

Sent by email only to [JAymes@BarStandardsBoard.org.uk](mailto:JAymes@BarStandardsBoard.org.uk)

11 July 2017

Dear Sir/Madam

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

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

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

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

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

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

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

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

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

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

**Q1: Do you consider, in principle, that the BSB should change its regulatory arrangements to allow for the civil standard to be applied to allegations of professional misconduct?**

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

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

**Q2: If your answer to (1) above is "yes", do you consider that the BSB should only change the standard of proof if and when the Solicitors Disciplinary Tribunal also does so?**

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

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

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

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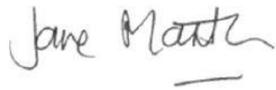
<sup>2</sup> The Legal Services Board, "*Regulatory sanctions and appeals processes*", link [here](#).

We would be very happy to meet and discuss any aspect of this response in further detail. Please contact Lau Ciocan for further queries at [lau.ciocan@legalservicesconsumerpanel.org.uk](mailto:lau.ciocan@legalservicesconsumerpanel.org.uk).

Yours sincerely

Dr Jane Martin

Chair

A handwritten signature in black ink that reads "Jane Martin". The signature is written in a cursive style. Below the signature, there is a short horizontal line.