



Bar Council response to the Bar Standard's Board 'Review of the Standard of Proof Applied in Professional Misconduct Hearings' consultation paper

1. This is the response of the General Council of the Bar of England and Wales (the Bar Council) to the Bar Standards Board (BSB) consultation paper entitled 'Review of the Standard of Proof Applied in Professional Misconduct Hearings.'¹
2. The Bar Council represents over 16,000 barristers in England and Wales. It promotes the Bar's high quality specialist advocacy and advisory services; fair access to justice for all; the highest standards of ethics, equality and diversity across the profession; and the development of business opportunities for barristers at home and abroad.
3. A strong and independent Bar exists to serve the public and is crucial to the administration of justice. As specialist, independent advocates, barristers enable people to uphold their legal rights and duties, often acting on behalf of the most vulnerable members of society. The Bar makes a vital contribution to the efficient operation of criminal and civil courts. It provides a pool of talented men and women from increasingly diverse backgrounds from which a significant proportion of the judiciary is drawn, on whose independence the Rule of Law and our democratic way of life depend. The Bar Council is the Approved Regulator for the Bar of England and Wales. It discharges its regulatory functions through the independent Bar Standards Board (BSB).

Overview

4. The Bar Council recognises that the wider regulatory landscape has changed since our 2011 consultation response on the subject of the standard of proof in disciplinary proceedings, in which we came down firmly in favour of retaining the criminal standard. In this response, the Bar Council seeks to represent the current diverse views of its members on both the principle and the practicalities of the proposal and invites the BSB to scrutinise the available evidence to consider if the case for change has really been made out. It does not seem to us that the BSB has done this as yet.

¹ BSB consultation paper entitled [Review of the Standard of Proof Applied in Professional Misconduct Hearings](#)

5. We have posed a number of questions that we suggest must be answered before any final decision is made on whether the standard of proof used in Bar Disciplinary Tribunals should change from the criminal to the civil standard.

6. Before compiling this response, we sought the views of our members who work in the disciplinary field. We set up a number of meetings with those who defend and prosecute barristers before disciplinary tribunals. We had similar meetings with Bar Tribunals and Adjudication Service (BTAS) panel members, barristers who defend and prosecute in disciplinary tribunals of other professions (including solicitors) and barristers instructed in cases before the higher courts in which the standard of proof in disciplinary proceedings has been examined. The topic was also fully debated at a Bar Council meeting held on 8 July. A non-binding vote of Bar Council members present at the meeting on the proposed change produced an even split. We have since received further members' views conveyed to us by circuit representatives.

7. In summary, the Bar Council sees that adopting the civil standard would be to join with other regulators and other jurisdictions which have taken that step in recent years. We recognise and support the protection of the public and appreciate that careful consideration needs to be given to the standard of proof appropriate for that purpose. However, we consider that there are also other public interest considerations to be borne in mind, and are not persuaded that we should adopt a change merely because others have done so. There must be careful scrutiny of the evidence of a need for change within our own jurisdiction and within our own profession, of the rationale for making any change, and of the benefits, disadvantages and ramifications of doing so. Before any change is brought about, there must be a careful study of the medium-to-long-term impact on the profession and those it serves. The BSB must also be sure – and recognise clearly in any rules and guidance making or reflecting such a change – what the effect would be in practice of stipulating that the civil standard should be applied, particularly in relation to allegations of serious misconduct.

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?

8. By way of a preface, we underline that it is of the utmost importance that the high standards for which the Bar is renowned are upheld robustly and that there are effective safeguards in place to prevent barristers who pose a demonstrable risk to the public from practising. Barristers trade on their reputation and of course the reputation of the profession as a whole is of fundamental importance. We would not wish for the profession or any part of it to be brought into disrepute by a small minority who do not meet the high ethical standards of the Bar as reflected in the BSB Handbook and elsewhere.

Views of those who favour moving to the civil standard

9. We begin with a summary of the views of those members of the profession who favour the proposed change.

Alignment with other professions and regulatory best practice

10. As indicated, we recognise that the wider regulatory context now is different from that in 2011. Over time there has been a shift by other professions to the civil standard in professional regulation, prompted in part by the Shipman enquiry in 2008-2009. For the legal professions, the case of *The Solicitors Authority v Solicitors Disciplinary Tribunal*² brought this issue to the fore when Sir Brian Leveson suggested that the standard of proof in disciplinary proceedings was ripe for reconsideration. As it stands, "the Bar Standards Board and the Royal College of Veterinary Surgeons are now the only legal regulators applying the criminal standard when determining charges of professional misconduct." The current standard in Bar disciplinary tribunals has become out of step with the regulatory norm.

11. Those in favour of the civil standard do not see any strong justification for treating the Bar differently from the medical profession, in particular, and highlight the parallels that can be found between the two professions. Both professions perform roles that are important to the public interest, and where the protection of that interest is paramount. Given the movement towards the civil standard in other areas of professional regulation, practitioners in favour of the civil standard highlight the anomaly of continuing to apply the criminal standard in Bar disciplinary tribunals, and suggest that the civil standard has become accepted as regulatory best practice.

Protection of the public

12. Those in favour of the civil standard of proof point to the overriding importance of protection of the public as the guiding principle. There is a tension between the serious consequences to the livelihood and reputation of the barrister subject to professional misconduct proceedings and the risk to a prospective client if a barrister is able to continue to practise despite being considered more likely than not to have committed professional misconduct, but where the evidence was not sufficient to prove the misconduct to the criminal standard.

13. Most of the barristers that we interviewed as part of our research for this consultation were of the view that changing or retaining the standard of proof would not make a difference to the outcome of the case in the vast majority of cases. However, there is a small minority of cases where it **could** lead to a different outcome. A BTAS

² [2016] EWHC 2862 (Admin).

Panel member gave an example of one case that they had been involved in, where they thought applying a different standard of proof would have made a difference to the outcome of the case.

15. Those in favour of change are dismayed by the prospect that a barrister who has, on a balance of probabilities, committed serious misconduct but is permitted to continue practising. This is at odds with the high professional and ethical standards to which the Bar adhere. A number of practitioners to whom we have spoken have highlighted the importance of the role of the disciplinary process in maintaining ethical standards and preventing those who do not adhere to the Bar's ethical values from being able to practise and hold themselves out as barristers. This point is extremely important. The Bar prides itself on its core values and its ethics are not only an integral part of what it means to be a practising member of the Bar, but are also of the utmost importance to the administration of justice and to the Bar's role in supporting the wider public interest.

16. Similarly concerns were expressed about the public perception of the standard. There were concerns that the public could perceive the criminal standard as mere protectionism working in the profession's interest rather than in the wider public interest.

Professional misconduct proceedings as civil proceedings

17. There is some debate about the nature of professional misconduct proceedings. Those in favour of the civil standard emphasise that first and foremost, regulatory proceedings are "civil" in nature and the right to earn a livelihood has to be balanced against the need to protect the public. Whilst it cannot be ignored that professional misconduct proceedings can cause much distress to the individual who is the subject of those proceedings, and may lead to an outcome which is severe for the barrister concerned, such as disbarment and the loss of the right to practise as a barrister, such proceedings are not brought in order to deliver punishment but in order to regulate the profession and so protect clients and the public. In more serious allegations of misconduct, it is of course possible that separate criminal proceedings will have preceded the disciplinary proceedings.

Views of those who favour retention of the criminal standard

18. We next summarise the views of those to whom we spoke who favoured retention of the criminal standard of proof, roughly similar in number to those that favour change.

Lack of evidence of problems with the criminal standard

19. There is a strong feeling amongst many that the public are already adequately protected in the current disciplinary system and that barristers who pose a risk to the public are not being acquitted of misconduct by disciplinary tribunals. We note that the BSB has not sought to rely on statistics or any suitably anonymised evidence to suggest that there are any or any significant number of barristers who are unfit to practise yet continue to do so.

20. The barristers we consulted, including those in favour of the civil standard, accept that cases where the barrister more likely than not committed a misconduct offence but the charges could not be proved to the criminal standard were likely to be few and far between. Only 42 cases came before a Bar disciplinary tribunal in 2015-16 and of those, four were dismissed because the conduct issues were not serious enough to constitute professional misconduct.³ Of those that proceeded, 83% resulted in one or more of the charges against the barrister being proved. There is not data (nor research so far as we are aware) providing an explanation for the acquittal of the remaining 13% but we gather that many acquittals flow from the tribunal taking the view that the wrong charges have been brought. Others are likely to have been acquitted 'on the merits' whatever the standard of proof.

21. So the number of cases where the burden of proof may make a difference to the outcome of a disciplinary case is unknown but likely, we suggest, to be very few. If so, this somewhat undermines a rationale for change based upon any perception that the status quo fails to protect the public.

22. It is also worth noting that we have not seen any evidence that the public perceive the current standard of proof to be unfair or causing harm.

Comparison with other professions

23. The Bar cannot and should not be compared with other professions who offer different services, practise in very different ways and deal with different levels of risk. As the BSB concede, there are no known "clear empirical studies"⁴ to support the contention that the civil standard confers greater public protection.

24. Internationally, the picture is also mixed. Scotland, Northern Ireland and the Republic of Ireland use the criminal standard in disciplinary tribunals. However, Australia, New Zealand and Canada have used the civil standard for a number of

⁴ BSB Review of the Standard of Proof Applied in Professional Misconduct Proceedings Consultation Paper 2017: 19 https://www.barstandardsboard.org.uk/media/1830289/sop_consultation_paper.pdf

years. The picture is varied in the USA. We suggest there is no single approach that must be universally correct. What may be right for one jurisdiction or one profession will not necessarily be right for another.

Case law

25. Although we appreciate that case law is not the decisive factor, and that the BSB may choose of its own volition to amend the standard of proof (subject to approval by the Legal Services Board), consideration of case law is revealing and we note that the BSB has provided some analysis in the consultation paper.

26. There are persuasive authorities from both the UK and commonwealth nations which support the retention of the criminal standard. The decision of the Divisional Court in *Re A Solicitor*⁵ supports the proposition that the standard of proof applicable in professional disciplinary proceedings should be the criminal standard where the charge is similar to a criminal offence. The BSB's 2015/16 Annual Report indicates that dishonest/discreditable conduct was by far the most common aspect of cases closed at tribunal stage.⁶ There is a powerful underlying argument that given the consequences for practitioners of an adverse finding in such cases, fairness demands that the criminal standard should be retained. This point is developed below.

27. In *Campbell v Hamlet*⁷ the Privy Council approved the criminal standard for all legal sector disciplinary proceedings.

28. More recently, in *Z v Dental Complaints Assessment Committee*⁸ before the Supreme Court of New Zealand, the majority ruled in favour of a change to the civil standard. However, the Chief Justice dissented, convinced that:

“the standard of proof beyond reasonable doubt protects against error in decision making Where serious disciplinary charges are brought under statutory process in circumstances where substantial penalties may be imposed and damage to reputation and livelihood is inevitable if adverse findings are made, fairness requires application of a higher standard of proof than one on the balance of probabilities.”⁹

⁵ [1993] QB 69.

⁶ BSB Enforcement Annual Report 2015/16: 18.

https://www.barstandardsboard.org.uk/media/1777872/enforcement_report_2015-16_-_final.pdf

⁷ [2005] 3 All ER 1116.

⁸ [2009] 1 NZLR 1.

⁹ *Ibid.*

29. *The Solicitors Regulation Authority v Solicitors Disciplinary Tribunal*¹⁰ (referred to, in the consultation paper, as ‘*Arslan*’) is relied on by the BSB as indicating that there is appetite for change to the civil standard amongst the judiciary, but we note that comments in this regard were *obiter*.

More certainty is necessary where barristers’ livelihoods and wellbeing are at risk

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

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

No variable civil standard

32. We note that many of those who favour the civil standard do so in the belief that a court or tribunal would look more closely at the evidence where the issue concerns serious misconduct. However, this is not to be confused with a ‘variable standard’: see *Re B*¹¹; (a Family case) *R (IPCC) v AC Hayman*;¹² and *Inayat Inayatullah v General Medical Council*¹³ (concerning disciplinary proceedings) which acknowledge the application of a ‘single unvarying standard.’

33. The General Medical Council reassured medical professionals in advance of its adoption of the civil standard in 2008 that a ‘flexible’ civil standard would be used: in other words, that a higher standard would be employed where the charges were particularly serious. However, the courts have subsequently ruled (in the cases referenced in the preceding paragraph) that there is only one civil standard, and no so-called sliding scale or flexibility of application.

34. We suggest that the state of the law is such that no false comfort should be taken from the misconception that there is a sliding scale or a higher evidentiary burden for more serious allegations. An application of the civil standard, however

¹⁰ [2016] EWHC 2862 (Admin).

¹¹ [2008] UKHL 35.

¹² [2008] EWHC 2191 (Admin).

¹³ [2014] WL 5311793 (Admin).

serious the allegation, will result in the case being proved if the tribunal is satisfied on the balance of probabilities that the charge is made out.

The particular vulnerability of lawyers in an adversarial system.

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

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

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

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

Chilling effects

39. Criminal and family barristers currently feel there is some degree of protection in the form of the criminal standard of proof should an allegation of misconduct be made by a client. If the standard is lowered, the resulting sense of increased vulnerability may have a chilling effect on interaction with clients and deter imaginative or innovative approaches in advocacy. Over-protective note-taking of exchanges with the client is not conducive to a good working relationship, and becomes impractical given the competing demands on them. Ensuring that another

person witnesses client meetings, or is able to produce a written record of their relations with their client, is impractical given the cost and the low level of their own fees and those payable to their instructing solicitors. Such measures would, in any event, inhibit the relationship of trust with their client. It may deter barristers from entering into these areas of practice, which are already perceived to be unattractive because of cuts to legal aid and long hours.

40. Similarly, barristers may be deterred from interacting with litigants in person when they are not before the court. This is already fraught with difficulty in many cases: a lower standard of proof applied to allegations made by litigants in person will compound the problem.

41. If barristers become more mindful of the risk of unfounded complaints being brought, this may result in overly-protective behaviour. For example, unnecessary submissions to the court in an attempt to placate an unreasonable client so as to avoid a complaint being brought. Barristers need to be fearless in representing their clients, but must also not be inhibited in complying with their duty to the court to act in the administration of justice. These core duties may be compromised if barristers feel compelled to 'watch their back' in case unjustified complaints might be made.

42. None of these potential impacts serves the interests of justice or protects the public. These wider 'public protection' implications of a change to the standard of proof need to be weighed against the proposition that a lower standard of proof will benefit clients and the public.

Public Access

43. Similar concerns arise in relation to public access. Barristers take instructions directly from their clients, without the involvement of a solicitor under this mode of instruction. 41% of complaints received by the Legal Ombudsman in 2016/17 concerned barristers acting on a public access basis. This is disproportionately high. We do not know how many of the cases brought before disciplinary tribunals concerned public access instructions, but they may well be similarly disproportionate. Some public access barristers have expressed their concern that a change to the standard of proof would make them more vulnerable to complaints, and this concern would appear to be supported by research already carried out by the BSB into public access work in 2016, which noted:

“Qualitative feedback indicates that there may be greater scope for complaints within the public access scheme, as clients have less experience of the law and may be more likely to misinterpret statements or legal advice. One barrister said she received a complaint after providing advice which the client misinterpreted – this was overturned post-investigation – but she felt the

incident highlighted that barristers are less likely to keep a record of everything they do and say, unlike solicitors, which again increases the risk of complaints.”¹⁴

44. A change to the standard of proof could be an additional disincentive to barristers to undertake public access work: and even more so in those fields of practice we have already identified as giving rise to greater vulnerability for barristers.

45. We know that the Competition and Markets Authority (CMA) wishes to increase consumer choice and the accessibility of legal services to consumers through the mechanism of increased competition, and they cite the LSB in their Legal Services Market Study Final Report as asserting that the public access scheme helps barristers compete on a more level playing field with solicitors who offer advocacy services.¹⁵ We believe that public access work is an important part of unbundling, which both increases consumer choice and lowers costs, thereby increasing accessibility to legal services—a stated aim of the CMA.

46. We suggest this is another potential unintended consequence of a change to the standard of proof that may run contrary to the public interest.

Disciplinary proceedings are more akin to criminal proceedings

47. There is no agreement on whether disciplinary proceedings can be more accurately equated with criminal or civil proceedings. In truth they probably sit on their own and defy categorisation into either the criminal or civil mould. However some believe that they are more akin to criminal proceedings because a statutory body is empowered to bring charges against an individual with the possibility of life-altering sanctions. If the disciplinary process is more analogous to criminal proceedings it would follow that it was more appropriate to apply the criminal standard.

Undermining the seriousness of professional misconduct proceedings

48. Some thought should be given to the fact that lowering the standard of proof may undermine the seriousness of a finding of professional misconduct. If the outcome is decided on a (mere) balance of probabilities, this may undermine the

¹⁴ Pye Tait Research into the public access scheme 2016: 44,45

https://www.barstandardsboard.org.uk/media/1788136/public-access-final-report_26.9.2016.pdf

¹⁵ Competition and Markets Authority, Legal Services Market Study Final report, 2016: G4

<https://assets.publishing.service.gov.uk/media/5887374d40f0b6593700001a/legal-services-market-study-final-report.pdf>

public sense of its seriousness and more readily enables the disciplined barrister to assert that the Tribunal's finding is wrong.

Questions for the BSB

49. We suggest that the BSB should not effect a change of this significance without focussing on the evidence demonstrating the need for change, the impact of such a change on barristers and public protection, the effect on the number of cases being heard before the tribunal, the process during any transition and the composition of the Professional Complaints Committee (PCC) and tribunal panel. We invite the BSB to consider our observations below, and we suggest that careful scrutiny of the available evidence is required before the case for a reduction of the standard of proof is made out.

Evidence of need for a change

50. As already mentioned, the consultation paper is bereft of any evidence that suggests that problems have been encountered with the current approach. We have been provided with no data which suggests that any material proportion of cases brought fails because the criminal standard of proof is applied. Neither has it been suggested that there are 'recidivists' who escape censure because of the current standard of proof. Many we have spoken to suggest that it is rare for a case to be dismissed in circumstances when it might have succeeded had the civil standard been applied. Indeed, it has been suggested to us that an acquittal is normally due to lacunae in the evidence or the wrong charges being preferred.

51. The BSB should explain the evidence which demonstrates the need for this regulatory change, and explain the rationale.

Wider consideration of the implications of a change to the standard of proof

52. We urge the BSB to look more closely at the implications of any proposed change. We note that the consultation paper is considering this issue from a position of principle and for that reason, or so we understand, no analysis is included on the effects of any change. However, the principle cannot be divorced from the practicalities or risks and implications of such a change. A full and thorough assessment of the impacts of any change and its effects on the public and the profession is required before a decision is made. This would also meet regulatory best practice.

53. For example: what will be the impact on the number of cases being brought before a tribunal? How will such change affect the public interest and the profession?

What will be the cost to the BSB and the BMIF and thus to the profession itself? The BSB should also seek to identify any unintended consequences of such a change. We have, for example, outlined our concerns about the possibility of a chilling effects earlier in the paper, which we are concerned could harm both the interests of clients and the administration of justice.

Impact on the number of cases coming before BTAS panels

54. We would like the BSB to provide a thorough assessment of the impact that change to the standard of proof would have on the number of cases being prosecuted by the BSB before BTAS. Some practitioners involved in such cases consider that an increase is likely. As a matter of common sense, if the threshold standard is lowered there will be more cases where there is “a reasonable prospect of success of a finding of professional misconduct being made.”¹⁶ Some attempt to assess the increase in numbers ought to be made. In the light of the anticipated size of the increase the BSB ought to consider supplementary questions:

- a) Will an increase in the number dilute the impact of such findings?
- b) What safeguards, if any, will be in place to meet the increased risk of marginal or unmerited cases being pursued, given the reports we have heard of the distress caused to barristers who are subjected to such proceedings?
- c) What are the cost implications for the profession?

Application of the civil standard of proof to the most serious allegations

55. We have discussed the case law concerning the interpretation of the civil standard and cautioned against the false comfort of a ‘variable’ standard. However, in the light of certain dicta which suggest that the more serious allegations require a greater cogency of evidence we believe that the BSB should clarify what its approach will be to proving the more serious allegations if the standard of proof is reduced.

Composition of the PCC and BTAS panels

56. We urge the BSB to ensure that both those who decide whether a case meets the required threshold to progress to tribunal, i.e. the PCC, as well as Tribunal members who decide the outcome of BTAS cases, have the necessary expertise and understanding of the barrister’s profession. This ensures that barristers are judged fairly by those with an understanding of their often complex duties to clients and the court, and provide a degree of reassurance to barristers that they will be treated fairly,

¹⁶ BSB Review of the Standard of Proof Applied in Professional Misconduct Proceedings Consultation Paper 2017: 4 https://www.barstandardsboard.org.uk/media/1830289/sop_consultation_paper.pdf

given what is at stake for them. The importance of this will be more acute if cases are decided on the civil standard of proof.

Process for transition

57. If the standard is changed, it is not clear to us whether the barrister who is charged would be subject to the standard in force at the time of the alleged misconduct or the standard in force at the time of the disciplinary tribunal. The BSB should develop a clear policy on this point, to avoid any uncertainty.

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?

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

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?

59. We understand that the BSB does not yet have detailed information on the areas of practice that generate most complaints which reach the tribunal stage. We think this information, which will soon be more readily available through changes to the Authorisation to Practice process, should, when available, be analysed to determine whether any other individuals with protected characteristics will be adversely impacted by a change in the standard of proof.

60. We understand anecdotally that women are over-represented in the field of family law and BAME barristers are over-represented in publicly funded work. These areas are thought to be those most exposed to complaints, owing to a number of factors including high rates of litigants in person, lack of a solicitor presence at client conferences (that, if present, would afford some degree of protection to barristers against complaints as witnesses to discussions) and the potentially devastating consequences for clients of a lost case in these areas of work, for example, loss of custody of a child or imprisonment.

61. If female or BAME barristers, because of their work in this area, are more likely to appear before the Bar’s Disciplinary tribunal, and because of a change in the standard of proof, more likely to be suspended or disbarred, then the impact on

diversity at the Bar should be a concern. The impact would be twofold; first there would be the actual impact on numbers of women and BAME barristers practising at the Bar and secondly, it may act as a disincentive to people with such protected characteristics being attracted to and retained at the Bar. Both would have the effect of making the Bar less reflective of the population it serves.

62. Before the establishment of the Legal Ombudsman, the BSB handled both service and conduct complaints. According to the BSB's 2013 report on diversity of barristers subject to complaints,¹⁷ in the period between 2007 and 2011 they found that the areas of law that generated the most complaints were civil (36.7%), criminal (35%) and family (15%). Whilst the practice areas generating complaints to the BSB will have changed since they began taking only conduct complaints, there are likely to be some similarities with those recorded as being the most common in the 2007-11 period.

63. We also know that service complaints referred to the Legal Ombudsman over the last three years are predominantly from clients of barristers working in the areas of crime, family and immigration and asylum (see Annex 1). While we recognise that the practice areas of barristers appearing before BTAS for misconduct will be different from those referred to the Legal Ombudsman for service complaints, there is referral of cases between both organisations and as such there is likely to be some overlap in the practice areas of barristers referred to the Legal Ombudsman with those appearing before BTAS.

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

Bar Council
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¹⁷Table 1 https://www.barstandardsboard.org.uk/media/1451930/diversity_report_2012_report.pdf

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Annex 1

The top 5 areas of law the Legal Ombudsman investigates about barristers are:

	% of all complaints resolved		
	2014/15	2015/16	2016/17
Crime	24%	20%	23%
Family law	17%	15%	22%
Immigration and asylum	23%	21%	11%
Litigation	13%	17%	19%
Employment	9%	10%	7%

Source: Legal Ombudsman