

SRA response

BSB consultation on standard of proof

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View the BSB consultation on standard of proof.

[<https://www.barstandardsboard.org.uk/media-centre/press-releases-and-news/bsb-consults-on-changing-the-standard-of-proof-used-in-professional-misconduct-proceedings-for-barristers/>]

Introduction and key points

1.

The Solicitors Regulation Authority (SRA) is the regulator of solicitors and law firms in England and Wales, protecting consumers and supporting the rule of law and the administration of justice. We do this by overseeing all education and training requirements necessary to practise as a solicitor, licensing individuals and firms to practise, setting the standards of the profession and regulating and enforcing compliance against these standards.

2.

We consider that all regulatory decisions should be made on the civil standard of proof to:

protect the public by putting their interests first rather than those of individual members of the profession, ensuring that action is taken when on the balance of probabilities an individual or firm presents a risk to the public

give the public confidence in the regulatory system and the profession

deliver a consistent, fair and efficient disciplinary process.

3.

We, like most modern regulators, make our own regulatory decisions on the civil standard of proof. That means if it is clear on the balance of probabilities that there has been a breach, we may impose an appropriate sanction. Our powers, however are limited. We have a number of options available, which we may use as a result of our disciplinary investigations (for example, we can issue a rebuke or a fine, impose conditions on a solicitor's practising certificate or restrict the employment of a non-solicitor, or the ability of a person to own or manage a firm).

4.

We prosecute more serious concerns at the Solicitors Disciplinary Tribunal (SDT), which in contrast applies a criminal standard of proof, as well



convening panels with a legal majority and solicitor chairs. The SDT can impose more robust sanctions including higher fines, suspending a solicitor (either for a period of time or indefinitely), or striking an individual off the Roll of Solicitors.

5.

We have, since 2010, consistently called upon the SDT to move to the civil standard of proof so that the public interest can be better served. This is particularly important as the SDT has the powers to suspend or strike off a solicitor when they present significant risks to the public or the administration of justice. Our calls have also been echoed by others, for example, the Law Commission said in its 2012 consultation paper [<http://www.lawcom.gov.uk/project/regulation-of-health-and-social-care-professionals/>] that:

"...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."

6.

The Insurance Fraud Taskforce addressed the issue of standard of proof in its report

[https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/494105/PU1817_Insurance_Fraud_Taskforce.pdf]

, published in January 2016. It recommended that there be a review of the standard of proof used in cases put before the Solicitors Disciplinary Tribunal.

"The Taskforce agrees that this high burden of proof is disproportionate, especially when compared to fines other regulators have issued during the period of this review, and may limit the deterrent message that such powers send out. The Taskforce considers that there is no rational justification for this discrepancy, and it may even prevent settlement by fines agreed above £2,000."

7.

In the Court judgment in the case of Arslan (10 November 2016) the Court confirmed that the civil standard of proof was the appropriate one for the SRA to use and, whilst it refused to make a decision on the standard of proof to be applied by the SDT as primary decision maker as this went beyond the issues in the case, the judges made clear their view that the



present situation in which the SDT applies a different standard of proof is unsatisfactory and illogical, and that the case law and current approach are "ripe for reconsideration".

8.

We regulate in the public interest, as do all regulators, so our priority is public protection. The criminal standard of proof means that the interests of individual solicitors or barristers always be put above those of the public. The use of the criminal standard of proof in regulatory decisions is costly, burdensome, unfair to the users of legal services and undermines confidence in the profession. The need to prove professional conduct cases beyond all reasonable doubt is an anachronism, with its roots in self regulation.

Responses to consultation questions

9.

Q.1 Do you consider, in principle, that the BSB should change its regulatory arrangements to allow for the civil standard to be applied to allegations of professional misconduct?

10.

We agree that the BSB should change its regulatory arrangements to allow for the civil standard to be applied to allegations of professional misconduct.

11.

The use of the criminal standard for professional conduct hearings is disproportionate, and risks putting the interests of individual members of the profession ahead of the interests of the public, with the risk of associated poor consumer outcomes and a loss of confidence in the profession. The higher standard of proof creates higher costs and increases the chances of a person who is not safe to practise remaining within the profession. The higher burden of proof also creates an incentive for defendants to fight cases, rather than to settle them through a paper-based process. The higher burden of proof aligns with the criminal, and therefore prosecutorial process, rather than the civil or even inquisitorial process. This in turn affects the approach to the rules of evidence and attitude of the defence.

12.

Using a civil standard of proof is considered regulatory best practice in the professions, both in the UK and internationally. The Insurance Fraud Taskforce final report recently recommended that the Government considers reviewing the standard of proof in cases put before the SDT, and the current



inconsistent approach with the SDT applying a standard of proof which is more generous to solicitors "means [the SRA's] enforcement actions may not act as a credible deterrent".

13.

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

14.

We believe that all legal services regulators should make disciplinary decisions to the civil standard of proof, removing regulatory arbitrage (whereby an individual could select a regulator with a disciplinary system that is perceived to be more lax) and increasing consistency. The impact of using the correct standard of proof would be that cases could be resolved more quickly with a more appropriate amount of evidence being obtained, reducing costs and the burden of regulatory costs on the profession.

15.

Consumers would benefit from a more proportionate and up to date disciplinary system which would allow action to be taken when it is more likely than not that an individual or firm has fallen short of the required standards. This would also increase public confidence in the profession.

16.

The civil standard of proof is the most appropriate standard to use for professional disciplinary hearings. It would also have the effect of allowing barristers and firms to have allegations of disciplinary breaches dealt with in a more efficient manner. Both individuals and firms would benefit from having disciplinary cases resolved more quickly. Again, importantly, increased public confidence in enforcement enhances public confidence in a profession, so barristers would see further benefits.

17.



Q2. If your answer to (1) 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?

18.

The current approach risks undermining public protection and confidence in the profession. We do not believe that the BSB should wait for the SDT to move to a civil standard of proof in order to make changes to their disciplinary system. The BSB's primary concern has to be public protection and that is best served by the use of the civil standard, in line with the vast majority of protective jurisdictions.

19.

In the Court judgment in the case of Arslan (10 November 2016) the Court confirmed that the civil standard of proof was the appropriate one for us to use and, whilst it refused to make a decision on the standard of proof to be applied by the SDT as primary decision maker as this went beyond the issues in the case, the judges made clear their view that the present situation in which the SDT applies a different standard of proof is unsatisfactory and illogical, and that the caselaw and current approach are "ripe for reconsideration". We continue to make the case for a change of the standard of proof used by the SDT, but we do not believe that change is imminent. We cannot require the SDT to move to a civil standard of proof, as it would require legislative change or a change to the SDT's policy or rules, but given that the BSB is not bound by the same constraint, it would be in both the public and the profession's interest to make the changes as soon as possible.

20.

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

21.

What matters is that there is an appropriate standard of proof consistently applied. We do not believe that there would be any adverse impacts on those with protected characteristics. Many users of legal services have protected characteristics and it is important that they are properly protected. That means using the civil standard of proof to protect all legal services consumers.