



Summary of Decision

The following table is a high level summary of the decision of the Legal Services Board. It is not a formal part of the decision notice.

Purpose of notice
<p>The LSB's decision to grant the application in full from the Bar Standards Board for the amendment of the standard of proof applied in disciplinary proceedings for professional misconduct.</p>
Alterations that are being approved by this decision
<p>The Bar Standards Board is amending its Disciplinary Tribunals Regulations to amend the standard of proof to be applied in disciplinary proceedings for professional misconduct from the criminal standard to the civil standard.</p> <p>This is achieved by amending just one word within The Disciplinary Tribunals Regulations. Replacing the word 'criminal' with 'civil'. However, there are several consequential rule additions including the creation of a specific rule to deal with transitional arrangements.</p> <p>The alterations are set out in further detail within the decision notice.</p>

Decision notice

The Bar Standards Board's application for the approval of amendments to the BSB Handbook to amend the standard of proof applied in disciplinary proceedings for professional misconduct.

The Legal Services Board (“**LSB**”) has granted an application from the Bar Standards Board (“**BSB**”) for approval of amendments to its regulatory arrangements (set out in the BSB Handbook) to amend the standard of proof applied in disciplinary proceedings for professional misconduct.

1. This decision notice sets out the decision taken, including a brief description of the changes. The chronology for the LSB's handling of this application is also set out at the end of this decision notice.
2. The LSB is required by Part 3 of Schedule 4 to the Legal Services Act 2007 (“**the Act**”) to review and grant or refuse applications by approved regulators to make alterations to their regulatory arrangements. The Bar Council is an approved regulator and the BSB is the regulatory arm to which the Bar Council has delegated its regulatory functions. The notes at page 5 of this notice explain the statutory basis for the decision.

Background

3. Comments made by senior judges in the 2016 Arslan Judgment¹ led to the BSB undertaking a public consultation in 2017. The BSB sought views on whether it should move from applying the criminal standard of proof to allegations of professional misconduct to applying the civil standard. Having consulted, the BSB concluded that making the change to the civil standard will allow it to better serve the public interest and will align its enforcement activity with current regulatory good practice.

Proposed changes

4. In order to implement the civil standard the BSB will replace the word ‘criminal’ with ‘civil’ in rE164 of its Disciplinary Tribunals Regulations (“the Regulations”).
5. A new rule rE261A will be added to the Regulations in order to implement a transitional provision. The provision will set out that where the alleged conduct took place prior to 1 April 2019 the criminal standard will apply to charges of professional misconduct and decisions on whether the disqualification condition has been established. The criminal standard will also apply where the alleged conduct took place prior to 1 April 2019 and continues beyond 31 March 2019 and forms the basis of a single charge of professional misconduct.
6. To ensure clarity on the standard of proof applicable to its determination by consent procedure the BSB will insert new rule rE70A into the Complaints Regulations of the Handbook to confirm that the civil standard will apply.

¹ The Solicitors Regulation Authority v Solicitors Disciplinary Tribunal [2016] EWHC 2862 (Admin)

7. This will also require a separate transitional provision emulating the provision at new rule rE261A. This will be added as new rule rE100A.

Key issues

8. The LSB welcomes the BSB's move to the civil standard of proof. This is consistent with the LSB's position, as set out in its 2014 report on regulatory sanctions², that there should be consistent use of the civil standard of proof across the legal services regulators.
9. During the course of its assessment the LSB asked the BSB about the risks posed by the proposed transitional arrangements and how it had considered those risks. The BSB confirmed it had considered a range of options for the transitional arrangements before making its decision to base this on the date of the alleged misconduct.
10. The BSB recognised that there are a range of risks associated with its transitional arrangements, such as: ambiguity over the date of conduct, different standards of proof applying in the same proceedings and the potential for long term applicability of the criminal standard of proof where historic misconduct allegations are made in the future.
11. Having considered those risks the BSB explained that it has concluded that its approach is justifiable for the following reasons:
 - a. It will retain the trust and confidence of the profession by avoiding the perception of procedural unfairness that would come with applying a transitional arrangement based on the steps in its own disciplinary procedures, rather than an arrangement based on the date of the alleged conduct.
 - b. Despite the potential for long term applicability of the criminal standard of proof, its use should diminish rapidly and over time cases requiring the criminal standard will become a rarity.
 - c. Whilst the proposal brings complexity, the regulated community are sophisticated in dealing with complex procedures and so will understand the application of the transitional arrangements.
 - d. The BSB intends to publish clear information on its website to inform the public on the application of the transitional arrangements.
 - e. Whilst the approach brings some practical issues it provides a clear delineation as to when each standard will be applied.
12. The LSB is satisfied with the additional assurances provided by the BSB in relation to its transitional arrangements, which demonstrate that due consideration has been given to the risks associated with the approach and how these could be mitigated.
13. During the course of its assessment the LSB also asked the BSB what action it intended to take to monitor the impact of the proposed changes. The BSB confirmed it

²Regulatory sanctions and appeals processes; An assessment of the current arrangements'
https://www.legalservicesboard.org.uk/projects/thematic_review/pdf/20140306_LSB_Assessment_Of_Current_Arrangements_For_Sanctions_And_Appeals.pdf

will monitor the impact of the proposed changes as part of its ongoing reporting mechanisms on its enforcement processes. A central focus of its analysis of trends will be on identifying any changes that could be attributed to the introduction of the civil standard of proof.

Decision

14. The LSB has considered the BSB application against the criteria in paragraph 25(3) of Schedule 4 to the Act. It considers that there is no reason to refuse the application and accordingly the application is granted.

15. **Annex A** to this decision notice sets out the amendments to the regulatory arrangements approved by the LSB.

Chronology

- The LSB confirmed receipt of an application from the BSB on 7 September 2018.
- The 28-day initial decision period for considering the application ended on 4 October 2018.
- An extension notice was issued on 4 October extending the initial decision period to 18 October 2018.
- This decision notice is effective from 10 October 2018.
- The decision notice will be published on our website by 12 October 2018.

Neil Buckley, Chief Executive

**Acting under delegated authority granted by the Board of the Legal Services Board
10 October 2018**

Notes:

1. The LSB is required by Part 3 of Schedule 4 to the Act to review and grant or refuse applications by approved regulators to make alterations to their regulatory arrangements.
2. Paragraph 25(3) of Schedule 4 to the Act explains that the LSB may refuse an application setting out a proposed change to the regulatory arrangements only if it is satisfied that
 - (a) granting the application would be prejudicial to the regulatory objectives
 - (b) granting the application would be contrary to any provision made by or by virtue of this Act or any other enactment or would result in any of the designation requirements ceasing to be satisfied in relation to the approved regulator
 - (c) granting the application would be contrary to the public interest
 - (d) the alteration would enable the approved regulator to authorise persons to carry on activities which are reserved legal activities in relation to which it is not a relevant approved regulator
 - (e) the alteration would enable the approved regulator to license persons under Part 5 [of the Act] to carry on activities which are reserved legal activities in relation to which it is not a licensing authority, or
 - (f) the alteration has been or is likely to be made otherwise than in accordance with the procedures (whether statutory or otherwise) which apply in relation to the making of the alteration.
3. The designation requirements referred to in paragraph 2(b) above are set out in paragraph 25(4) of Schedule 4 to the Act and are
 - (a) a requirement that the approved regulator has appropriate internal governance arrangements in place
 - (b) a requirement that the applicant is competent, and has sufficient resources to perform the role of approved regulator in relation to the reserved legal activities in respect of which it is designated, and
 - (c) the requirements set out in paragraphs 13(2)(c) to (e) of Schedule 4, namely that the regulatory arrangements are appropriate, comply with the requirements in respect of resolution of regulatory conflict (imposed by sections 52 and 54 of the Act) and comply with the requirements in relation to the handling of complaints (imposed by sections 112 and 145 of the Act).
4. In accordance with paragraphs 20(1) and 23(3) of Schedule 4 to the Act, the LSB has made rules³ about the manner and form in which applications to alter regulatory arrangements must be made. Amongst other things, the rules highlight the applicant's obligations under section 28 of the Act to have regard to the Better Regulation Principles. They also require applicants to provide information about each proposed change and details of the consultation undertaken.
5. If the LSB is not satisfied that one or more of the criteria for refusal are met, then it must approve the application in whole, or the parts of it that can be approved.

³ Rules for Rule Change Applications – Version 2 (November 2010)

Annex A – Proposed Amendments

rE164: The *Disciplinary Tribunal* must apply the ~~civil~~ **criminal** standard of proof when deciding charges of *professional misconduct* and in deciding whether the *disqualification condition* has been established.

rE261A: Notwithstanding the provisions in rE164 and rE261, the *Disciplinary Tribunal* must apply the criminal standard of proof when deciding:

1. charges of *professional misconduct* where the conduct alleged within that charge occurred prior to 1 April 2019, including where the same alleged conduct continued beyond 31 March 2019 and forms the basis of a single charge of *professional misconduct*; and
2. whether the *disqualification condition* has been established, in relation to an applicable person's alleged breach of duty or other conduct which occurred prior to 1 April 2019, including where the same alleged conduct continued beyond 31 March 2019.

rE70A: Where a matter is to be considered under the Determination by Consent procedure as per rE67, the standard of proof to be applied is the civil standard of proof.

rE100A: in considering matters under the *determination by consent procedure*, the *PCC* must apply the criminal standard of proof when deciding charges of *professional misconduct* where the conduct alleged within that charge occurred prior to 1 April 2019, including where the same alleged conduct continued beyond 31 March 2019 and forms the basis of a single charge of *professional misconduct*.