister increased from eight to 19 (14 of which have been dismissed), and harassment and victimisation complaints rose from six to 11 in 2017/18, eight of which have been dismissed. Seven of the harassment and victimisation complaints were from members of the public (including three litigants in person), two were from pupil barristers and two were from an employed barrister.

### Case study

*We received a complaint from a Litigant in Person. There were four strands to the complaint. The first was that the barrister was rude to the complainant. Assessment did not disclose a potential breach of the Handbook. The second aspect that the barrister misled the court was based upon the barrister putting his client's case with which the complainant disagreed. There was no potential breach in this. Thirdly, the aspect of conducting litigation was dismissed because this was based solely upon the barrister appearing in court, which is not litigation for the purposes of our consideration. Finally, a complaint about the court bundle not containing all documents was also dismissed as this had been done by the solicitors and there was nothing to show that the barrister had any role in putting the bundle together. Whilst this final complaint was mainly dismissed because it was older than 12 months and not in the public interest to investigate, we also had to consider if there was any potential breach to consider the public interest. Without any potential breach the matter was dismissed.*

2.61 Discrimination complaints rose from six to 18, but all of these were dismissed because there was insufficient evidence to support the allegations. Seven of these complaints were raised by two barristers about their treatment in chambers. Ten were from members of the public, relating to the conduct of the barrister on the other side in litigation.

### **Internal Complaints**

2.62 The significant increase seen in external complaints was also seen in the number of internal complaints we have logged in the past year. In 2017/18 we opened 171 internal complaints compared to 112 in 2016/17, bringing internal complaints to the levels last seen in 2012/13.

2.63 **Subject matter of internal complaints:** The general increase in the number of internal complaints is evenly spread throughout the complaint categories. Of the 171 internal complaints, 56% related to non-compliance with practising requirements, a similar proportion to 2016/17.

2.64 The majority of these practising requirement cases related to failures to renew or obtain a practising certificate, which increased from 54 complaints in 2016/17 to 73. Almost a third of these relate to those completing pupillage failing to get a practising certificate within a month of qualification. As a result, we have now reviewed the communications that accompany the grant of a Full Qualification Certificate to pupils to make it clear that this certificate is only valid for one month and that the barrister will need to apply for a full practising certificate before expiry.

### **Outcome of complaints at the initial assessment stage**

2.65 In 2017/18, a total of 272<sup>12</sup> of all complaints were dismissed at the initial assessment stage, as opposed to being formally investigated. This equates to 57% of all decisions taken on complaints, which is a considerable increase from 2016/17, when 47% were closed at the initial assessment stage.

2.66 As stated above, the primary reason for closing complaints at this early stage is due to insufficient or no evidence of a potential breach of the Handbook. Indeed, 192 complaints were dismissed at the initial assessment stage due to the lack of any evidence of a potential breach. This indicates that a substantial proportion of the concerns raised with us are not about professional conduct, and that the public do not necessarily understand our regulatory role, or the role barristers play in presenting cases in court. Again, as indicated above in relation to other issues, this indicates a need to raise awareness of how both the regulation and the legal system operate.

2.67 Decisions at the initial assessment stage are normally taken by staff under delegated authority and it is rare that cases are referred to the PCC for decision. In 2017/18, 96% of initial assessment decisions were taken by staff, which is in line with the proportion from previous years. This demonstrates two of the key themes arising from this annual report: first, an overall increase in the number of pre-complaints and complaints; and, secondly, an overall lower risk profile than previously. An

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<sup>12</sup> This includes 262 external and 10 internal complaints. The latter covered internal complaints that were raised but later withdrawn for various reasons.

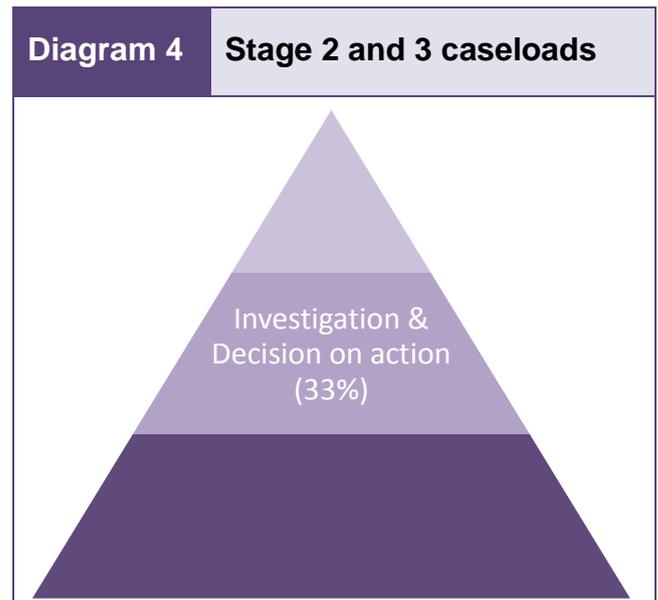
expected outcome of these two factors, given the BSB’s risk-based and proportionate approach to regulation, would be an increase in staff decisions – namely early closure of cases and the imposition of administrative sanctions (see paragraphs 2.76-2.78 below).

### Entities

2.68 The BSB started authorising and regulating entities in April 2015. As at end of June 2018, 102 entities had been authorised by the BSB, with 93 currently in operation. No complaints have been received about any of these entities.

### Stage 2 and 3 – Investigation and decision

- 2.69 Following a referral to formal investigation, the distinction between external and internal complaints becomes less relevant as the same investigation process is followed for all complaints.
- 2.70 In 2017/18, 199 new cases were referred to formal investigation and added to the number of cases outstanding from 2016/17, so the overall number of live investigations in 2017/18 was 226.
- 2.71 At the end of an investigation, the case is reviewed, and a decision taken as to what action, if any, should be taken. In some cases, the investigation shows that no breach of the Handbook has occurred or there is insufficient evidence of a breach and the case will be dismissed. In others, where the breach is supported by the evidence, the risk may nevertheless be considered too low to warrant regulatory action. In the remaining cases a decision will be taken as to whether the risk (seriousness of the conduct) is one that warrants the imposition of an



administrative sanction or referral to disciplinary action. Such decisions can either be taken by staff under delegated authority or will be taken by the PCC at a meeting.

- 2.72 Administrative sanctions (warnings and fines) are not disciplinary in nature. They are imposed where there is evidence of a breach of the Handbook on the balance of probabilities and the breach is not sufficiently serious to amount to professional misconduct.
- 2.73 In 2017/18 a total of 155 cases were closed at the investigation stage which is a significant increase, up by 40% from the 111 closed at this stage in 2016/17. In the main this has been for similar reasons to those which have led to an increase in dismissals prior to investigation: i.e. an increase in case numbers and a decrease in the risk profile. This is explored further below.
- 2.74 **Dismissals:** almost half of the closures (74) at the investigation stage were dismissed. This represents 16% of the total closures during the year. This is similar to last year where 69 were

dismissed at this stage. Of the dismissals, 49 were dismissed by staff, 24 by the PCC and one by an experienced member of the PCC. In 61 cases (39% of all closed investigations) this was because assessment of the evidence obtained meant that there was either no evidence or insufficient evidence to establish that a breach occurred. Of the remaining dismissals, five were dismissed but with formal advice being given about causes of concern falling short of a breach. Three related to successful appeals against administrative sanction (see paragraph 2.100). The remaining cases were dismissed in circumstances where, although there was evidence of a breach of the Handbook, it was not in the public interest to take regulatory action.

- 2.75 Additionally, eight cases were withdrawn where further enquiries revealed that the complaint had been opened in error.
- 2.76 **Administrative sanctions:** In 2017/18, 77 cases were the subject of administrative sanctions (16% of all cases closed), 66 of which were warnings. This is the same as the number seen two years ago in 2015/16 (77) but is a 97% increase on the

number recorded in 2016/17 (39) and potentially contributes to the lower number of tribunal cases in 2017/18 (see paragraphs 2.79-2.81 below). However, five of these sanctions were appealed and four were overturned, leaving a final number of 73 cases in which an administrative sanction was imposed.

- 2.77 Similar to last year, the majority of these administrative sanctions were imposed for breaches of the practising requirements regulations, 27 of which were a result of pupils failing to comply with the practising requirements. This latter issue also arose in 2015/16 when there was a spike in complaints about pupils practising without practising certificates. Steps were taken then to provide clearer information for pupils and we had thought this had been effective given that there were no such complaints in 2016/17. However, the rise again this year was worrying. We have made adaptations to our communications with pupil barristers and we hope this will lead to improved compliance. We will be closely monitoring the position.
- 2.78 The overall upward trend in the use of administrative sanctions is reflective of our risk-based and proportionate approach to enforcement decisions,

| Table 6  |     | Complaint outcomes 2017/18 |  |
|--|-----|----------------------------|--|
| Outcome  | #   | %                          |  |
| Closed without investigation                       | 272 | 59%                        |  |
| Closed after investigation (No enforcement action) | 82  | 18%                        |  |
| Administrative sanction                            | 73  | 16%                        |  |
| Referred to disciplinary action                    | 37  | 8%                         |  |

which reserves disciplinary action for only those cases that present a high risk to the regulatory objectives.

- 2.79 **Referrals to disciplinary action:** a total of 37 new cases were referred to some form of disciplinary action in 2017/18: 24 to a Disciplinary Tribunal and 13 to the Determination by Consent (DBC) procedure – see page 27 below. Excluding the barrister subject to multiple disciplinary proceedings, the adjusted figures show that 67 cases were referred to disciplinary action in 2015/16, 54 in 2016/17 and 37 in 2017/18. Prior to 2015/16, referrals stood at about 65 per year. Therefore, the number of referrals to disciplinary action is at its lowest for many years.
- 2.80 This decreasing trend can be attributed, in part, to the greater use of administrative sanctions as a more proportionate response. It is also a reflection of the lower number of cases opened in 2016/17. Many referrals to disciplinary action will be made in the year after the case is received given the time taken to complete investigations (see paragraphs 3.21 below). It remains to be seen whether this decrease is

reflective of an ongoing trend or whether, with the increase in complaints received as explained above, we will see the number of disciplinary cases rise again during 2018/19.

- 2.81 Whilst the number referred to a disciplinary tribunal has decreased by nearly a half since last year (46 to 24), the number of cases progressed through the DBC procedure has increased from eight to 13.
- 2.82 **Decisions post investigation:** the number of staff decisions post-investigation continues to follow the year on year increase identified in last year's report – this year staff decisions comprised 76% of all post-investigation decisions as compared to 69% in 2016/17 and 58% in 2015/16. This reflects our risk-based approach as well as the BSB's revised governance principles that emphasise the need for decisions to be taken at the lowest appropriate level, particularly where cases do not require proceedings for professional misconduct. It should be noted that our policy is that only the PCC can refer an external complaint for disciplinary action, which also impacts

### Case study

*We received a complaint from a party to family proceedings about her ex-husband's barrister. The barrister had tweeted a photo of some case files as an illustration of the amount of work he needed to do one evening. In the photo, it was possible to make out the names of the parties. The initial assessment concluded that the complaint revealed a potential medium-risk breach of the Handbook, breach of confidentiality, and the matter was referred to formal investigation. The barrister responded stating that he had not been conscious at the time what the photo showed, he had removed the tweet the next morning when the issue was brought to his attention and he recognised the misjudgement on his part. We were satisfied that a breach of the Handbook had occurred. However, given the one-off nature of the tweet, the insight shown by the barrister and the remedial action taken, we considered that the imposition of an administrative warning was a proportionate and appropriate response to the breach.*

upon the number of decisions staff can take. The PCC decision-making powers therefore continue to be reserved, rightly, for the most serious and high-risk cases as well as those which benefit from both lay and barrister input. Indeed, 81% of the decisions to refer to disciplinary action were taken by the PCC, with only 19% taken by staff.

### Requests for Review

- 2.83 Under the Complaints Regulations, where there is new evidence, or some other good reason, the PCC or staff (under delegated authority) can reopen a complaint and reconsider it. In most cases, this arises where a complaint has been dismissed at the initial assessment stage and only rarely following an investigation.
- 2.84 In 2017/18, we received 51 requests for review, two of which were reopened following a decision to dismiss. Although the number of such requests is a substantial increase from 2016/17 (41), the percentage of total complaints received which such requests for review constitute remains the same at 17%. This increase (as predicted in last year's report) is due to the decision to register

disagreements with a decision as 'request for review' even though an explicit request may not have been made. This compares to the previous more stringent interpretation taken whereby an explicit request had to be made for a review to be triggered and recorded.

- 2.85 The number of original decisions which were overturned has significantly decreased from 8 in 2016/17 to 2. This is in line with the typical range seen in previous years, excluding last year's spike. We speculated in 2016/17 that the spike was due to high staff turnover and vacancies and the return to previous levels supports this view. In the two cases that were reopened, one involved a review of a decision to dismiss the complaint at the initial assessment stage, which was replaced with a decision to investigate in part, and the other involved reconsideration of a decision to dismiss a complaint after investigation due to new evidence that was provided following the original dismissal.
- 2.86 The increase in requests for review is a potential area of concern. It may indicate that we are not communicating reasons

### Case study

*We received a complaint from a member of the public who had concerns about the way in which the barrister on the other side had presented the case at a tribunal hearing. The complainant alleged that the barrister had made submissions knowing that they were false and that afterwards, outside the tribunal, apologised for doing so. The initial assessment concluded that the complaint revealed a potential high-risk breach of the Handbook, misleading the court, and the matter was referred for formal investigation. During the investigation, transcripts of the hearing and decision as well as the barrister's comments were obtained. The complaint was dismissed after investigation because there was insufficient evidence that the barrister had made any misleading statements. The complainant requested a review of this decision. Enquiries were made of the Chair of the tribunal panel who could not recall the matters. The conclusion of review was that there was no reason to change the original decision to dismiss.*

for decisions in a manner that allows complainants to appreciate our role and the extent of our powers. We will continue to work on how we communicate to try to address this.

## Stage 4 - Disciplinary action

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

### Determination by Consent

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

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

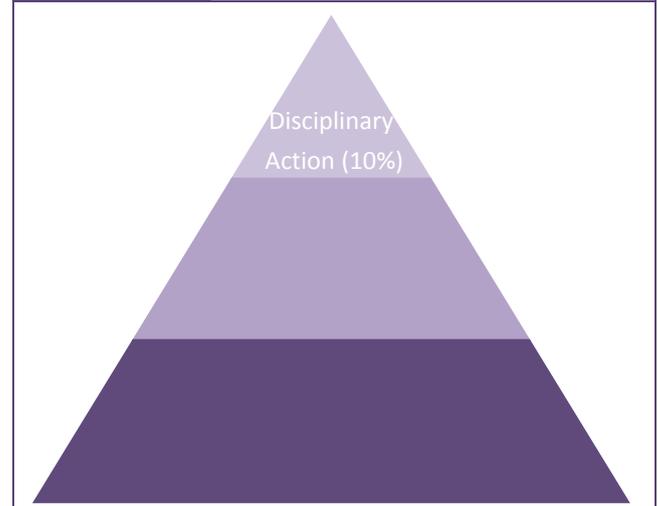
*The barrister is given the opportunity to accept or reject the PCC's finding(s) and sentence.*

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

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

Diagram 5

Stage 4 caseload



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

- 2.88 Disciplinary action takes two forms: Determination by Consent (DBC) and Disciplinary Tribunal. DBC is an entirely consensual process reserved for lower level professional misconduct which would not attract a sanction greater than a fine and where the facts are not in dispute. Decisions on DBC cases are made by the PCC on the papers. All other cases of professional misconduct are heard in front of independent Disciplinary Tribunals convened by the Bar Tribunal and Adjudications Service (BTAS).
- 2.89 The DBC procedure provides for a swifter resolution to a case, with fewer resources required than in a similar case referred to a Disciplinary Tribunal and less stress for the barrister. The limited powers of sanction offer a level of certainty as to the outcome. The increased use of the procedure reflects

the BSB’s ongoing commitment to using proportionate means to address breaches of the Handbook and professional misconduct.

- 2.90 In 2017/18, 47<sup>13</sup> cases were closed at the disciplinary action stage: eight by DBC and 39 during Tribunal proceedings although not all reached a final hearing. This represents 10% of all case closures in 2017/18. This is a significant difference from the previous year’s 27% (116 cases). Excluding the multiple cases against Barrister B, the position is different with the number of tribunal cases standing at 65 cases - 17% of all case closures.
- 2.91 **DBC:** All eight DBC cases closed arose from internal complaints and all of these resulted in a disciplinary finding. Six of the DBC cases related to criminal convictions for drink driving, which is double the number of cases in 2016/17. The other two cases related to a criminal conviction other than drink driving and for failing to preserve client confidentiality.

- 2.92 **Disciplinary Tribunals:** 39 tribunal cases were concluded in 2017/18, as compared to 56 (excluding Barrister B) in 2016/17. Although this is a decrease from last year, it is more in line with the 44 cases concluded in 2015/16. However, with the increase in the number of complaints received it remains to be seen whether this decrease is part of an ongoing trend, or if numbers of tribunal cases will rise again in due course.
- 2.93 Of the 39 tribunal cases in 2017/18, 36 cases were fully determined by a tribunal and 31 resulted in one or more charges being proved: an uphold rate of 86%, which is similar to previous years. This level of prosecutions resulting in a disciplinary finding is in no small part due to the dedication and expertise of our panel of pro bono barristers who provide invaluable assistance by representing the BSB at Tribunals.
- 2.94 The outcomes of the remaining eight included two being dismissed by the

| <b>Table 7</b>                                       |  | <b>Sanctions imposed by Disciplinary Tribunal panels or the Professional Conduct Committee (DBC) – annual comparison 2016/17 to 2017/18</b> |          |                   |          |
|--|--|---|----------|-------------------|----------|
|  |  | <b>2016/17</b>  |          | <b>2017/18</b>    |          |
| <b>Sentence</b>                                      |  | <b>Barristers</b>   | <b>%</b> | <b>Barristers</b> | <b>%</b> |
| Disbarred  |  | 20  | 40%      | 6                 | 19%      |
| Suspended  |  | 6   | 12%      | 8                 | 25%      |
| Fined  |  | 25  | 50%      | 18                | 56%      |
| Reprimanded  |  | 16  | 32%      | 15                | 47%      |
| Advised as to Future Conduct                         |  | 1   | 2%       | 0                 | 0%       |
| Prohibited from Accepting Public Access Instructions |  | 1   | 2%       | 1                 | 3%       |
| Other  |  | 0   | 0%       | 1                 | 3%       |

<sup>13</sup> This number does not represent the number of hearings as cases can be heard together.

Tribunal having heard the evidence and finding the charges not proved. The BSB withdrew charges or offered no evidence in the other six cases based on legal advice, as part of our ongoing duty to review cases to assess whether there remains a reasonable prospect of proving professional misconduct.

2.95 **Disciplinary sanctions:** Table 7<sup>14</sup> shows the sanctions imposed following a disciplinary finding either by DBC or by a Disciplinary Tribunal. In line with previous years, the most common sanction was a fine which was imposed on 56% of barristers appearing before a tribunal. However, it is interesting to note that the percentage of barristers who are being reprimanded has increased over the past two years, now at 47% compared to 32% last year.

2.96 We have also seen a significant drop in the number of barristers disbarred: six compared to 20 in 2016/17. However, this is more in line with the number disbarred in previous years (seven in

2015/16). It would therefore appear that 2016/17 was unusual and not necessarily an indication of increasing incidence of very serious professional misconduct. All the disbarments this year related to some form of dishonesty. Two related to an overseas conviction for fraud, two to falsifying documents as part of the pupillage process, one arose from a dishonesty finding by another approved regulator and two related to dishonesty in employment/chambers.

2.97 **Recovery of fines:** A total of £26,520 in fines were imposed in 2017/18: £21,700 in disciplinary fines and £5,350 in administrative sanction fines. This is generally consistent with the previous two years. Of the 17 fines due to be paid in 2017/18, seven were paid within the time allowed and a further eight were paid in full, albeit late. We continue to chase the two outstanding fines. The BSB has no express power to recover fines owing. Where there is non-compliance we try to work with the barrister to achieve payment including

### Case study

*The BSB received a complaint that a barrister had been broadcasting serious allegations about another barrister in a Crown Court robing room. The unproven allegations were based on information he had obtained from being instructed in a case. The barrister in question had also contacted the other barrister's wife on social media alluding to the same allegations. The complaint was assessed as revealing a medium risk breach of the Handbook and a potential breach of Core Duties 3 and 5. It was referred to formal investigation.*

*Further information was obtained during the investigation about the nature of the allegations that had been broadcast and the risk level was, as result, adjusted to high. The PCC was satisfied that there was sufficient evidence of serious breaches of the Handbook amounting to professional misconduct. It therefore referred the matter to a three-person tribunal. The charges were found proved and a sanction of nine-month's suspension from practice was imposed. The barrister appealed the finding and sanction to the High Court. The findings were upheld on appeal, but the sanction reduced to three months' suspension.*

<sup>14</sup> The number of sanctions imposed is higher than the number of cases as multiple sanctions can be imposed in relation to one case.

allowing payment by instalments. If after concerted attempts, it is not possible to obtain full payment, we will usually raise an internal complaint for failing to comply with a disciplinary finding.

## Appeals

- 2.98 Where administrative sanctions have been imposed, or findings of professional misconduct have been made by a Disciplinary Tribunal, barristers have the right to appeal against the findings and/or the sentence imposed. Appeals against administrative sanctions are heard by an Appeal Panel convened by BTAS, whereas appeals against Disciplinary Tribunal outcomes are made to the High Court. The total number of appeals received this year is almost double that of 2016/17: up from six to 11. This is largely attributable to the increase in appeals against the imposition of administrative sanctions (see paragraph 2.100 below).
- 2.99 While the number of appeals concluded in 2017/18 is at the lowest seen in the past five years, the number of successful appeals remains similar to previous years.
- 2.100 **Administrative sanction appeals:** five appeals were received against the imposition of an administrative sanction in 2017/18: an increase from the last three years, where only one such appeal was received each year. All five were appeals against the imposition of a warning and one also included an appeal against a discretionary fine imposed. Three of these sanctions were imposed by the PCC and two by the PCD. Four of the five were successfully appealed. This appears worrying but analysis of the cases indicates that there were

individual, rather than systemic, reasons for each successful appeal.

- 2.101 **Disciplinary Tribunal appeals:** six new appeals were lodged in the High Court against Disciplinary Tribunal decisions in 2017/18, which is a similar number to last year. Combined with the three outstanding appeals from 2016/17 there were a total of nine appeals pending during the course of 2017/18.
- 2.102 **Tribunal appeal outcomes:** Three appeals were outstanding at the start of 2017/18; five appeals were decided during the year and four were left outstanding at the end of 2017/18. Of the five decided appeals, one (20%) was successful, two (40%) were dismissed whereas two were subsequently discontinued. This is compared to the 22 appeals decided (17 of which related to Barrister B) in 2016/17 with 19 dismissed and three being allowed.
- 2.103 There was no discernible pattern in the successful appeals, some relating to the way the tribunal decided a case and others to the way the BSB had presented it.

## Legal action

- 2.104 In addition to the right of appeal, barristers can also exercise their right to challenge decisions made by the BSB, or by a Disciplinary Tribunal, by way of Judicial Review proceedings. Challenge by way of judicial review is also available to complainants. Claims against the BSB are also occasionally lodged in the Employment Tribunal and civil courts.
- 2.105 The number of legal claims dealt with in 2017/18 was similar to previous years. At the start of 2017/18, there was one existing Judicial Review from a

defendant to criminal proceedings, and two discrimination claims – one in the Supreme Court and one before an Employment Tribunal. These were the same cases that were open at the end of 2016/17. During 2017/18 one further judicial review application was received and the BSB was one of nine defendants in a judicial review claim involving a struck off solicitor. The BSB was also subject to a County Court claim for allegedly failing to make reasonable adjustments for a complainant.

2.106 The first Judicial Review arose from the decision to dismiss aspects of a complaint relating to a barrister's conduct in an appeal against conviction. The applicant sought an injunction to prevent the BSB proceeding with a tribunal pending a review of a previous PCC decision to dismiss other aspects of the original complaint. The injunction was refused but the applicant continued with the judicial review application. The application was, however, subsequently withdrawn.

2.107 The matter before the Supreme Court was an appeal against previous lower court decisions to dismiss a claim for discrimination on the basis the claim was time-barred. The matter was referred to the Supreme Court on a limitation point. The case was heard on 4 October 2017 and the judgment was handed down on 6 December 2017. The court disagreed with the Court of Appeal's decision that the claim for discrimination was time-barred. The original substantive claim will therefore, in due course, be considered by the High Court.

2.108 The matter before the Employment Tribunal was a discrimination claim by a

disbarred barrister. Following a lack of progress for some months, the court issued an "unless order" which required the Claimant to identify the issues in the case. The order was not complied with and the claim was struck out on 28 February 2018.

2.109 The one new Judicial Review application received in 2017/18 was lodged by a complainant challenging a decision not to investigate. The Administrative court refused permission and the claimant withdrew their subsequent application for an oral permission hearing.

2.110 The County Court claim remains live, although it has been provisionally struck out.

2.111 This means that we started 2018/19 with the lowest level of outstanding litigation cases for almost a decade.

### **Fitness to Practise**

2.112 As outlined above at paragraph 2.26, where we receive information from any source that suggests that a practising barrister is unfit to practise due to health reasons, we take this forward as a Fitness to Practise (FTP) matter and it is dealt with separately from our enforcement procedures. In 2017/18 we logged four FTP matters, compared to two in 2016/17 and only one in 2015/16.

2.113 Two of the FTP cases logged in 2017/18 arose from conduct allegations, the third was logged after concerns were identified by the BSB during a conduct investigation, and the last arose from medical evidence supplied in preparation for a disciplinary tribunal hearing. It would be inappropriate to comment on the detail of these matters given the low numbers.

2.114 It is impossible to draw any conclusions from the four FTP cases and it is not possible to say whether they reflect a change in pressures of work at the Bar. Nevertheless, the trend is upwards, and we will be keeping a close eye on any further changes in the future to ensure that it is reflected in the BSB's overall assessment of risk.

## Part 2: How well did we perform

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

### Performance Indicators

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

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

- 3.4 The KPI and our three operational indicators (OPIs) are set out in Table 8, along with our performance against them for the year. Our KPI target for the year was to conclude or refer to disciplinary action 80% of cases within our service standards (i.e. eight weeks for the initial assessment of complaints, five months for concluding internal complaint investigations and eight months for concluding external complaint investigations).<sup>15</sup>
- 3.5 In 2017/18 we met the KPI target of 80% with a year-end outturn of 84.1%. This is our highest performance since the KPIs were introduced in 2013/14 and an improvement on last year where the performance against KPI was 80.1%. We have also seen a year on year increase in performance over the last four years from 68.9% in 2014/15 to 84.1% in

| Indicator  | Description  | Performance | Target |
|------------|--|-------------|--------|
| <b>KPI</b> | The percentage of complaints concluded or referred to disciplinary action within service standards                         | 84.1%       | 80%    |
| OPI 1      | The percentage of complaints concluded or referred to investigation within 8 weeks   | 83.9%       | 80%    |
| OPI 2      | The percentage of external complaints concluded or referred to disciplinary action within 8 months following investigation | 70.0%       | 80%    |
| OPI 3      | The percentage of internal complaints concluded or referred to disciplinary action within 5 months following investigation | 85.9%       | 80%    |

<sup>15</sup> The calculations exclude periods of time that complaints are put on hold e.g. pending the outcome of court proceedings.

2017/18. This target was achieved despite the increase in the number of cases opened and the increase in active caseload throughout the year for which the staff and the PCC are to be commended.

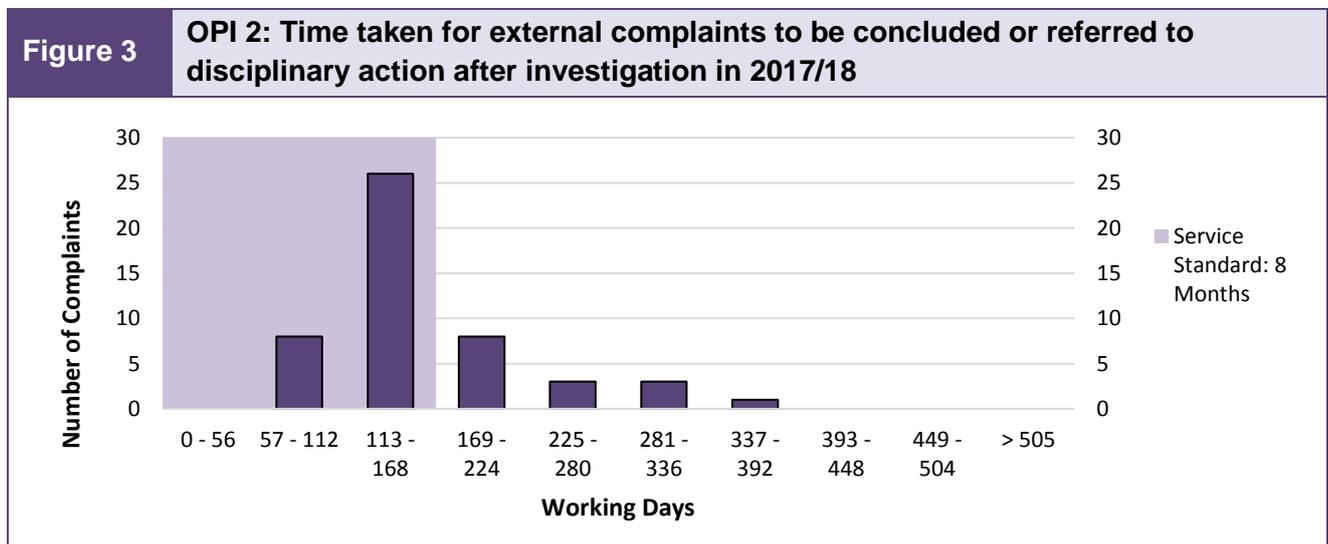
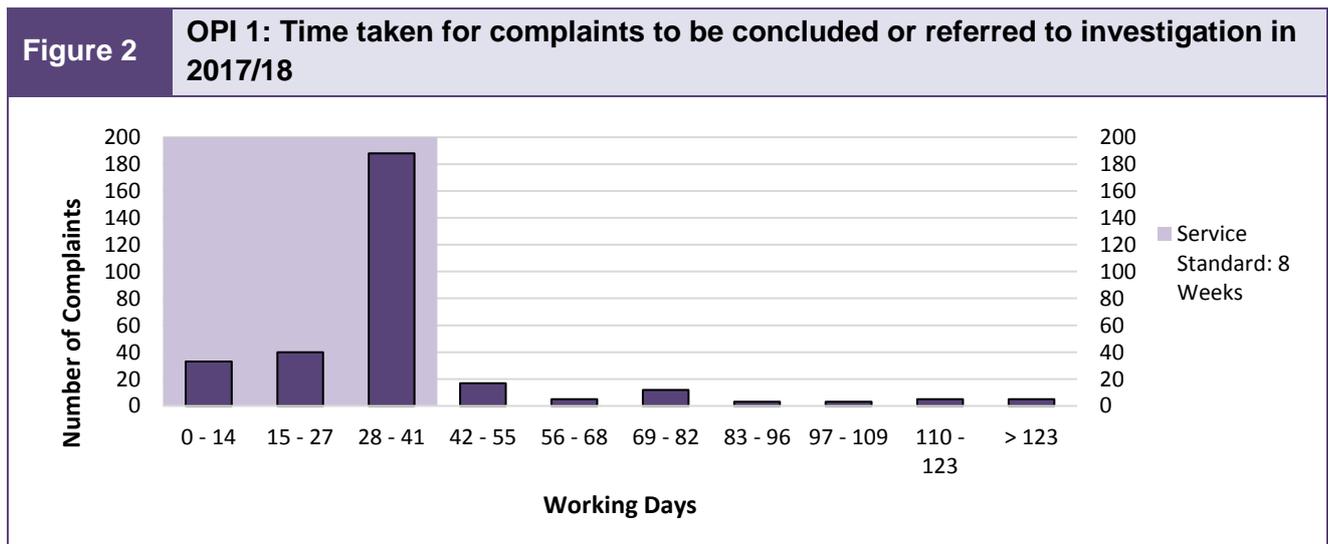
**3.6 Outcome against the OPIs:**

performance in relation to each of the underlying operational indicators was slightly different. Our aim is to try to complete initial assessment within eight weeks (OPI 1); investigations of external complaints within eight months of receipt of a complaint (OP1 2); and investigation of internal complaints within five months

(OPI 3). We also aim to meet each OPI in 80% of cases.

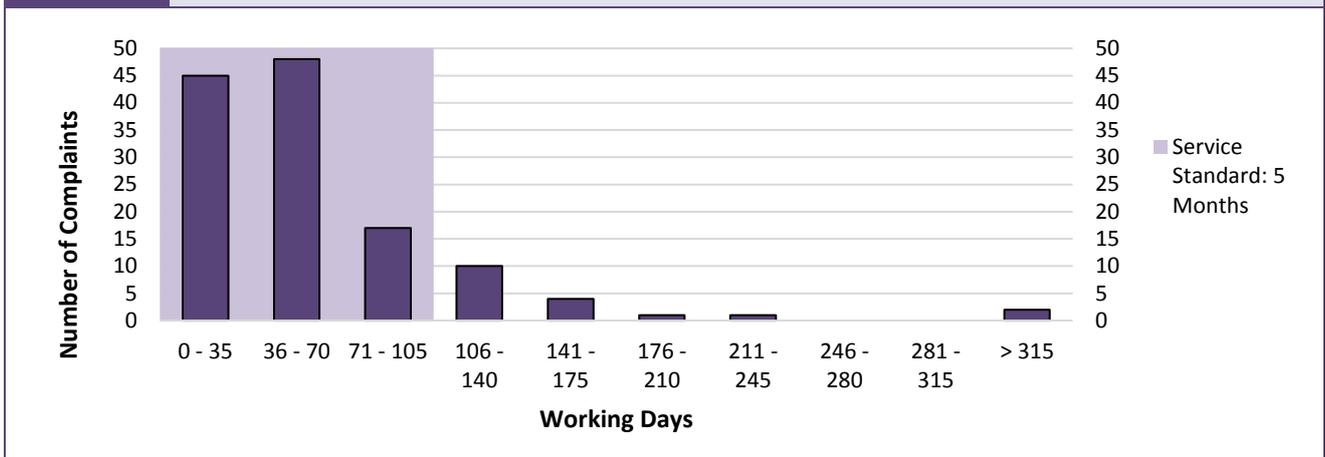
3.7 In relation to OPI 1 we met the timescale in 83.9% of cases and therefore exceeded the target of 80%.

Performance differed between the time taken to investigate external and internal complaints which includes referral of any relevant matters to the PCC and taking decisions to impose administration sanctions. For external complaints, we achieved this in 70% of cases against the target of 80%, the same as last year. Performance in relation to the investigation of internal complaints, improved by 10% with 86% of cases



**Figure 4**

**OPI 3: Time taken for internal complaints to be concluded or referred to disciplinary action after investigation in 2017/18**



completed on time as compared to 76% last year.

3.8 The target of 80% for investigation of external complaints has been missed two years running. All efforts have been made to try to speed up the process, but this is proving challenging. We have addressed identified areas of avoidable delay. However, cases are increasingly complex and subject to challenges to the process from both barristers and complainants: most of which are shown to be unfounded but prolong the process.

3.9 Further, more barristers are legally represented at the investigation stage. The statistics show that 25% of the cases that were closed outside the OPI 2 service standard involved barristers who were legally represented. This is by no means intended to imply any criticism of barristers who seek representation at the investigation stage. However, it does indicate that either the target of 80% in this area, or the time allowed for completing investigations of external complaints, may no longer be realistic. There are major changes due to be introduced in 2019 (see paragraphs 5.12-5.16 below) and we will be reviewing the KPIs as part of these.

However, we decided the indicators should remain in place pending the changes.

3.10 Figures 2 to 4 illustrate how long it took us to assess and investigate complaints in 2017/18.

**Disciplinary action – service standards**

3.11 While we do not have formal performance indicators in relation to disciplinary action, we still monitor the time taken to conclude Determination by Consent and Disciplinary Tribunal cases and have internal service standards for these stages. Our aim is to conclude DBC cases within 3 months of the date of the referral to the process following investigation. The service standards for the completion of Tribunal proceedings, following referral, differ according to whether the proceedings relate to an internal or external complaint and whether they are in front of a three or five-person tribunal panel. Table 9 shows the relevant service standards and compares those figures to the completion of the Determination by Consent and Disciplinary Tribunal stages in 2016/17.

- 3.12 Performance in concluding the disciplinary action stages has generally improved. However, it remains the position that the service standards are not achieved in most cases that come before a three-person tribunal.
- 3.13 **DBC:** seven out of eight cases dealt with under the DBC procedure were concluded within the 93 working days service standard compared to four out of eight last year which is a significant improvement. Progress of DBC cases is within our control and we have worked hard to ensure that we deal with such cases expeditiously and the year-end outcome indicates that we have been successful. In the one case that did not meet the service standard there was a delay in obtaining a response from the barrister to agree the documentation to be placed before the PCC.
- 3.14 **Disciplinary Tribunals:** the time taken for Disciplinary Tribunals to progress from referral to hearing slightly improved as compared to 2016/17. A similar rate

as last year (27%) of three-person Tribunals arising from external complaints were concluded within our service standards. However, only 8% of internal complaints were concluded within our service standards. Despite this low number it is a small improvement, as in the last two years no three-person Tribunals in relation to internal complaints were completed within the service standards. We also managed to conclude 62% of five-person Tribunals within the service standard: up from 56% in 2016/17.

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

| Table 9                            |          | Disciplinary action stages completed within service standards 2017/18 |          |         |             |         |             |
|------------------------------------|----------|---|----------|---------|-------------|---------|-------------|
| Stage                              | Type     | Service Standard (SS)   |          | 2016/17 |             | 2017/18 |             |
|                                    |          | (Days)  | (Months) | Cases   | % within SS | Cases   | % within SS |
| Determination by Consent           | Internal | 93  | 3        | 8       | 50%         | 8       | 88%         |
| Three-person Disciplinary Tribunal | Internal | 86  | 2.8      | 14      | 0%          | 12      | 8%          |
| Three-person Disciplinary Tribunal | External | 166   | 5.4      | 7       | 29%         | 11      | 27%         |
| Five-person Disciplinary Tribunal  | Both     | 197   | 6.4      | 73      | 56%         | 13      | 62%         |

3.16 It is important that we progress cases as swiftly as possible and we therefore closely monitor the progress of disciplinary cases. We are satisfied that there are no clear areas of avoidable delay in the system, but we will continue to work hard to progress Tribunal cases as swiftly as possible.

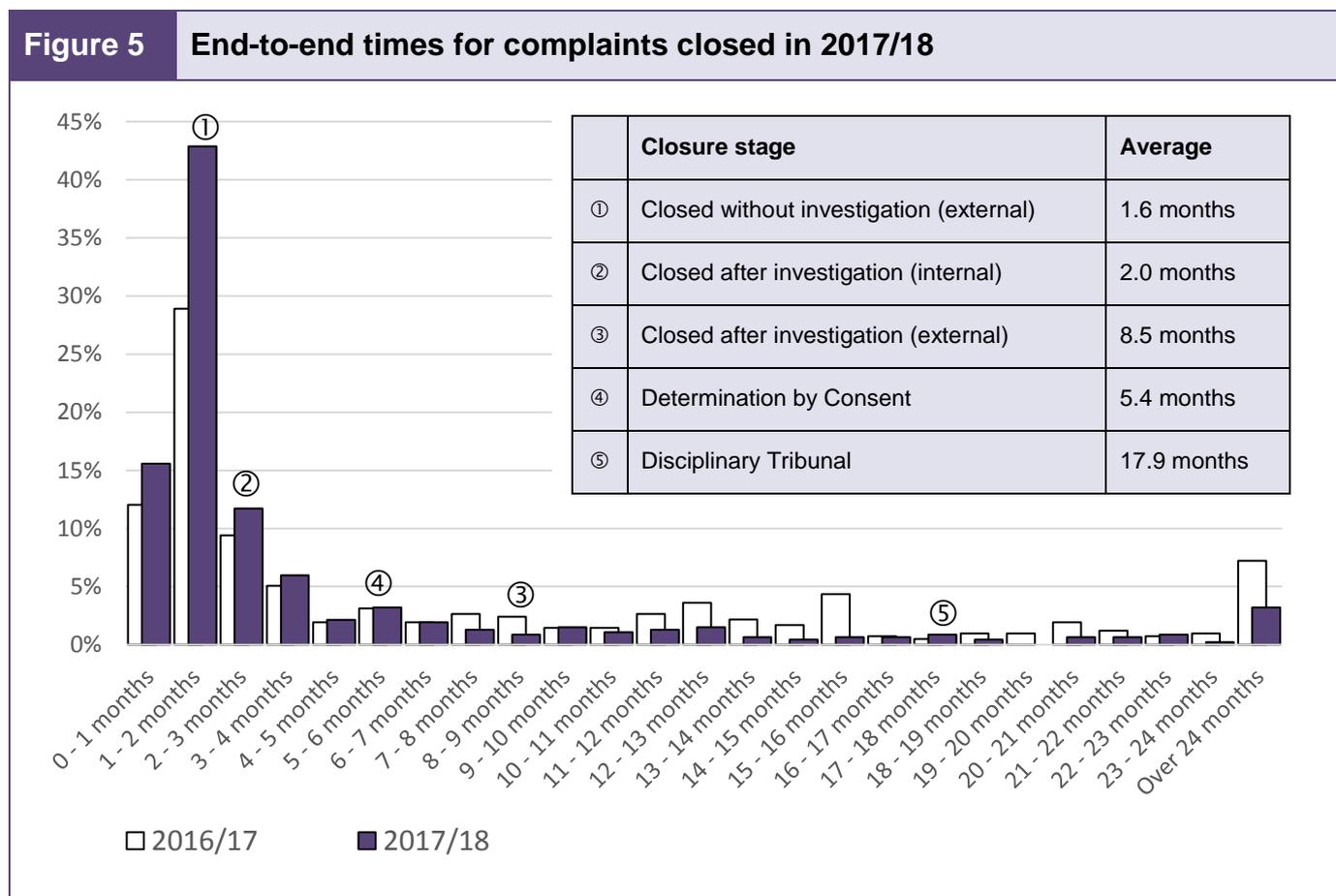
3.17 Revised Disciplinary Tribunal Regulations were introduced in November 2017 which include a number of provisions that we hope will streamline the Tribunal process. The limited number of cases that have been through the Tribunal process since then means it is too early to say whether this aim has been achieved.

### End-to-end times

3.18 The performance indicators and service standards described above exclude any

periods when a case is put on hold or is formally adjourned by a Tribunal. These time periods do not represent the full end to end times from the opening of the case to its conclusion as the reasons for cases being put on hold are outside the BSB's control. Invariably the reasons are the barrister is suffering from ill health or there are ongoing court or other proceedings which are relevant to the consideration of a complaint and therefore no action can be taken until they are concluded. The indicators also only show what proportion of complaints fell inside or outside the time targets. We therefore also report on end-to-end times for our entire enforcement process. These indicate how long – in real time – complaints took to close in 2017/18.

3.19 Figure 5 illustrates how long each of the complaints closed in 2017/18 took from



opening to final closure: whether this was at the initial assessment, investigation or disciplinary action stages. Also marked on the chart are the average times taken for different complaint outcomes.

3.20 Overall, the average time to conclude cases of all types was 1.8 months in 2017/18, a further significant reduction of one month from the 2.8 months in 2016/17. This represents a year on year decrease in the average time taken to conclude cases of all types, and an overall reduction by 60% since 2014/15, where it took on average 4.4 months. This ongoing reduction in overall time periods to conclude cases indicates significant improvements in the efficiency of the system over the last few years despite the increased caseload in the last year. Further, the percentage of cases closed within three months has significantly improved from 50.4% in 2016/17 to 70.1% in 2017/18.

3.21 However, the average time taken to conclude investigations of external complaints has increased over the last two years: it now stands at 8.5 months compared to 7.8 months in 2016/17 and 7.3 months in 2015/16. The potential reasons for this are outlined above at paragraphs 3.8-3.9.

3.22 Similarly, the average time taken to conclude Tribunals has increased by 2.8 months from 15.1 months last year to 17.9 months this year. This is disappointing but potentially reflects the increasing complexity of disciplinary cases and the extent of challenges to the processes. However, there has been a substantial improvement in the average time taken to conclude cases after DBC, taking 3 months less time, down from 8.4

months in 2016/17 to 5.4 months in 2017/18. This is the shortest recorded average time taken seen in the last four years.

3.23 The percentage of long running cases (two years or over in age) has reduced again for the third year running. Whilst there were 50 such cases in 2015/16, and 34 cases in 2016/17, the number now stands at 16 cases: a 50% reduction.

3.24 Overall, the picture is one of increasing efficiency, despite increasing complaint numbers, with the time taken to progress matters reducing in all areas except in relation to investigations of external complaints and concluding Disciplinary Tribunal cases. The large reduction in the number of long running cases is also a significant achievement.

## Part 3: Continuous improvement

- 4.1 We regularly review our procedures following the conclusion of cases, particularly tribunal hearings, judicial reviews and appeals. Any lessons that we can learn from these cases are fed back into the system to ensure continuous improvement.
- 4.2 In addition, the Quality Review Sub-Committee (QRSC) of the PCC – a three-member panel with a lay chair – spot-checks a percentage of staff decisions. The PCC has authorised staff in PCD to take certain decisions on complaints including decisions to: dismiss complaints; impose administrative sanctions; and refer some complaints to disciplinary action. To ensure that the quality of the staff decision making remains high the QRSC assesses the timeliness, thoroughness, transparency and accessibility of PCD decision-making along with the decision itself.
- 4.3 The QRSC reviewed 10% of the decisions made by PCD staff during 2017/18. In total 36 cases were reviewed and the QRSC agreed with the decisions taken by staff in all cases. The panel provided useful feedback for staff on the content of dismissal letters. These focussed broadly on being comprehensive in explaining why the complaint was dismissed and providing clarity on considerations or actions which were taken. However, in several cases the QRSC commented positively on dismissal letters, describing them as “excellent”, “thorough and helpful” and “concise”.
- 4.4 As noted in last year’s report, we maintain a central ‘Lessons to Learn’ log which is available to all staff and captures any issues arising from casework at any stage of the process or on QRSC review, including issues arising from Tribunal cases and High Court appeal judgments. The log is reviewed regularly by senior PCD staff, and action points are identified and taken forward. Such issues in the past year have included: improved accuracy in categorising complaints; appropriate drafting of charges; ensuring address changes are correctly and promptly recorded; revising the contents of dismissal letters; tightening requirements for service of documents; improving investigation plans to ensure effective evidence gathering; and the correct approach to analysing allegations of dishonesty.
- 4.5 Examining one of the lessons in more detail, feedback received both this year and last highlighted concerns over the quality of some dismissal letters. As a result, we have reduced the use of standard paragraphs and made other improvements to our dismissal letter templates, and we have provided further training for staff on the use of plain English. Our emphasis on drafting skills will continue into 2018/19, with a programme of external training tailored to the work of the BSB.
- 4.6 This lessons to learn log also provides a mechanism for identifying issues for inclusion in our regular newsletters to the PCC and members of the prosecution panel. Reader feedback indicates that these newsletters are widely read and are an effective means of communication

to assist with keeping participants in the enforcement system up to date.

- 4.7 **Training:** we also use performance and feedback information to inform the PCD training programme which is designed to ensure the maintenance, updating and development of legal knowledge and associated skills within the Department. In 2017/18 the training programme included: drafting charges; working with witnesses; the operation of Family courts; the operation of Employment Tribunals; legal privilege; disclosure; disciplinary appeals; investigations training; rules of evidence in the regulatory disciplinary context; and Data Protection Act/GDPR training.

### Casework lessons

- 4.8 A wide range of issues learnt from cases have led to changes and improvements or have revealed wider matters that the BSB may need to consider. Set out below are just a few of these arising from appeal judgments from the High Court and judgments of the independent Disciplinary Tribunal and Appeal Panels.
- 4.9 In 2017 the BSB took the rare step of appealing a sanction imposed by a Disciplinary Tribunal, on the grounds that it was considered to be unduly lenient. The barrister had been convicted of six counts of breaching a Restraining Order, which had resulted in a sentence of 9 months' imprisonment, suspended for 24 months with a requirement to undertake 150 hours of unpaid work. The Tribunal had imposed a reprimand against the barrister for this conduct, particularly taking into account the barrister's admission of the professional misconduct charges, his positive personal references and also, following correspondence from
- the BSB in July 2015, his agreement to voluntarily suspend himself from practice.
- 4.10 The BSB's appeal was unsuccessful but resulted in a number of useful lessons for the BSB. These included a review of our approach to accepting voluntary suspensions by way of undertaking, improvements to our procedures around disciplinary appeals (such as involving a second case officer at appeals and obtaining a second opinion as to the appropriateness of any BSB appeals) and improved recording of internal decisions, as well as identifying several areas where further staff training would be useful.
- 4.11 Several decisions by tribunal panels, tribunal directions judges and appeal panels also provided the impetus for a number of operational changes. For instance, after a tribunal dismissed charges in one case, a series of changes were implemented to ensure charges are reviewed by managers before being served, and to ensure that staff members are properly notified of operational changes that are made when they are absent from the office. Another judgment resulted in changes being made to our minuting of PCC decisions and ensuring investigation plans are routinely and correctly utilised. We also revised our decision template sheets following points raised in another judgment.

### Wider issues for the BSB and the Bar

- 4.12 **Practising certificates:** As observed above, the rise in practising certificate cases relating to pupils has resulted in our review of the communications that

accompany the grant of a Full Qualification Certificate to pupils to make it clear that this certificate is only valid for one month and that the barrister will need to apply for a practising certificate before expiry. While we continue to do what we can to ensure pupils are informed about their obligations, it remains the case that pupils are responsible for ensuring they are aware of, and comply with, their requirements to obtain the relevant authorisations to practise as set out in the Handbook.

4.13 **Integrity/dishonesty:** a High Court decision<sup>16</sup> relating to solicitors early in 2017 raised questions around the interpretation of the word “integrity” as set out in Core Duty 3. As a result, there were concerns about our ability to prosecute charges of a lack of integrity, as distinct from dishonest behaviour. The matter was clarified on appeal by the Court of Appeal in March 2018<sup>17</sup>, which clarified that dishonesty and integrity are not synonymous and are distinct concepts. As the judgement in question indicated: “As a matter of common parlance and as a matter of law, integrity is a broader concept than honesty.”<sup>18</sup>

4.14 **The internet and social media:** as identified in last year’s report, the number of complaints relating to barristers’ use of social media is increasing. These often raise issues about the boundary between a barrister’s professional life and personal life, the interaction with freedom of expression and our regulatory role in this area. In relation to the latter, the Handbook makes it clear that our regulatory role

extends beyond conduct in a barrister’s professional life and we will take action where a barrister’s conduct breaches the Core Duties. We have in the past, and during the course of the last year, taken successful disciplinary action and imposed administrative sanctions, where barristers’ communications on social media, in our view, diminish the trust and confidence which the public places in the profession (Core Duty 5).

4.15 We recognise that the lines between professional and personal life have become increasingly blurred with the rise in the use of social media. As is the case with many professional regulators, we are actively considering what further guidance we can provide to the Bar regarding the use of social media and also the circumstances in which regulatory action will be considered where the conduct occurs in the course of non-professional activities. It is essential that the public continues to have trust and confidence in the profession and inappropriate comments on social media run a high risk that this trust and confidence will be compromised.

4.16 **Harassment and bullying:** as is rightly the case, there has been a spotlight shone in recent years on the need to address unacceptable behaviour in the work place particularly sexual harassment and bullying. We have been working with the Bar’s representatives and other organisations, to establish how the BSB can work in a collaborative way to assist with stamping out such behaviour at the Bar. Enforcement

<sup>16</sup> *Malins v SRA* [2017] EWHC 835 (Admin)

<sup>17</sup> [Wingate and Evans v SRA; SRA V Malins \[2018\] EWCA Civ 366](#)

<sup>18</sup> At [95].

action is a blunt tool in this respect and places a huge responsibility on those who have been subject to such experiences. Nevertheless, we are committed to taking action, and supporting victims to assist us in doing so, where such conduct represents a breach of the professional obligations set out in the Handbook. The BSB is actively developing a pilot exercise to exempt groups of barristers, who want to offer formal confidential support services to victims, from the serious misconduct reporting obligations. The results of the pilot will be used as an evidence base to determine whether any changes to the regulatory obligations would be appropriate.

## Part 4: Wider work of the PCD

- 5.1 The PCD and PCC's primary function is to consider concerns about the conduct of barristers and take enforcement action where appropriate. Our work informs the wider work of the BSB particularly in relation to identifying risks to the regulatory objectives, but we also provide other services and participate in and/or lead on change projects. This work is outlined in the paragraphs below.

### Disciplinary history checks

- 5.2 The PCD holds the records for disciplinary findings against barristers and therefore we are the source of information for enquiries about the disciplinary history of barristers. Such enquiries are usually made by the Bar Council's Records Team to inform the issue of Certificates of Good Standing. However, we also provide information to: the Judicial Appointments Commission (for use in processing applications for judicial office); the Queen's Counsel Appointments body (in relation to applications for Silk) and the Inns of Court (in relation to appointments of pupil supervisors). Disciplinary checks are also carried out for the Chartered Institute of Legal Executives (CILEx) Regulation in relation to prospective registrants.
- 5.3 Disciplinary checks are carried out by the PCD's Operational Support Team (OST) and in 2017/18 they completed a total of 986 disciplinary history checks including 271 in relation to Queen's Counsel applications, 273 in relation to judicial applications and 195 for CILEx Regulation. This work can be intensive at certain times of the year, but we have

been able to meet the deadlines for responses to enquiries in all cases.

### Data Protection Act enquiries

- 5.4 The PCD regularly receives requests under the Data Protection Act from individuals asking for copies of personal data that the BSB holds about them. These are known as subject access requests (SARs). These are handled by trained staff in our OST and can take up a considerable amount of time and staff resource given the statutory time lines for responding.
- 5.5 In 2017/18, we received six SARs. Of these, four were from barristers who were the subject of complaint(s) and two were from complainants. All but one of these requests were dealt with within the 40-day time limit which applied at the time, with the exception being extended by a month due to the volume of personal data needing to be searched. We feel that this puts us in a strong position to comply with the revised timescale of 30 days, which was introduced following the implementation of the General Data Protections Regulations and Data Protection Act 2018 on 25 May 2018.

### Projects

#### **Disciplinary Tribunal Regulations Review**

- 5.6 This project concluded in November 2017 when the revised Disciplinary Tribunal Regulations came into force. It took us much longer to bring this project to fruition than we originally anticipated due to a moratorium on making changes to the BSB Handbook pending the LSB's consideration of the BSB's application to

licence Alternative Business Structures. The revised regulations are now included in the BSB Handbook and the revised supporting policies and guidance that underpin the regulations are available on the BSB's website, including guidance for witnesses.

### **Standard of Proof**

- 5.7 As mentioned in last year's report, a public consultation paper on whether the standard of proof applicable to professional misconduct allegations should be changed from the criminal standard (beyond reasonable doubt) to the civil standard (on the balance of probabilities) was issued on 2 May 2017. The consultation closed on Friday 21 July 2017. The Board considered the responses in November 2017. It decided that the standard of proof should be changed to the civil standard but also agreed that the change should not come into force until April 2019 to allow time for the Bar to adjust and for relevant training to take place. The application to the Legal Services Board for the relevant change to the BSB's regulatory arrangements was submitted in September 2018.

### **Publication of findings**

- 5.8 Back in 2011, the BSB consulted on proposed changes to the publication of disciplinary findings with a view to restricting the time periods that such information would be in the public domain. Other priorities meant that this issue was not taken forward, but work recommenced in 2017. An interim change to the BSB's publication policy was made in June 2017 when the time period for publication of suspensions from practise up to and including 12

months in length was changed from indefinite publication to 10 years. The change was applied retrospectively and therefore all such suspensions were removed from the BSB's website as of 3 June 2017. This does not, however, impact on our policy to disclose such information on request.

- 5.9 We have continued to work on amendments to the publication policy which need to be aligned with the requirements of the GDPRs and the intention is to produce a revised policy in 2018/19 with much reduced publication periods for all findings except disbarments which will remain in the public domain indefinitely.

### **General Data Protection Regulations**

- 5.10 In preparation for the General Data Protection Regulations (GDPR) on 25 May 2018, accompanied by the new Data Protection Act 2018, we have been undertaking extensive preparatory work over the last year, in conjunction with other departments in the BSB and Bar Council. The PCD's work has been focussed on Subject Access Requests, which is the area in which most of our data protection work occurs.
- 5.11 The PCD staff have received detailed training on the implications of the new legislation for their work. This training will allow us to facilitate better data subjects' rights of access and to build capacity to respond to such requests under the GDPR. The PCC members have also received training on the implications of the GDPR for their work.

## **Governance review – Modernising Regulatory Decision-Making**

- 5.12 The PCD is also involved in two major projects arising from the BSB's ongoing modernisation of its governance and regulatory approach. Both projects will continue through to implementation in 2019/20.
- 5.13 **Centralised Assessment:** this project started in 2014/15. Its aim is the centralisation of the assessment of all incoming information to replace the various assessment processes carried out in different departments across the BSB. This will allow for more consistent handling of incoming information and risk assessment. We will be creating a Centralised Assessment Team (CAT) which will handle the assessment of all incoming information including reports of potential misconduct. To reflect the change in approach we will be moving away from the terminology of "complaints", given that the BSB's role is not to resolve complaints but to maintain professional standards. Indeed, we are prohibited by the law from providing redress to complainants in the form of apologies and/or compensation. Our view is that we need to reframe our relationship with the public by managing better the expectations of the public in relation to our role: continuing to use the terminology of "complaints" creates unrealistic and inaccurate expectations of what we are able to do.
- 5.14 **Enforcement decision making – creation of an Independent Decision-making Body (IDB):** this new body will be responsible for taking all regulatory decisions that require independent input. It will replace the current PCC and our Authorisation Review Panels (ARPs), which hear appeals against decisions not to grant waivers from the Handbook provisions and decisions not to authorise entities.
- 5.15 To support these changes, new regulations will be introduced in 2019 to replace the current "Complaints Regulations".
- 5.16 The BSB held a public consultation on these changes from March – May 2018 and the Board formally approved the proposals outlined above in July 2018. While this was outside the period of this report, it reflected the cumulation of intensive work carried out from 2016-2018 to develop the proposals for the revised decision-making system. We will continue to work on the implementation plans during 2018/19 with a view to their introduction in June 2019.

## Conclusions and action points

- 6.1 2017/18 was a very busy year for both the PCD and the PCC. As this report shows, not only was there a significant increase in the number of pre-complaints and complaints opened, but throughput also increased and the corporate KPI was exceeded. We were able to handle this increase without any significant backlogs arising, while at the same time improving the end to end times for progressing cases and reducing the number of long running cases.
- 6.2 Therefore, the overall picture is one of increasing efficiency in the handling of enforcement cases. Both the PCD staff and the members of the PCC are to be commended for their performance and commitment. However, we cannot ignore the fact that time taken to investigate external complaints and conclude Disciplinary Tribunal cases has increased. This is a reflection of the increasing complexity of cases but nevertheless is an area that we need to monitor closely to ensure that there is no avoidable delay.
- 6.3 With the significant increase in reports/complaints received, inevitably there was an increase in concerns raised with us about a range of subject matters. This was particularly stark in relation to the increase in: reports of serious misconduct; complaints from litigants in person; allegations of barristers misleading the court or others; complaints about civil matters; and referrals to the Legal Ombudsman.
- 6.4 It would be dangerous to draw any firm conclusions from the statistics in this report regarding the behaviour of the Bar given the low numbers of concerns raised in each area as compared to the total population of the practising Bar. In all cases, the trends reflect reported behaviours in relation to significantly less than 0.1% of the practising Bar.
- 6.5 However, the high level of complaints/reports that are dismissed or not taken forward, combined with the nature of the areas that saw significant increases, indicates a need for the BSB to assist with ensuring there is access to, and clarity of, public information about the role of barristers in the legal system. The apparent trends indicate that the public do not understand the role of barristers in our adversarial legal system and can view the legitimate presentation of cases as matters of concern.
- 6.6 The apparent trends also provide evidence to support the need for us to reframe our relationship with the public so that we can manage expectations better and reduce the risk of misunderstandings that our role is to resolve complaints rather than maintain standards at the Bar.
- 6.7 The reduction in the number of cases referred to formal disciplinary action was significant in percentage terms but less so in absolute numbers. The ongoing embedding of our risk-based approach to regulation could be a factor in the reduction in disciplinary cases but the statistics do not necessarily provide a sound basis for making this assumption. It will be interesting to see if the increase in reports/complaints in 2017/18 translates to an increase in 2018/19 of cases warranting enforcement action.
- 6.8 Effectively addressing public and professional concerns about the use of social media as well as enhancing our

approach to, and mechanisms for, dealing with issues of harassment and bullying are areas that we intend to continue to focus on. The increase in the reports/complaints in these areas has been small in terms of numbers but significant in comparison to previous years. They reflect the concerns of the public, and as a public interest regulator we must continue to work actively to address these matters.

- 6.9 Looking forward, the structural changes in the way we handle incoming information and take enforcement decisions, will, we hope, have a positive impact on managing expectations and modernising decision making.
- 6.10 Preparing for and implementing these major changes, will be the main focus of our work in 2018/19 alongside maintaining and building on the increased efficiencies in progressing cases in a timely manner.

### **Action points**

- 6.11 Our emphasis in 2018/19 will be on the following action points:
- Working with other departments of the BSB and stakeholders to promote better understanding of the role of barristers and the BSB's regulatory role in taking enforcement action.
  - Working collaboratively with stakeholders to ensure that reports/complaints of harassment and bullying are addressed effectively, and appropriate regulatory action taken; and
  - Clarifying our approach to enforcement action in relation to the inappropriate use of social

media and conduct arising from non-professional activities.

- Preparation for, and implementation of, the structural changes in handling incoming information and regulatory decision making; and
- Continued training of staff in preparation for the above changes, including further training of staff in effective writing to suit all relevant audiences.

**Sara Jagger**

**Director of Professional Conduct**

**Aidan Christie QC**

**Chair of the Professional Conduct Committee**

**September 2018**