

CONSULTATION ON CHANGING
THE STANDARD OF PROOF
IN DISCIPLINARY PROSECUTIONS

RESPONSE OF THE PABA

1. Despite the endemic flaws of process in a system that already stacks the odds so heavily against the accused Barrister, that a raft of reforms are needed in consultation with Barristers who specialise in defending in these cases, the BSB is currently consulting on a suggestion that allegations of professional misconduct be made subject to the civil, rather than the criminal, standard of proof. The effect of this change would plainly be such as to make it easier to convict Barristers facing professional misconduct allegations where, say, the word of the Barrister is contradicted by a client.
2. This is a strange plan given the BSB's assertion (from data that no outsider can access), that most Barristers it prosecutes are convicted anyway and that the growing role of lawyers acting for the defence has had little effect on the incidence of such convictions.
3. This debate has been had in our sister profession. The Law Society opposes change. The SRA (the prosecuting authority) wants change. Notably, the SDT's (admirable) position as the tribunal of trial is that it is subject to the common law of England. Here, Solicitors set us a most laudable example of resisting ridiculous ideas.
4. The legal principles emerge from *Campbell v Hamlet* [2005] UKPC 19 in which Lord Simon Brown said this, a little over 6 years ago, in the Privy Council:

"That the criminal standard of proof is the correct standard to be applied in all disciplinary proceedings concerning the legal profession, their Lordships entertain no doubt. "

5. One is reminded of the *Privy Council in Bhandari v Advocates Committee* [1956] 1 WLR 1442 per Lord Tucker at p.1452:

"...we cannot envisage any body of professional men sitting in judgment on a colleague who would be content to condemn on a mere balance of probabilities...."

6. The BSB does not state that it can make its own laws, but is behaving as if somehow it can. It ought, therefore, to be reminded that, as the late and much lamented Lord Bingham observes in his work, *The Rule of Law* (2010),

"Be you never so high, the law is above you,"

7. With Dr Fuller's dictum in *Gnomologia: Adagies and Proverbs* (1733) resounding in our ears, it is surely a fatuous and wrong-headed waste of time and precious Bar Council funds for the BSB to be consulting formally on doing something that the Law Lords in *Hamlet* stated clearly cannot be done. The Bar Council lumberjack will be denuding trees in vain.

8. Moreover, the BSB claims to be "evidence-based" in its regulation. But where is the evidence that a single guilty Barrister won a case by abusing the test of "beyond reasonable doubt." And if the COIC tribunals are a truly independent umpire, why is the prosecution able to dictate key changes in the rules of the game ? Why does this proposal not come from COIC itself ? Will it, like the SDT, firmly oppose the proposal, as a group of self-respecting Barristers should ?

9. By clause 11 of its Constitution, the BSB must monitor and "*ensure the just operation of disciplinary tribunals.*" It is quite impossible to understand how a move by the BSB towards the civil standard of proof can, therefore, be *intra vires* the BSB's Constitution.

10. Finally, if the BSB seriously thinks that the Bar will accept such a change with equanimity, it must really be out of touch: there will be a storm of protest, just as there was when the BSB proposed the absurd idea of prosecutions for "improper behaviour."