

BAR  
STANDARDS  
BOARD

REGULATING BARRISTERS

**Consultation on the regulation of non-professional  
conduct**

**July 2022**

## About the BSB

1. The Bar Standards Board (“**BSB**”) is the regulator of barristers and other specialised legal services businesses in England and Wales. The BSB is responsible for:
  - Setting the education and training requirements for becoming a barrister;
  - Setting continuing training requirements to ensure that barristers' skills are maintained throughout their careers;
  - Setting standards of conduct for barristers;
  - Authorising organisations that focus on advocacy, litigation, and specialist legal advice;
  - Monitoring the service provided by barristers and the organisations we authorise to assure quality;
  - Handling reports against barristers and the organisations we authorise and taking disciplinary or other action where appropriate.
2. The BSB Handbook serves as the key regulatory tool through which we can ensure the effective administration of justice. It sets standards for those we regulate. In doing so, we seek to promote the regulatory objectives set out in s1 Legal Services Act 2007, which are:
  - Protecting and promoting the public interest;
  - Supporting the constitutional principle of the rule of law;
  - Improving access to justice;
  - Protecting and promoting the interests of consumers;
  - Promoting competition in the provision of services;
  - Encouraging an independent, strong, diverse and effective legal profession;
  - Increasing public understanding of citizens' legal rights and duties; and
  - Promoting and maintaining adherence to the *professional principles*.
3. The *professional principles* are that:
  - a. Authorised persons should act with independence and integrity;
  - b. Authorised persons should maintain proper standards of work;
  - c. Authorised persons should act in the best interests of their clients;
  - d. Persons who exercise before any court a right of audience, or conduct litigation in relation to proceedings in any court, by virtue of being authorised persons should comply with their duty to the court to act with independence in the interests of justice; and
  - e. The affairs of clients should be kept confidential.
4. The BSB is required to be a risk-based, transparent and proportionate regulator, targeting our work at the areas of most need in relation to our regulatory objectives.

## About this consultation

5. The purpose of this consultation is to clarify where we think the boundaries lie in the regulation of conduct that occurs in a barrister's private/personal life (which we refer to as “non-professional life” or “non-professional conduct”)<sup>1</sup>.

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<sup>1</sup> We refer to “*non-professional conduct*” or “*non-professional life*” because we recognise that we have no interest in matters that arise in a barrister's private or personal life which have no bearing on them as barristers or the wider profession.

6. We recognise that our existing (non-mandatory) guidance may not always reflect the circumstances in which the BSB will have a regulatory interest<sup>2</sup> in conduct that occurs outside professional practice or the circumstances where it is accepted in case law that it might be legitimate for regulators to intervene in relation to conduct in non-professional life. This is an important matter, which balances barristers' human rights against the public interest in preserving public confidence in the profession and individual barristers.
7. To provide clarity about when we may have a regulatory interest in non-professional conduct, we have drafted a new guidance document on our proposed approach to the regulation of non-professional conduct and we have developed a number of proposed changes to some of our non-mandatory guidance in the BSB Handbook and our Social Media Guidance.
8. Set out below is: our understanding of the current legal position in relation to the regulation of non-professional conduct; the details of our proposed changes; and a number of questions on which we welcome stakeholder views.
9. This consultation is open for comment from 21 July 2022 until 5pm on 20 October 2022. Following the closure of the consultation, we will collate and analyse the responses before we seek our Board's approval on the final drafts of the guidance documents and any drafting changes to the BSB Handbook.

### **Context: the legal position**

10. Barristers are central to the effective operation of the legal system, and it is important that our regulation serves to maintain public trust and confidence in them as individual practitioners and the wider profession. While barristers cannot be held to unreasonably high standards and are not to be viewed as "paragons of virtue"<sup>3</sup>, barristers are nevertheless held to a higher standard of conduct than ordinary members of the public. This is because of the important and highly respected role they play in ensuring access to, and the administration of, justice.
11. Members of the public must feel able to access an independent, strong, diverse, and effective profession. This means we have an important role in ensuring that any member of the profession, whether practising or unregistered, acts in a way that maintains public trust and confidence in the profession and in doing so that we protect and promote the public interest and the interests of consumers, as well as improving access to justice.
12. Although our key role is the regulation of barristers' conduct in the course of their professional activities, the BSB Handbook also sets standards of conduct which apply to barristers **at all times**.
13. The courts have long recognised that conduct occurring outside an individual's professional practice may justify interference by their regulatory body, whether that is because the conduct affects the individual in a professional context or the wider standing of the profession<sup>4</sup>.

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<sup>2</sup> By "regulatory interest" we mean the circumstances in which we, as a regulator of the profession, may have a legitimate concern about conduct which has the potential to engage provisions of the BSB Handbook and which is apt for further consideration in accordance with our processes. This might include, for example, undertaking an initial risk assessment to inform whether a matter is suitable for onward referral for supervision activity or enforcement action.

<sup>3</sup> Wingate and Evans v SRA; SRA v Malins [2018] EWCA Civ 366

<sup>4</sup> See, for example, Marten v Royal College of Veterinary Surgeons Disciplinary Committee [1966] 1 QB 1; Meadow v General Medical Council [2006] EWCA Civ 1390; R (on the application of Remedy UK Ltd) v General Medical Council [2010] EWHC 1245 (Admin); R (on the application of Pitt v General Pharmaceutical Council [2017] EWHC 809 (Admin).

14. More recently, the principle was restated by the Divisional Court in Ryan Beckwith v Solicitors Regulation Authority [2020] EWHC 3231 (Admin), where the President of the Queen’s Bench Division and Mr Justice Swift observed, in relation to the SRA Handbook, that:

*There can be no hard and fast rule either that regulation under the Handbook may never be directed to the regulated person's private life, or that any/every aspect of her private life is liable to scrutiny. But Principle 2 or Principle 6 may reach into private life only when conduct that is part of a person's private life realistically touches on her practise of the profession (Principle 2) or the standing of the profession (Principle 6). Any such conduct must be qualitatively relevant. It must, in a way that is demonstrably relevant, engage one or other of the standards of behaviour which are set out in or necessarily implicit from the Handbook.<sup>5</sup>*

15. We recognise that in cases involving conduct that occurs outside of practice in particular, the right balance needs to be struck between the public interest in preserving public confidence in individual barristers and the wider profession and a barrister’s rights which are guaranteed under the Human Rights Act 1998 and the European Convention on Human Rights (“ECHR”). Our regulation of a barrister’s non-professional conduct is likely to engage Article 8 (the right to private life) and, in some cases, Article 10 (the right to freedom of expression).
16. The BSB as a public authority must act compatibly with the rights that are protected under the ECHR and the Human Rights Act 1998. However, some of those rights (including Article 8 and Article 10) are qualified rights, which means that they may lawfully be interfered with where such interference can be justified and is proportionate. This requires a careful balancing exercise, for example between the rights of the individual barrister and the rights of others (such as the rights and reputation of other members of the profession or consumers of barristers’ services). This is an exercise that must be conducted on a case-by-case basis according to the particular facts. However, we have recognised the importance of balancing those rights in our draft guidance on the regulation of non-professional conduct and our redrafted Social Media Guidance.
17. We note that the Government introduced a draft UK Bill of Rights before Parliament on 22 June 2022 which is intended to reform the UK’s approach to human rights. We will maintain a watching brief as this develops over the next parliamentary year and will consider the extent to which a new Bill of Rights may affect the BSB’s regulation of conduct which engages the rights which are protected under the ECHR.

## **Our current arrangements**

### **What does the current Handbook guidance say?**

18. Part 2 of the BSB Handbook contains the Code of Conduct which includes ten Core Duties which underpin our entire regulatory framework, as well as rules that supplement those Core Duties. Compliance with both the Core Duties and rules is mandatory, but the Core Duties and Rules are also supported by guidance which serves a number of purposes, including to assist in the interpretation and application of the Core Duties and Rules to which the guidance relates. Although many of the Core Duties and Conduct Rules in the BSB Handbook only apply when a barrister is practising<sup>6</sup> or otherwise providing legal services, certain Core Duties and Conduct Rules apply to barristers **at all times**, such as Core Duty 5 and Rule C8.

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<sup>5</sup> At paragraph [54].

<sup>6</sup> See the definition of “practice” at Part 6 of the BSB Handbook.

19. The implication of this is that, for the most part, conduct that occurs in a barrister's non-professional life will be governed by the provisions that apply at all times<sup>7</sup>. Non-mandatory guidance on the application of these provisions is also included in the BSB Handbook at Guidance C16, Guidance C25, Guidance C26, Guidance C27 and Guidance C28. These have been set out below:

<b>Handbook provisions</b>	<b>Wording of the BSB Handbook provisions relating to non-professional conduct</b>
Core Duty 5	You must not behave in a way which is likely to diminish the trust and confidence which the public places in you or in the profession
Rule C8	You must not do anything which could reasonably be seen by the public to undermine your honesty, integrity (CD3) and independence (CD4).
gC16	Rule C8 addresses how your conduct is perceived by the public. Conduct on your part which the public may reasonably perceive as undermining your honesty, integrity or independence is likely to diminish the trust and confidence which the public places in you or in the profession, in breach of CD5. Rule C9 is not exhaustive of the ways in which CD5 may be breached.
gC25	A breach of Rule rC9 may also constitute a breach of CD3 and/or CD5. Other conduct which is likely to be treated as a breach of CD3 and/or CD5 includes (but is not limited to): .1 subject to Guidance C27 below, breaches of Rule rC8; .2 breaches of Rule rC10; .3 criminal conduct, other than minor criminal offences (see Guidance C27); .4 seriously offensive or discreditable conduct towards third parties; .5 dishonesty; .6 unlawful victimisation or harassment; or .7 abuse of your professional position
gC26	For the purposes of Guidance gC25.7 above, referring to your status as a barrister, for example on professional notepaper, in a context where it is irrelevant, such as in a private dispute, may well constitute abuse of your professional position and thus involve a breach of CD3 and/or CD5
gC27	Conduct which is not likely to be treated as a breach of Rules rC8 or rC9, or CD3 or CD5, includes (but is not limited to): .1 minor criminal offences; .2 your conduct in your private or personal life, unless this involves: .a abuse of your professional position; or .b committing a criminal offence, other than a minor criminal offence
gC28	For the purpose of Guidance C27 above, minor criminal offences include: .1 an offence committed in the United Kingdom which is a fixed-penalty offence under the Road Traffic Offenders Act 1988; or .2 an offence committed in the United Kingdom or abroad which is dealt with by a procedure substantially similar to that for such a fixed-penalty offence; or .3 an offence whose main ingredient is the unlawful parking of a motor vehicle.

<sup>7</sup> This will generally be Core Duty 5 and Rule C8 as the other provisions that apply at all times relate predominantly to a barrister's duty to co-operate with the BSB and other regulators and the duty to provide information or report certain matters to us.

20. As can be seen from Guidance C25 and C27, the Code of Conduct takes a firm stance that any criminal conduct (other than a minor criminal offence<sup>8</sup>) is likely to be regarded as a breach of the BSB Handbook. We believe this remains appropriate for the reasons set out at paragraphs 28 to 31 below.
21. However, for other (non-criminal) conduct, the current emphasis at Guidance C27 is that the BSB is unlikely to treat conduct in a barrister's private or personal life as a breach of the BSB Handbook unless it involves an abuse of professional position. We consider this is too narrow and have summarised our proposed approach at paragraphs 31 to 35 and paragraphs 40 to 43 below.

### **What does the current Social Media Guidance say?**

22. Alongside the BSB Handbook, the BSB has also published Social Media Guidance which is intended to help barristers to understand their duties under the BSB Handbook as they apply to the use of social media. It specifically references Core Duty 5 and Core Duty 3 (to act with honesty, and with integrity) and Core Duty 8 (not to discriminate unlawfully against any person) and applies to barristers both in their professional and personal capacity.

### **Why do we need to amend the current BSB Handbook and Social Media Guidance?**

#### *BSB Handbook*

23. The current non-mandatory guidance in the BSB Handbook suggests that we are unlikely to treat conduct in a barrister's private or personal life as a breach of the BSB Handbook unless it involves an abuse of professional position (or involves criminal conduct that is more than a minor criminal offence). We consider the guidance is too narrow and does not reflect modern society and the broad types of conduct that can occur in a barrister's non-professional life that might realistically affect the individual in a professional context or the wider standing of the profession, such as cases involving sexual harassment outside of the workplace or discrimination.
24. Further, although the current guidance is just that and is not a 'hard-edged' rule<sup>9</sup>, in practice we may take regulatory action in other areas of barristers' private/personal lives, including cases involving social media, harassment, acts of discrimination outside a work context, and when barristers pursue vexatious litigation or fail to comply with court orders in their private life. We therefore want to make clearer for the benefit of the profession and the wider public the circumstances in which we are likely to have a regulatory interest in non-professional conduct.

#### *Social Media Guidance*

25. We consider that our current Social Media Guidance needs to be amended to achieve a more proportionate balance with a barrister's freedom of expression (as protected by Article 10 of the European Convention of Human Rights and the Human Rights Act 1998).

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<sup>8</sup> Minor criminal offence includes:

a) an offence committed in the United Kingdom which is a fixed-penalty offence under the Road Traffic Offenders Act 1988;

b) an offence committed in the United Kingdom or abroad which is dealt with by a procedure substantially similar to that for such a fixed-penalty offence;

c) an offence whose main ingredient is the unlawful parking of a motor vehicle

<sup>9</sup> Diggins v Bar Standards Board [2020] EWHC 467 (Admin) and AB v Bar Standards Board [2020] EWHC 3285 (Admin)

## Our proposals

26. It is our aim, as a transparent and risk-based regulator, to ensure that barristers and the public have a clear understanding of the standards expected of barristers and the circumstances in which we might have a regulatory interest in non-professional conduct.
27. The case law is clear that the closer non-professional conduct is to professional practice, the greater the justification for regulatory interference on the basis that the conduct might reflect on how the individual might behave in a professional context or have an impact on public trust and confidence in the profession.

### Criminal conduct

28. We take the view that it is incompatible with the high standards expected of the profession for barristers to engage in criminal conduct<sup>10</sup>. This is because we consider it to be important that all barristers, both practising and unregistered, are (and are seen to be) rule-abiding citizens in order to maintain public trust and confidence in them and in the profession.
29. Barristers also have a duty promptly to self-report certain types of criminal conduct to us by virtue of Rule C65.1 and Rule C65.2 of the BSB Handbook. This obligation applies at all times to both practising and unregistered barristers. A failure promptly to self-report is, in itself, a breach of the BSB Handbook which could attract our regulatory interest.
30. We have a regulatory interest in barristers who engage in criminal conduct (again, for offences which are more than a “*minor criminal offence*”) regardless of whether the underlying conduct occurred in a professional or non-professional context.
31. There may be circumstances where barristers engage in conduct which could constitute a criminal offence but, for various reasons, they have not been charged or criminal conduct is not proved. We may nevertheless have a regulatory interest in such conduct, but it will be considered in line with the principles applicable to “other conduct” below.

### Other conduct

32. In Ryan Beckwith v Solicitors Regulation Authority [2020] EWHC 3231 (Admin), the Divisional Court considered that for a regulator to intervene in a solicitor’s private or personal life, the underlying conduct must be qualitatively relevant to the practice of the profession or the standing of the profession and it must, in a way that is demonstrably relevant, engage one or other of the standards of behaviour which are set out in or necessarily implicit from the SRA Handbook.
33. In the recent BSB case of AB v Bar Standards Board [2020] EWHC 385 (Admin) Mr Justice Bourne observed (in reference to the current non-mandatory Guidance C25 and C27):

*“It seems to me that, applying the guidance, conduct in a person’s private or personal life is in general not likely to be treated as a breach of CD5 but nevertheless can be so treated for good reason. The reason could be that the conduct, though personal or private, clearly is or is analogous to conduct which contravenes other provisions of the Code.”*

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<sup>10</sup> By “criminal conduct” we mean conduct that results in a criminal conviction or caution, unless it is for a “minor criminal offence” (see footnote 7), or where a barrister is charged with an indictable offence in England and Wales (or a criminal offence of comparable seriousness in any other jurisdiction).

34. In relation to other (non-criminal) conduct, we are likely to have a regulatory interest in conduct that is, or is analogous to, conduct that would contravene other relevant provisions of the BSB Handbook (or standards that are necessarily implicit from it) if it occurred during a barrister's professional life. This is because such conduct is more likely to have a closer connection to the profession and have a bearing on the public's trust and confidence in the barrister or the profession.
35. When deciding whether non-professional conduct might have an impact on the public's trust and confidence in the barrister or the profession, we also consider that the closer the link between the context or environment in which the conduct occurred and that of the profession, the greater the likelihood that we will have a regulatory interest.

How will we determine whether the BSB has a regulatory interest?

36. A new guidance document has been drafted, which sets out our proposed approach to regulating non-professional conduct (attached at **Annex 1**).
37. It is intended that this guidance document will be used by staff in regulatory decision-making roles when considering whether, in principle, we have a regulatory interest in non-professional conduct that is reported to us.
38. In order to determine whether we have a regulatory interest in conduct which is reported to us we propose to ask two questions. These are:

**Question 1**

**Has the barrister been:**

- a. Charged with an indictable offence in England and Wales;**
  - b. Charged with a criminal offence of comparable seriousness elsewhere; or**
  - c. Convicted of, or accepted a caution for, any criminal offence other than a *minor criminal offence*<sup>11</sup> (subject to the Rehabilitation of Offenders Act 1974 (as amended)).**
39. Question 1 is consistent with a barrister's current duty to self-report certain criminal matters, in line with Rule C65 of the BSB Handbook.
40. If the answer, with respect to any element of the conduct, to the above question is no, then we will go on to ask the second question.

**Question 2**

**Is the conduct:**

- a. conduct which is, or is analogous to, conduct that could breach relevant standards of the BSB Handbook that apply to practising barristers; and**
- b. sufficiently relevant or connected to the practice or standing of the profession such that it could realistically:**

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<sup>11</sup> As defined in Part 6 of the BSB Handbook.



- a. **affect public trust and confidence in the barrister or the profession; or**
- b. **be reasonably seen by the public to undermine the barrister’s honesty, integrity and independence**

**taking into account the context and environment in which it occurred?**

41. Question 2 is intended to capture the principles behind Core Duty 5 and Rule C8, whilst also reflecting the case law which requires there to be a sufficient “nexus” between non-professional conduct and the profession. It is intended that both limbs of this question must be answered in the affirmative for the BSB to have a regulatory interest in non-professional conduct.
42. By setting out more clearly our approach to the regulation of non-professional conduct, supported by case studies, we are hoping that in addition to assisting those in regulatory decision-making roles at the BSB, the guidance will be helpful to the profession and the public in understanding where we are likely to have an interest in non-professional conduct.
43. However, it is important to note that the guidance is aimed at understanding whether we have an in-principle regulatory interest in non-professional conduct. Having an in-principle regulatory interest in conduct does not mean that regulatory action will necessarily follow. As a risk-based and proportionate regulator, we focus our resources on cases that pose the most harm to the regulatory objectives, and reports of potential breaches of the BSB Handbook will remain subject to a risk assessment before a decision is made whether to take further action, and this will include an exercise to consider and balance any relevant human rights that are engaged.

**Question 1: Overall, have we struck the right balance between the public interest in preserving public confidence in the profession and individual barristers and a barrister’s rights which are guaranteed under the Human Rights Act 1998 and the European Convention on Human Rights?**

**Question 2: Do you have any observations on the questions we are proposing to ask when considering whether we have a regulatory interest in non-professional conduct?**

**Question 3: Are the case studies included in our draft guidance helpful?**

**Question 4: Do you have any general comments or feedback on our draft guidance on the regulation of non-professional conduct?**

Guidance in the BSB Handbook

44. To reflect our proposals above, the suggested re-drafting of the non-mandatory guidance in the BSB Handbook is set out below. The proposed changes to the current drafting are:

*Guidance C25*

- a. Guidance C25 – ‘breaches of rC9’ has been moved from the introductory paragraph to the list of conduct which is likely to be treated as a breach of Core Duty 3 or Core Duty 5. This does not change the meaning of the provision;
- b. Guidance C25.1 - ‘subject to Guidance C27’ has been removed;
- c. Guidance C25.3 - the language has been amended to reflect the reporting obligations at Rule C65;

- d. Guidance C25.4 – removed ‘or discreditable conduct towards third parties’ and replaced with ‘seriously offensive conduct towards others’;
- e. Guidance C25.6 – now includes a reference to discrimination.

#### *Guidance C26*

- a. This drafting has been updated to include a reference to Rule C8 to make it clear that abuse of professional position in a non-professional context could be a breach of the provision.

#### *Guidance C27*

- a. Has been redrafted to provide clarity about our approach to dealing with misconduct in a barrister's private life, linking back to the Core Duties and Rules that apply at all times.

#### *Guidance C28*

- a. The current wording of Guidance C28 mirrors the definition of a “minor criminal offence” which appears in Part 6 of the BSB Handbook. It has therefore been deleted to avoid repetition. This provision is also no longer necessary, given the changes proposed to Guidance C25 and Guidance C27 which remove any references to a “minor criminal offence”.

### **Proposed new drafting**

#### **gC25**

Conduct which is likely to be treated as a breach of CD3 and/or CD5 includes (but is not limited to):

1. breaches of rC8;
2. breaches of rC9;
3. breaches of rC10;
4. criminal conduct which you are under a duty to report to the *Bar Standards Board* pursuant to rC65;
5. seriously offensive conduct towards others;
6. dishonesty;
7. unlawful *discrimination, victimisation or harassment*; or
8. abuse of your professional position.

#### **gC26**

For the purposes of gC25.8 above, referring to your status as a barrister in a context where it is irrelevant but may influence others may constitute abuse of your professional position and thus involve a breach of CD3, CD5 and/or rC8. An example of this might be using professional notepaper in a private dispute.

## Proposed new drafting (cont'd)

### gC27

The application provisions at Section A of Part 2 of this *Handbook* (the Code of Conduct) set out which Core Duties and rules apply to you and when they apply. Certain Core Duties and rules (such as CD5 and rC8) apply to you at all times and may therefore also be relevant to conduct which occurs in your private or personal life.

To assist in considering whether conduct which occurs in your private or personal life is likely to be treated as a breach of CD5 and/or rC8, the BSB considers that the factors set out in the Guidance on the Regulation of Non-Professional Conduct are likely to be relevant.

### gC28 (remove)

**Question 5: Do you consider our proposed drafting changes to the non-mandatory guidance provisions in the BSB Handbook assist in clarifying our approach to the regulation of non-professional conduct?**

**Question 6: Do you have any general comments or feedback on any of the proposed drafting changes to the non-mandatory guidance?**

### Social media

45. We are proposing a significant redraft to the current version of the [Social Media Guidance](#) following concerns that the current guidance does not strike the right balance between regulatory intervention in relation to social media use and freedom of expression (as protected by Article 10 of the Human Rights Act 1998). The guidance applies in relation to both professional and non-professional conduct, but recognises that it is not always easy to say whether the nature of a communication on social media is truly private.
46. If social media are used in a purely non-professional context, we also propose to consider the matters set out in our new draft '*Guidance on the Regulation of Non-Professional Conduct*' (referred to above) when considering whether we have a regulatory interest in the conduct.
47. The new draft guidance is attached at **Annex 2**, and we welcome views.
48. In general terms, any conduct on social media which might be said to be inconsistent with the standards expected of barristers may amount to a breach of the BSB Handbook. For example, conduct on social media may demonstrate a lack of integrity, it may breach client confidentiality, or it may be conduct which is likely to diminish the trust and confidence which the public places in the barrister or in the wider profession.
49. The inherently public nature of the Internet means that anything which a barrister posts online could theoretically be at risk of being read by anyone and could be linked back to their status as a barrister, regardless of whether they identify themselves on social media as a barrister. This degree of exposure can have an impact on the extent to which public confidence in the barrister or the profession is likely to be diminished by a barrister's use of social media.
50. Given the potentially wide scope of conduct that might engage relevant provisions of the BSB Handbook, it is not possible to provide an exhaustive list of the types of conduct that might amount to a potential breach.

51. In redrafting the guidance, we have:

- a. given greater recognition to a barrister's right to freedom of expression, and clarified that the BSB can, in appropriate circumstances, nevertheless interfere with this when balancing it against the rights of others, including confidence in the profession;
- b. identified what the BSB will consider when determining whether conduct on social media might amount to a potential breach of the BSB Handbook; and
- c. provided a non-exhaustive list of the types of conduct that we may regard as a potential breach (along with supporting case studies).

52. The previous version of the Social Media Guidance (October 2019) suggested that comments that were considered distasteful or “offensive” by others may be a breach of the BSB Handbook. We have given careful thought to the language used in the previous guidance and considered the appropriate threshold for regulatory interference in cases that involve conduct that might be said to be offensive. This is an issue that regularly arises in the context of reports about a barrister’s use of social media.

53. Guidance C25.4 of the BSB Handbook states that conduct which may amount to a breach of BSB Handbook includes conduct which is “seriously offensive”. This is consistent with the approach of many other regulators and we think it sets the bar at a threshold that is appropriate, bearing in mind the need to strike the right balance between an individual barrister’s rights and the rights of others, including the public interest in preserving public confidence in the profession and individual barristers. In amending the Social Media Guidance we have ensured it is consistent with the standards set out in the BSB Handbook.

**Question 7: Do you have any feedback or comments on the new Social Media Guidance?**

**Question 8: Are the case studies in our draft Social Media Guidance helpful?**

54. As the new Social Media Guidance will not be published until after the consultation has concluded and any necessary amendments are made, we have made a number of interim changes to the current Social Media Guidance, with immediate effect, to address the primary concerns with the current guidance. Our new, interim Social Media Guidance can be viewed on the BSB website [here](#).

**Equality impacts**

55. We have conducted an Equality Impact Assessment (“EIA”) of the BSB’s current approach to regulating conduct in non-professional life. As part of this assessment, we have considered:

- a. existing research published by the BSB;
- b. the demographics, by protected characteristic, of the registered and unregistered barrister populations; and
- c. internal data for different stages of the BSB’s regulatory process – report, investigation, and referral for disciplinary action – for non-professional conduct by registered barristers for the period of 15 October 2019 and 1 January 2022.<sup>12</sup> Although we have a breakdown of the frequency with which

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<sup>12</sup> When the BSB introduced its updated enforcement regime on 15 October 2019, one of the relevant changes (for the purpose of the EIA) was the introduction of a “Setting/Context” data field on the case management

unregistered barristers appear in these internal data, we are unable to use it to assess the equality impact of the BSB's current approach to regulating non-professional conduct on unregistered barristers because there is a significant "no response" rate for unregistered barristers declaring their protected characteristics.

56. Our EIA has suggested that, on the whole, there are limited equality impacts arising from our current approach to the regulation of non-professional conduct. However, the EIA reveals that registered barristers with the following protected characteristics appear to be overrepresented in the internal data compared to the proportion of the registered barrister population they make up:

- a. at the **Investigations** stage, those who are aged 45-54 or are male; and
- b. at the **Investigations referred for disciplinary action** stage, those who identify as having an "Other"<sup>13</sup> religion/belief or are male.

57. It is important to recognise that the internal data pool is very small, so no reliable conclusions can be drawn from this data analysis. Further, there is limited data-based evidence to explain why barristers in these groups may be overrepresented in the internal data (explained further in the EIA). It remains difficult for the BSB to identify or propose any measures to mitigate these potential negative impacts on barristers in these protected characteristic categories.

58. Although these observations suggest there could be a potential negative impact of the BSB's current approach to the regulation of non-professional conduct on registered barristers in the abovementioned groups, it is not necessarily the approach itself (as it is applied equally to all barristers), but the barristers' conduct and other external factors outside the BSB's control that may impact the frequency at which these barristers appear in the internal data. The BSB's enforcement process is entirely reactive to barristers' conduct of which we become aware and which is often brought to our attention by third parties and that may be a breach of the BSB Handbook. While there is a wider question about whether certain groups are overrepresented in our enforcement processes, that is a broader issue that we will consider and deal with separately.

59. The EIA can be read in full at **Annex 3**, and we welcome views.

**Question 9: Are there any other potential equality impacts that you think we should be aware of?**

**How to respond to this consultation**

60. The deadline for this consultation is **20 October 2022 at 5pm**. You do not need to wait until the deadline to respond to this consultation. Responses can be submitted via the [online form](#) or using the [Word document version](#) and submitted to [CNPL@BarStandardsBoard.org.uk](mailto:CNPL@BarStandardsBoard.org.uk).

61. If you have a disability and need to access this consultation in an alternative format, such as larger print or audio, please let us know. Please let us know if there is anything else we can do to facilitate feedback other than via written responses.

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system, where BSB staff could explicitly record that a report being assessed concerned non-professional conduct. All cases opened before 1 January 2022 which have the "Setting/Context" marked as 'Non-Professional' have been included in this EIA data analysis.

<sup>13</sup> The other options that were available to barristers were: Buddhist, Christian, Hindu, Jewish, Muslim, Sikh, No religion, No Information or Prefer not to Say.

62. Whatever response your form takes, we will normally want to make it public and attribute it to you, or your organisation, and publish a list of respondents. If you do not want to be named as a respondent to this consultation, please let us know in your response.

### **Our consultation questions**

Question 1: Overall, have we struck the right balance between the public interest in preserving public confidence in the profession and individual barristers and a barrister's rights which are guaranteed under the Human Rights Act 1998 and the European Convention on Human Rights?

Question 2: Do you have any observations on the questions we are proposing to ask when considering whether we have a regulatory interest in non-professional conduct?

Question 3: Are the case studies included in our draft guidance helpful?

Question 4: Do you have any general comments or feedback on our draft guidance on the regulation of non-professional conduct?

Question 5: Do you consider our proposed drafting changes to the non-mandatory guidance provisions in the BSB Handbook assist in clarifying our approach to the regulation of non-professional conduct?

Question 6: Do you have any general comments or feedback on any of the proposed drafting changes to the non-mandatory guidance?

Question 7: Do you have any feedback or comments on the new Social Media Guidance?

Question 8: Are the case studies in our draft Social Media Guidance helpful?

Question 9: Are there any other potential equality impacts that you think we should be aware of?

### **Next steps**

63. Once the consultation closes, we will collate and analyse the responses before we seek the final approval of our Board to our proposed guidance and drafting changes to the BSB Handbook.