BAR STANDARDS BOARD

REGULATING BARRISTERS

Consultation:

The Bar Standards Board's Enforcement Powers and Procedures

(Proposed revisions to the Enforcement Regulations: Part 5 of the BSB Handbook)

July 2025

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Foreword

1. Our ambition is to be recognised as an excellent regulator trusted to advance the public interest.[1]

2. To support our ambition, over the past two years we have been working on a programme of reform comprising a large number of transformative projects and initiatives. The three principal objectives of this reform programme are:

   - **proactive, consumer-focused regulation**, meeting all the characteristics of an effective approach to regulation, anchored in a much deeper, intelligence-based understanding of the market we regulate;
   - **modernised delivery** of our authorisation and enforcement for operational excellence; and
   - **engaged, agile and committed people** in a newly re-organised structure designed to clarify accountabilities and empower our people to have the skills and capacity to achieve our business goals.

3. We have made good progress so far, including the implementation of a re-organised BSB in December 2024. Work is ongoing to modernise the delivery of the BSB's gatekeeping and enforcement functions so they are quick, effective and responsive with no loss of quality.

4. To that end, the BSB has been progressing a number of projects focused on modernising delivery which include implementation of the recommendations arising from the review of our enforcement functions by Fieldfisher LLP, which we published in April 2024 and whose recommendations we accepted in full.

5. This consultation follows a significant redesign of our end-to-end enforcement process and review of the regulations that underpin it. It is an important consultation that spans a very wide number of significant issues. It is the first of two planned consultations and focuses on *in principle* proposals for change, with a second consultation on the drafting (or redrafting) of the regulations to follow in 2026.

6. It is a major step in our reform programme and the proposals set out in this paper are informed by the important overall aims of improved fairness, transparency, efficiency and effectiveness of our enforcement system. I would like to thank colleagues and other internal and external stakeholders for the hard work and support they have provided to develop the proposals set out in this paper.

7. Given the importance of the enforcement system in protecting the public, I welcome and encourage responses from anyone with an interest in the work of the BSB and/or regulation more widely, including barristers, members of the

[1] The BSB is currently developing a 5-year strategy for consultation this autumn.

public and individuals and organisations with experience of conduct and enforcement issues, as well as other professional regulators.

8. There is a lot of information in this consultation paper, as it covers a wide number of issues. Not everyone will want to comment on all of the proposals. People are therefore very welcome to provide feedback only in relation to the proposals in which they have an interest. The details for how to do so can be found below.

9. In responding to this consultation, you will help us to revise the Enforcement Regulations in a way that allows us to realise the full benefits of changes to our end-to-end enforcement process.

Mark Neale
Director General

Responding to this consultation

1. This consultation is open for comment from **3 July 2025 to 15 October 2025**. You do not need to wait until the deadline to respond. Responses can be submitted online by using our online survey platform or emailed to enforcementregs@barstandardsboard.org.uk.

2. If you would like to access this consultation document in an alternative format, such as larger print or audio, please contact us at: enforcementregs@barstandardsboard.org.uk or by telephone at 020 7611 1444.

3. If you would like to provide your feedback via another method than a written response, please contact us using the same contact details above.

4. Whatever form your response 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

5. We are planning events to discuss the proposals set out in this consultation paper, and hope that many barristers, members of the public and other stakeholders and consumers interested in the regulation of the Bar will be able to join those sessions.

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Glossary of Terms

Term	Definition
BSB	Bar Standards Board
Bar Council	General Council of the Bar
The Enforcement Review	An independent review of our enforcement system by Fieldfisher LLP
BTAS	Bar Tribunals and Adjudication Service
COIC	Council of the Inns of Court
EDRs	The Enforcement Decision Regulations 2019 (Part 5A of the BSB Handbook)
DTRs	The Disciplinary Tribunals Regulations (Part 5B of the BSB Handbook)
ISDRs	The Interim Suspension and Disqualification Regulations (Part 5C of the BSB Handbook)
FtP	Fitness to practise
FtPRs	The Fitness to Practise Regulations (Part 5D of the BSB Handbook)
KC	King's Counsel
CILEX	Chartered Institute of Legal Executives
EIA	Equality Impact Assessment

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Part 1: Introduction

About the BSB

1. We are the independent regulator of barristers and other specialised legal services businesses, and their employees and managers, in England and Wales. While the General Council of the Bar (Bar Council) is the approved regulator under the Legal Services Act 2007, the Bar Council has delegated its regulatory functions to the independent BSB.

2. We play a key role, acting in the public interest, authorising barristers and assessing their suitability to practise, setting the standards by which they operate and acting where appropriate when they fail to meet those standards. We also actively promote an effective market for barristers' services, using our regulatory tools to improve competition, access to affordable services and high-quality justice for consumers.

3. We have a duty under the Legal Services Act 2007 to act, so far as is reasonably practicable, in a way which is compatible with the regulatory objectives when discharging our regulatory functions. The regulatory objectives 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;
   - encouraging an independent, strong, diverse and effective legal profession;
   - increasing public understanding of the citizen's legal rights and duties;
   - promoting and maintaining adherence to the professional principles. These are that barristers should act with independence and integrity, maintain proper standards of work, act in the best interests of their clients, comply with their duty to the court to act with independence in the interests of justice, and keep the affairs of their clients confidential; and
   - promoting the prevention and detection of economic crime.

4. We also have a duty under the Legal Services Act 2007 to have regard to the principles under which regulatory activities should be transparent, accountable, proportionate, consistent and targeted where action is needed.

5. We are a values-based organisation and aim to act with:
   - **fairness and respect** – we strive to achieve equal access and equal treatment, valuing and respecting our differences;
   - **independence and integrity** – we are objective and evidence-based, open, honest and accountable, and we expect everyone to meet these same ethical standards; and

- **excellence and efficiency** – we are committed to learning and improving, seeking to maximise our effectiveness by making the best possible use of our resources.

About this consultation

6. This consultation arises from a review and redesign of our end-to-end enforcement process which was has been informed by the recommendations that arose from an independent review of our enforcement system by Fieldfisher LLP (**the Enforcement Review**). It is part of our work to modernise delivery of our gatekeeping and enforcement functions so they are quick, effective and responsive with no loss of quality.

7. This consultation seeks feedback on proposed changes to our Enforcement Regulations in Part 5 of the BSB Handbook. It covers a broad range of issues of wider principle and procedure, with changes varying from substantial alterations to our current process and practice, to changes that seek to codify or clarify existing practice. The proposals are informed by key principles, including the need for transparency, fairness and efficiency in our enforcement process.

8. In identifying the proposals for change set out in this paper, we have drawn on the outcome of the Enforcement Review, whilst also considering the experience of colleagues applying the Enforcement Regulations in practice. We also sought the views of other internal and external stakeholders, considered practice across comparator regulators, especially in the legal sector, and we consulted an expert Stakeholder Reference Group, to whom we are grateful for their valuable input and insights.

9. The proposals explored in this consultation relate to *in principle* changes to the enforcement process and procedures, rather than the detailed drafting (or redrafting) of the underlying regulations.

10. Our proposals are at a formative stage and we are keen to receive feedback from the public and the profession on all issues outlined in the paper to help with the development of our approach. With the benefit of the feedback, a second consultation will follow next year with a focus on drafting changes. That will also set out the responsibilities of and powers conferred on various roles such as the President of the Council of the Inns of Court, the Chair of the Tribunals, and the BTAS Registrar. The aim is to introduce a revised set of Enforcement Regulations with effect from January 2027.

11. In Part 2 of the consultation paper, we summarise briefly the work that has been done to review the Enforcement Regulations, together with a high-level overview of all of the proposals for change. In Part 3 we set out the detail of those proposals.

The Enforcement Review

12. The starting point to the proposals on which we are consulting is the Enforcement Review. The Enforcement Review examined how well the BSB's enforcement system operates from first receipt of concerns about barristers' conduct right through to final decisions being made on sanctions to be imposed by staff, Independent Decision-Making Panels or by a Disciplinary Tribunal.

13. The Enforcement Review found that the BSB's enforcement system was largely in line with similar models used in professional regulation elsewhere and that fundamentally the approach in place was appropriate. However, the report detailed a wide range of recommendations for improvement which covered eight main areas:
    - Creating a senior executive role with responsibility for the end-to-end enforcement process;
    - Building a "best in class" knowledge management environment;
    - Improving communication and collaboration between our Contact and Assessment Team and Investigations and Enforcement team, and enhancing the BSB IT system to support the teams working more effectively;
    - Making the BSB's core responsibilities clear to members of the public submitting reports;
    - Improving the Contact and Assessment Team's performance through operational interventions;
    - Implementing a set of changes in the way the Investigations and Enforcement team works and how it is supported to significantly improve performance;
    - Improving the effectiveness of the Bar Tribunals and Adjudication Service (BTAS) and the Disciplinary Tribunal to reduce the elapsed time in the management of cases and delivering stronger interactions between BTAS and the BSB; and
    - Making changes to the BSB Handbook and internal operating procedures to enable greater process efficiency.

14. We published the report of the Enforcement Review (**the Enforcement Review)** in April 2024 and accepted all the recommendations for change. We have implemented, or are in the process of implementing, those recommendations. A number of them directly impact on the Enforcement Regulations and have shaped some of the proposals set out in this consultation.

Our wider reform ambition – Enforcement, efficiency and effectiveness review

15. In seeking to implement the recommendations arising from the Enforcement Review we used the opportunity to conduct a wholesale review of our enforcement processes, and to redesign them to be modern, efficient and effective.

16. Some of the identified changes did not require changes to the Enforcement Regulations or our IT systems and so we have already been able to take them forward. We also plan on implementing a number of other changes in the immediate term. For example, we have:

- made organisational changes to bring the end-to-end enforcement process under one directorate: 'Regulatory Enforcement'. This has already led to improved cooperation and communication between our Contact and Assessment and Investigation and Enforcement Teams;
- restructured the Contact and Assessment Team and resourced it to ensure it can cope with periods of high demand, and thus be more resilient;
- set up a joint working group with BTAS, which has already introduced a scheme to check case readiness in advance of substantive Disciplinary Tribunal hearings and has provided guidance to Tribunal panel members on their powers when case management directions are not complied with;
- started reviewing and updating internal documentation, such as investigation plans and staff inductions; and
- reconsidered our approach to the drafting of allegations of potential breaches of the BSB Handbook – which we set out in Part 3 below.

17. Other process changes or changes in approach that we can implement without changes to the Enforcement Regulations are more minor. These include how our Independent Decision-Making Panels deal with cases under the Determination by Consent process where the subject admits facts but not misconduct, streamlining the process for ensuring compliance with financial orders/penalties arising from enforcement action, as well as changes to our Case Management System to better support staff.

18. We are also introducing measures to monitor the time it takes to complete the full end-to-end process, from receipt of information up until a case reaches a final hearing before the Disciplinary Tribunal. These will provide targets for both the BSB and BTAS and enable us to monitor the greater efficiencies that the changes being introduced will bring and will be published in due course. Taken together these reforms to process and the regulations will ensure that the BSB can meet those measures assessed as part of the Enforcement Review. In particular, we are keen to ensure that in sensitive cases, such as those where sexual harassment is alleged, the end-to-end process would be accelerated by the proposals outlined in this paper, including: the simplified approach to drafting allegations, earlier publication of charges, the enhanced powers for BTAS to proactively manage cases by setting directions and overseeing compliance, by the presumption of witness anonymity, and potentially by a reduced panel membership. In due course we will look to quantify the gain in outcomes from the present process.

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Part 2: An overview of our review and proposals for change

The BSB's enforcement function

19. "Enforcement" is a term that we use to describe the tools that are available to us to enforce the standards expected of barristers under the BSB Handbook, which includes the Code of Conduct at Part 2, in the public interest. It is an important mechanism to encourage high standards of behaviour at the Bar and to ensure public trust and confidence in the profession, our regulation of it and the overall justice system.

20. Our enforcement function includes the following aspects of our work: (i) receiving and assessing reports of potential breaches of the BSB Handbook; (ii) investigating reports of potential breaches; (iii) taking decisions on what, if any, action to take where a breach has occurred; and (iv) where relevant, pursuing disciplinary proceedings against barristers[2].

21. When we refer to enforcement in this consultation paper, we also refer to our powers to take urgent action to address immediate public protection/public interest concerns, as well as our separate, non-disciplinary regime to address public protection/public interest concerns that arise from a barrister's health condition which may impair their ability to practise.

22. Enforcement is a core function of the work of the BSB. In 2023/2024, we assessed 1,724 reports of potential breaches of the BSB Handbook, referred 108 cases for investigation (of which 81 were accepted for investigation) and 39 cases were determined by the Disciplinary Tribunal. Sanctions included reprimands, fines, suspensions and disbarments.[3]

23. To ensure fairness and consistency in how we handle reports of potential breaches of the BSB Handbook, we generally follow a standard four-stage process. An overview of our current enforcement process is included at Appendix 1 – overview of our enforcement process, which may assist in understanding some of the proposals in this paper. Further information is also available on our website (see *How we make enforcement decisions*).

Our approach to reviewing the Enforcement Regulations

24. The proposals on which we are consulting relate to changes to our Enforcement Regulations, which underpin our enforcement function. The Enforcement Regulations are in Part 5 of the BSB Handbook, which has five sections as follows:
    - Section A - The Enforcement Decision Regulations;
    - Section B - The Disciplinary Tribunals Regulations;
    - Section C - The Interim Suspension and Disqualification Regulations;

[2] While we regulate, and can take enforcement action against, barristers, BSB entities and employees and managers of the same, we use the term "barrister" throughout this document for ease.
[3] For further information, please refer to our 2023-2024 Regulatory Decisions Report.

- Section D - The Fitness to Practise Regulations; and
- Section E – The Interventions and Divestiture Regulations[4].

25. Our work to review and modernise our Enforcement Regulations and allow for greater efficiency and effectiveness aligns with the regulatory objectives of:
    - protecting and promoting the public interest;
    - protecting and promoting the interests of consumers; and
    - promoting and maintaining adherence to the "professional principles".

26. The intended benefits are that the revised regulations support:
    - efficiency and productivity improvements;
    - improved confidence in the enforcement system; and
    - maintenance of the quality of decision-making.

27. The objectives are to produce a set of regulations that:
    - include sufficient and appropriate powers to address relevant behaviours;
    - contribute to improving timeliness of the enforcement processes;
    - are better organised, simplified and expressed using plain English so they are easily understood by the profession, public and decision-makers;
    - are accompanied by relevant supporting documentation; and
    - are communicated effectively both internally and externally and training given to decision-makers.

28. With those in mind, when reviewing the Enforcement Regulations we had particular regard to:
    - the public interest;
    - fairness;
    - efficiency, including improved timeliness;
    - quality;
    - simplification;
    - ease of understanding; and
    - equality, in line with the Public Sector Equality Duty.

29. The BSB is also mindful that the Enforcement Regulations impact not only barristers, as regulated professionals, but also third parties who are involved in the disciplinary process, including witnesses and information providers. Through our reforms, we are also seeking to improve the experience of witnesses involved in the disciplinary process, in particular in sensitive cases such as sexual misconduct. Our proposals allow for faster timetabling of matters, earlier publication of charges (which might also encourage other witnesses) and a presumption in favour of anonymity for witnesses making an allegation of a sexual or violent nature. Together with the overall reforms, these changes would provide greater reassurance to witnesses.

[4] We have not reviewed Part 5E of the Handbook and so there is no further reference to it in this consultation.

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30. The review has been a substantial exercise drawing on internal review of process and policy. It has been informed by internal workshops, external engagement, desktop research, comparative research of other regulators and a review of relevant case law. We also drew insight from the practical experience of colleagues at the BSB, as well as logs maintained by staff which detailed operational issues in respect of the regulations in Part 5 of the Handbook.

31. We have been greatly assisted in developing these proposals by a Stakeholder Reference Group, and are hugely grateful for their engagement, insights, time and support. The Group comprised practitioners and consumer representatives, those engaged in the current enforcement processes in different ways and advisers working in disciplinary and regulatory law and were selected to provide independent and expert insights into our developing proposals. Their contribution has provided both expertise and perspective in helping evaluate and iterate the options for change.

32. We have also consulted with BTAS throughout the process. Their contribution to the development of our proposals has been invaluable and we are grateful for their input.

Summary of our proposals and issues for feedback

33. This consultation is wide ranging and inevitably long given the number of issues that are covered in the proposals. We provide a high-level summary of all of the proposals on which we seek feedback below. More detail in relation to each proposal can be found in Part 3, or by clicking the internal document link for each below.

Enforcement Decision Regulations 2019 (Part 5A)

a. Proposal 1: Communication of detailed, written 'allegations'. We will communicate detailed, written allegations of potential breaches of the BSB Handbook to the barrister at a later stage than now, once the investigation is more developed.

b. Proposal 2: Introducing a power to "add" and/or "amend" the written allegation. Decision-makers (members of staff or our Independent Decision-Making Panels) will have the power to add to, or amend, the written allegations, without the matter being remitted back to the barrister for comment, before a decision is made at the conclusion of an investigation. This power will only be exercisable in limited circumstances where any additions or amendments are aligned with the facts and substance of the original allegations so there is no unfairness to the barrister.

   We will also introduce a power to add new allegations of a failure to co-operate with the BSB in relation to our enforcement work, provided the barrister has been notified of the risk that such allegations may be added without further notice to them.

c. Proposal 3: Giving staff the power to refer criminal convictions cases for disciplinary action. BSB staff decision-making powers will be broadened so that they will have the power to refer all cases of criminal convictions directly for disciplinary action at the conclusion of an investigation.

d. Proposal 4: Amending the powers to reconsider post-investigation decisions. Requests for a reconsideration of decisions made by an Independent Decision-Making Panel will first be reviewed by a single member of the Independent Decision-Making Body (the Chair, Vice-Chair or somebody appointed in their absence) to decide whether the criteria for reconsideration are met.

e. Proposal 5: Confidentiality of reports and investigations. We will retain the duty on the BSB to keep reports or allegations assessed or investigated confidential. However, we will amend the exceptions to this duty of confidentiality so that it is clear that we are able to make disclosures for the purpose of furthering an investigation. We are also consulting on the publication of charges once the investigation is complete and the case is proceeding to the Tribunal (proposal 32).

The Disciplinary Tribunals Regulations (Part 5B)

f. Proposal 6: Introducing an overriding objective. We will introduce an overriding objective to the Disciplinary Tribunals Regulations that cases be dealt with justly and proportionately. We will also introduce a duty on the Disciplinary Tribunal to give effect to that overriding objective when exercising any power under, or interpreting, the regulations. The parties will be required to support the Disciplinary Tribunal to further the overriding objective.

g. Proposal 7: Introducing a power for BTAS to regulate its own procedure. We will introduce a power for the Disciplinary Tribunal to regulate its own procedure in relation to the management of individual cases, but strictly in accordance with the Disciplinary Tribunals Regulations and any guidance issued.

h. Proposal 8: Greater case management by BTAS. We will introduce greater case management powers and responsibility for BTAS so they are able to set directions more quickly and actively manage proceedings, including a power to list case management hearings at any point.

i. Proposal 9: Clarifying when sanctions come into effect, pending appeal. We will provide clarity in the Disciplinary Tribunals Regulations that a decision on sanction will not come into effect until any appeal has concluded or the appeal period has passed (if no appeal is filed).

We will also give the Disciplinary Tribunal greater powers to impose an immediate interim suspension or conditions pending an appeal. In relation to disbarments, we will retain the current approach that requires the Disciplinary Tribunal to impose an immediate suspension or conditions unless it is inappropriate to do so. In relation to all other cases, the Disciplinary Tribunal will be able to make an immediate order where it considers that it is necessary for the protection of the public or is otherwise in the public interest.

j. Proposal 10: Representations on sanction. We will amend the Disciplinary Tribunals Regulations to make it clear that both parties will have the right to make representations before the Disciplinary Tribunal on the question of sanction, where charges against the barrister have been found proved.

k. Proposal 11: Service by email. We will amend the regulations to allow service by e-mail without the prior consent of the barrister, where the barrister's e-mail address is already known to the BSB. This is likely to result in service by e-mail becoming the default method of service in most cases.

l. Proposal 12: Clarifying the BSB's entitlement to costs. We will clarify the position that the BSB is entitled to seek to recover the costs we incur in relation to the conduct of disciplinary proceedings from the point a barrister is referred to a Disciplinary Tribunal.

m. Proposal 13: The BSB's right of appeal. We will clarify the BSB's right to appeal to the High Court in cases where charges are partially dismissed.

n. Proposal 14: Presumption of anonymity. We will introduce a presumption that, by default, any witness making an allegation of a sexual or violent nature, will be anonymised in the disciplinary proceedings.

The Interim Suspension and Disqualification Regulations (Part 5C)

o. Proposal 15: Simplifying the grounds for referral to an interim panel and imposition of interim orders. We will simplify and reduce the grounds for referring a practising barrister to an interim panel to decide whether to impose an interim suspension pending the outcome of disciplinary proceedings. The grounds will be reduced from five to two, being where a referral is necessary:
   - to protect the interests of clients (or former or potential clients); or
   - to protect the public or is otherwise in the public interest.

   Once a matter has been referred to an interim panel, the panel will have the power to decide whether or not an interim suspension (or other order) is necessary on the same two grounds.

p. Proposal 16: Grounds for the imposition of an immediate interim suspension. We will broaden the power of the Chair of the Independent Decision-Making Body to impose an immediate interim suspension (following referral to, and pending consideration by, an interim panel) so that one may be imposed where it is justified having considered the risk to the public or the public interest if one were not imposed.

q. Proposal 17: Listing process. We will streamline the listing process for interim suspension cases. All interim suspension cases will be listed for hearing within a specified number of days (e.g. 21) following a referral to an interim panel and reasonable notice of the hearing will be given to the barrister. This approach to listing will also apply to review and appeal hearings.

r. Proposal 18: Direct referral powers. Panels considering interim suspension cases will no longer have the power to refer matters before them directly to a Disciplinary Tribunal.

s. Proposal 19: Right of review. We will extend the right to request a review of an interim order, which is currently only afforded to the barrister, so that the BSB also has a right to request a review.

   We will also amend the regulations to allow both parties to make representations in relation to a review request and to be notified of the outcome of BTAS' decision as to whether to convene a review panel.

t. Proposal 20: Granting powers to the Disciplinary Tribunal panel to consider requests to review interim orders. Disciplinary Tribunal panels will be given the power to consider and decide on a request to review an interim order made by an interim panel once the substantive disciplinary hearing of related charges has commenced.

The Fitness to Practise Regulations (Part 5D)

u. Proposal 21: Rebranding the Fitness to Practise regime and the grounds for referral. We are proposing to "rebrand" the fitness to practise regime as the "health regime" and to make consequential changes to the regulations. We also intend to update the criteria for referring a matter under the health regime by removing the current requirement for "incapacitation" and for the same test to apply to panels deciding whether to impose orders either for the protection of the public or otherwise in the public interest.

v. Proposal 22: Convening a panel and fixing a hearing date. We will impose a duty on BTAS, following a referral by the BSB of a barrister to a health panel, to convene a panel, fix a hearing date and notify both parties of the date.

w. Proposal 23: Introducing a power to accept undertakings prior to a referral to a health panel. The BSB will have the power to agree conditions which are intended to manage a barrister's health issues in clear and straightforward cases before and instead of a referral being made to a health panel.

x. Proposal 24: Length of orders. We will remove the current six-month time limit on suspensions and disqualifications that can be imposed under the regulations, and we seek feedback on whether:
- there should be no upper time limit on any period of suspension or disqualification that may be imposed by a health panel; or
- we should set a maximum time limit of 36 months on all suspensions or disqualifications that may be imposed by a health panel.

y. Proposal 25: Giving panels the power to impose interim conditions at Preliminary Hearings. We will give health panels the power, at preliminary meetings, to impose interim conditions to protect the public or in the public interest (in addition to the existing power to impose an interim suspension or disqualification).

z. Proposal 26: Rights of review and clarifying the review process. We will simplify the regulations by providing for a single right of review of any restriction or conditions. The right of review may be requested at any time during the period of any restriction or conditions where there has been a significant change in circumstances or some other good reason. Review requests will be submitted to BTAS, who will decide whether to refer them onto the panel. The review process will be streamlined, with the review panel empowered to issue directions as needed.

Other Issues

aa. Proposal 27: Changes to panel composition. Whether all Disciplinary Tribunal panels should consist of three members with a *legal* majority or whether the option to refer more serious cases to a five-member panel with a *barrister* majority should be retained.

bb. Proposal 28: Changes to the Independent Decision-Making Panel. Independent Decision-Making Panels considering enforcement cases will consist of three members with a lay majority.

cc. Proposal 29: Changing the requirements for panel chairs. We propose that chairs of Disciplinary Tribunal panels need not be a Judge or King's Counsel, but may be an experienced legal practitioner with at least 15 years' practising experience.

dd. Proposal 30: Panel secretary role. Disciplinary Tribunals will be supported by a Panel Secretary, rather than a clerk (as now), who will be a BTAS employee.

ee. Proposal 31: Panel composition in health proceedings. The composition of panels in health proceedings will consist of either:
- Three panel members supported by a medical advisor; or
- Three panel members, including a medical member.

ff. Proposal 32: Bringing forward the timing of publication of disciplinary cases. We propose to bring forward the publication of the fact that disciplinary proceedings are underway by publishing a summary of charges, either:
a. upon the service of charges by the BSB; or
b. following the setting of case management directions by BTAS.

gg. Proposal 33: Public vs private hearings across the enforcement process. We have undertaken a review of the current approach to holding hearings in public vs private across the enforcement process. We are proposing to change the approach in some of those hearings, to support the principle of transparency.

hh. Proposal 34: Media and non-party access to documents. To support further the principle of transparency and accountability, we propose to work on policies and guidance which will set out the approach to disclosure and access to documents for non-parties (including the media), without introducing explicit provisions in the regulations.

34. We believe that these proposals will deliver service provision efficiencies while maintaining quality, respecting the balance of obligations between the BSB and respondent barristers, and enhancing public trust and confidence in the profession and in our regulation of it. We welcome feedback to help shape our final proposals.

Part 3: Detailed proposals for change

Introduction

35. We set out in this Part of the consultation paper the detail of all of our proposals for change, including our rationale for each, and other issues on which we seek feedback. We have structured it so that the proposals are divided according to which section of Part 5 of the Handbook they relate to. Each proposal includes a short summary, an overview of the background and current approach and our proposal for change.

36. We have also assessed the potential impacts of our proposals on equality and have included a summary of our initial Equality Impact Assessments in relation to each proposal. We will update the Assessments, to account for the feedback we receive, along with the proposals in the next consultation, as well as monitoring outcomes.

Part 5A of the Handbook: The Enforcement Decision Regulations 2019

37. The Enforcement Decision Regulations 2019 (EDRs) govern our initial assessment and investigation of reports and allegations of potential breaches of the BSB Handbook. The EDRs include the decision-making powers that are available to us following the conclusion of an investigation. This includes the power to refer allegations of potential breaches to the independent Disciplinary Tribunal, as well as our regime for imposing administrative sanctions for less serious breaches that do not constitute professional misconduct. They include a power to reconsider allegations once they have been disposed of, where there is new evidence or for some other good reason.

Proposal 1: Communication of detailed, written 'allegations'

Summary of the proposals

38. We will communicate detailed, written allegations of potential breaches of the BSB Handbook to the barrister at a later stage than now, once the investigation is more developed.

Background and current approach

39. Currently, where a potential breach of the BSB Handbook is identified that is deemed suitable for further investigation, detailed written allegations are normally drafted and sent to the barrister for comment at the outset of an investigation. The written allegations are usually sent to the barrister at the same time as they are first notified of the report and that an investigation has been initiated. The investigation then continues to gather further evidence.

40. The regulations currently provide that an investigation of an allegation cannot be concluded without taking reasonable steps to inform the barrister of the

allegation and providing them with a reasonable opportunity to comment on it.[5] A decision is then made at the end of the investigation as to whether further action is warranted, based on the evidence and any response from the barrister. Our current approach to the preparation of detailed, written allegations at the outset of an investigation is not required by the regulations and the regulations do not prescribe when, during the investigation, written allegations must be sent for comment (provided it is done before the investigation is concluded).

41. The Enforcement Review raised a number of concerns with our current practice. One of the main issues identified was that, in many cases, there is not enough evidence at the outset to draft fully particularised allegations. This contributes to delays in notifying barristers and slows the overall investigation process. The Enforcement Review also highlighted that premature allegation drafting may lead to a more rigid and less open-minded investigative approach.

Proposal

Proposal to change approach without a regulation change

42. Given the issues identified with our current approach, we propose to defer the point at which we will communicate the detailed, written allegations to the barrister for comment until the investigation is more developed.

43. Under our proposed approach, once a potential breach of the Handbook is identified and assessed as being of sufficient risk to justify investigation, the matter will be referred to the Investigations and Enforcement Team to determine whether it should be treated as an 'allegation'.[6]

44. At that point, a formal investigation will begin. However, detailed, written 'allegations' will no longer be drafted at this early stage. Instead, the barrister will receive correspondence which will notify them of the fact of an investigation, together with a broad summary of the potential breaches that have been identified and the relevant underlying facts. They will also be informed that no response is required at that stage and that the potential breaches currently identified by the BSB may develop or change as the investigation progresses.

45. Once the BSB has conducted its investigation and identified whether, in light of the further evidence gathered, there are potential breaches, we will provide the barrister with the opportunity to comment on detailed, written 'allegations' before the investigation can be concluded.[7]

46. This proposal marks a significant change from our current practice. However, as the BSB's current approach is not required by the regulations, we propose to introduce it following the conclusion of this consultation. We consider our

[5] rE15.
[6] rE12-13.
[7] rE12.

proposed approach is permitted by the current regulations. We are therefore keen to receive views and feedback before implementing these changes.

Proposal to change the regulations

47. Notwithstanding our view that we can implement the new approach described above without a change to the regulations, in the longer term we propose to amend the regulations to clarify the position. We therefore propose to give the BSB explicit powers to conduct an initial investigation for the purpose of determining whether there is evidence of a potential breach of the Handbook, before putting detailed, written allegations to the barrister for comment.

Benefits of the proposal

48. Deferring the point at which we will communicate detailed, written allegations to the barrister (until the investigation is more developed) will allow the BSB to gather more evidence before drafting particularised allegations. This should lead to clearer and more accurate allegations. As allegations will no longer be sent at the outset of the investigation before evidence has been gathered, we will streamline and reduce delays in the investigation process.

Equality Impacts

49. As we intend to communicate written, detailed allegations at a later stage in the investigation than currently, we recognise this change could have a disproportionate impact on some barristers. For example, barristers with certain disabilities could be disproportionately impacted by the uncertainty caused by delays in receiving detailed allegations. However, we believe we can mitigate any impact by ensuring that the initial communication with the barrister includes sufficient information so as to avoid unnecessary distress.

Do you agree with our proposal to defer the point at which detailed, written allegations are formulated and sent to the barrister for comment to later in the investigation when relevant information has been gathered? If not, why not?

Do you envisage any issue (legal or practical) with our proposal to introduce the new approach to the communication of detailed, written allegations, before any change to the regulations?

Proposal 2: Introducing a power to add to and/or amend the written allegation

Summary of the proposal

50. Decision-makers (members of staff or our Independent Decision-Making Panels) will have a narrow power to add to, or amend, the written allegations, without the matter being remitted back to the barrister for comment, before a decision is made at the conclusion of an investigation. This power will only be exercisable in limited circumstances where any additions or amendments are aligned with the facts and substance of the original allegations so there is no unfairness to the barrister.

51. We are considering whether to introduce a power to add new allegations of a failure to co-operate with the BSB in relation to our enforcement work, provided the barrister has been notified of the risk that such allegations may be added without further notice to them.

Background and current approach

52. Currently, the regulations do not provide any explicit power for decision-makers to add to, or amend, the written allegations when considering what, if any, action ought to be taken at the conclusion of an investigation. This can cause delay where small amendments that do not change the substance of an allegation need to be put back to the barrister for comment before an investigation can be concluded. This may arise, for example, where some clearly relevant provisions of the Handbook which may have been breached have been omitted from the written 'allegation', or the allegation worded too narrowly.

53. Feedback from IDB members during the Enforcement Review also indicated that "*it would be of considerable benefit… to enable the panels to add or modify allegations as they assessed cases*".[8]

Proposal

54. First, we believe that our proposal to defer the point at which detailed, written allegations are formulated and sent to the barrister for comment (see Proposal 1) will go some way to addressing this issue. The number of cases in which the written allegations ought to be amended should therefore be lower.

55. However, we propose to introduce a power which, subject strictly to the requirements of fairness, will allow decision makers to add to, or amend, written allegations without the matter needing to be put back to the barrister for further comment.

56. To ensure fairness to the barrister, this power will be narrow in scope and may only be exercised where the any additions or amendments are closely aligned

[8] Enforcement Review, 2.7.7.

with the facts and substance of the original allegation(s) that the barrister has already commented on.

57. The proposed power would not permit the introduction of new allegations arising from different facts, the alteration of the substance of the allegation (whether as to the facts or the type of potential breach) or to increase the seriousness of the allegation (for example changing it to one of dishonesty, rather than integrity).

58. In addition, we are also exploring the introduction of a power for decision-makers to add allegations for a failure to co-operate with the BSB or respond to a reasonable request by the BSB (CD9 and rC64) during the course of an investigation, without needing to put that allegation to the barrister. Any power would be contingent on the BSB having first notified the barrister at the outset of the investigation that regulatory action may be taken for non-cooperation and that allegations of failing to co-operate may be added without further notice to them. We would, however, make it clear that the power to add such an allegation does not infringe an individual's right to choose not to comment.

Benefits of the proposal

59. The proposal will improve efficiency by avoiding unnecessary delays caused by remitting cases for minor amendments, while ensuring fairness though strict safeguards. It will also support the effective progression of cases by allowing panels to address non-cooperation directly, where relevant to existing allegations.

Equality impacts

60. We have no data to suggest that this proposal will have any positive or adverse impact on barristers with particular protected characteristics.

Do you agree with our proposal to introduce powers to add to, or amend, the written allegation(s), without an opportunity for further comment from the barrister, in the circumstances described in Proposal 2? If not, why not?

Do you agree with the introduction of a power to add allegations of non-cooperation during an investigation, without requiring an opportunity for further comment from the barrister? If not, why not?

Proposal 3: Giving staff the power to refer criminal convictions cases for disciplinary action

Summary of proposal

61. BSB staff decision-making powers will be broadened so that they will have the power to refer all cases of criminal convictions directly for disciplinary action at the conclusion of an investigation.

Background and current approach

62. At the conclusion of an investigation into potential breaches of the BSB Handbook, a decision needs to be made as to whether and what action should be taken. Both BSB staff and Independent Decision-Making Panels have the power to take decisions at this stage of the process, although Independent Decision-Making Panels' powers are wider than those of the BSB staff.

63. Currently BSB staff, under delegated authority from the Commissioner[9], have the power to refer some cases of alleged misconduct direct for disciplinary action. However, this power is limited to the following types of conduct:[10]

a) a conviction for an offence of dishonesty or deception; or
b) a conviction for an offence under Section 4, Section 5 or Section 5A Road Traffic Act 1988 (Driving or being in charge of a motor vehicle with alcohol concentration/concentration of a controlled drug above prescribed limit); or
c) a breach of Part 3 or 4 of the Handbook; or
d) any failure to pay an administrative fine within the relevant time; or
e) a failure to comply with any requirements of a sanction imposed following Disciplinary Action.

64. In contrast, Independent Decision-Making Panels have wide powers to refer any case for disciplinary action, provided they consider there is a realistic prospect of a finding of professional misconduct (or the disqualification condition being satisfied) and, having regard to the regulatory objectives, it is in the public interest to pursue disciplinary action.[11]

65. The impact of the current approach is that BSB staff are required to refer nearly all cases of criminal convictions to an Independent Decision-Making Panel for a decision, despite the BSB's policy that, unless there are exceptional mitigating circumstances, all criminal convictions should result in some form of disciplinary action.

66. Therefore, currently cases have to be put to an Independent Decision-Making Panel even where a referral for some form of disciplinary action is practically

[9] The Commissioner is a vehicle through which decision-making can be delegated to the executive and in practice all powers and functions of the Commissioner are exercised by BSB staff in accordance with the BSB's Scheme of Delegations.
[10] See rE19.4 of the Enforcement Decision Regulations.
[11] see rE22.4 of the Enforcement Decision Regulations.

inevitable (for example, convictions relating to sexual offences). This is an inefficient approach and one that creates unnecessary delay.

Proposal

67. We propose to broaden the categories of cases that staff have the power to refer direct for disciplinary action, to include those with any type of criminal conviction. Such a referral could either be to the Determination by Consent procedure or to a Disciplinary Tribunal, depending on the seriousness of the alleged conduct and/or whether any facts are in dispute.
68. In giving staff broader powers, there will remain two important safeguards:

    a. firstly, staff will not be required to refer criminal convictions cases directly for disciplinary action if the circumstances of the case do not indicate that is appropriate. The proposal therefore does not mean that all criminal conviction cases will be referred direct for disciplinary action by BSB staff; and
    b. secondly, we will continue to operate a categorisation system which requires certain types of cases (e.g. due to complexity) to be referred to an Independent Decision-Making Panel for a decision on whether a referral for disciplinary action is appropriate.

69. One of the considerations underpinning the proposal to widen staff-decision making in relation to criminal convictions is that criminal convictions cases are usually evidentially straightforward and most criminal convictions are likely to result in some form of disciplinary action[12].

Benefits of the proposal

70. Expanding staff powers in the way proposed would allow for a more streamlined and efficient referral process, allowing for faster decision-making in cases where the need to a convene a panel to take the referral decision is likely to be unnecessary. It will allow for a more expedient referral of criminal convictions cases, particularly serious ones, which is particularly important in cases where there are victims of the criminal behaviour who are likely to find the regulatory process stressful.

Equality impacts

71. As our proposal is primarily focussed on improving the efficiency of the process rather than altering the outcomes themselves, we do not anticipate any significant change in the number of criminal conviction matters being referred for disciplinary action. However, we recognise that this proposal could have a disproportionate impact on barristers from minority ethnic groups and men, as they are over-represented in the criminal justice system at all levels. This disparity does not necessarily arise from the BSB's approach, but rather from external factors outside the BSB's control. The BSB's enforcement process is

[12] Which may involve disposal by consent under our "Determination by Consent" procedure (see rE39 to rE45 of the EDRs).

entirely reactive to barristers' conduct of which we become aware (often by third parties) and may constitute a breach of the BSB Handbook.

72. Although the proposal will result in more direct referrals being made by BSB staff to the Disciplinary Tribunal for those with criminal convictions, barristers who have been referred to the Tribunal will have the opportunity to provide further evidence in relation to the nature of the offence.

Do you agree that staff should be given the power to refer all types of criminal convictions cases directly for disciplinary action? If not, why not?

Proposal 4: Amending the powers to reconsider post-investigation decisions

Summary of proposal

73. Requests for a reconsideration of decisions made by an Independent Decision-Making Panel will first be reviewed by a single member of the Independent Decision-Making Body (the Chair, Vice-Chair or somebody appointed in their absence) to decide whether the criteria for reconsideration are met.

Background and current approach

74. Currently, decision-makers (including Independent Decision-Making Panels) have the power to reconsider allegations disposed of where there is new evidence or for "some other good reason". The effect of this regulation is that where allegations are, for example, referred for disciplinary action there is an opportunity for that decision to be reconsidered before charges are formally served.

75. Requests for reconsideration can arise at any time and the regulations do not impose any time limits. However, the BSB has a strict ten-week timeframe to serve charges from the date of the decision to refer allegations to a Disciplinary Tribunal (which marks the formal commencement of disciplinary proceedings).[13]

76. Where a request for a reconsideration is received, two decisions are required: firstly, a decision on whether the grounds for a reconsideration are met (i.e. is there new evidence or "some other good reason"?); and secondly, if the grounds are met, a decision on the outcome of that reconsideration. Any new decision takes effect as if the earlier decision had not been made.

77. Procedural difficulties can arise where there is a request to reconsider a decision by an Independent Decision-Making Panel to refer allegations to a Disciplinary Tribunal. This is because: a) a full panel needs to consider a request for reconsideration in order to decide whether the relevant grounds are met (as well as take a new decision if so); and b) there is a small window of time within which to convene a panel to consider the request before the deadline to serve charges. This timing issue is further exacerbated in cases where a request for a reconsideration is received close to the ten-week deadline to serve charges or where one of our Independent Reviewers has been asked to look at an IDB decision first, which can add time and potentially delay the process further.[14]

Proposal

78. We propose to amend the regulations so that a single member of the Independent Decision-Making Body (namely the Chair or Vice-Chair, or other member appointed in their place) will consider requests for reconsideration in order to decide whether the relevant grounds for a reconsideration are met.

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[13] rE102.

[14] See BSB Policy Reviews of regulatory decisions and the role of Independent Reviewers.

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79. In cases where the Chair of the Independent Decision-Making Body (or other person appointed) considers the grounds are met, the matter will be referred to an Independent Decision-Making Panel to determine the outcome of the reconsideration itself. In these circumstances, the original decision will be treated as set aside given a new decision will follow. This will be an easier process to administer because it will not require a full panel to be convened to determine whether the decision should be reconsidered.

80. If, however, the Chair (or other person appointed) decides that the grounds for a reconsideration are not met, that will mark the end of the process and the original decision will stand.

81. As part of this change, we will also amend the regulations to clarify that Independent Decision-Making Panels (as well as BSB staff) may, following a reconsideration, take any further or different action as if the earlier decision had not been made.[15]

Benefits of the proposal

82. The proposal will streamline the process and reduce the risk of delay by only requiring one member of the Independent Decision-Making Body to consider requests for reconsideration. Only those requests that have merit will then be referred onto an Independent Decision-Making Panel to carry out the reconsideration. As a panel meeting is not required, the decision on whether a matter needs to be reconsidered will be taken more swiftly and this will provide certainty at an earlier stage.

83. The proposed approach would also address the procedural problem in cases where a request for reconsideration has been made in relation to a decision to refer allegations to a Disciplinary Tribunal. This is because an earlier determination that a case needs to be reconsidered will mean that the original decision to refer to disciplinary action no longer stands and therefore the ten-week deadline to serve charges will fall away. The ten-week period will recommence from the date of the reconsidered decision should the second decision also involve a referral of allegations to a Disciplinary Tribunal.

Equality Impacts

84. By reducing unnecessary delays in the reconsideration process, the proposal may improve participation and provide certainty at an earlier stage which may have a positive impact on barristers, including those with a disability.

85. However, we recognise that this proposal carries the risk of unconscious bias affecting decisions as a single member of the IDB may decide whether the reconsideration criteria is met. However, we believe that this risk can be sufficiently mitigated by ensuring that all BSB equality and diversity policies are followed and IDB members receive adequate training.

[15] rE62.

Do you agree with the proposal to allow a single member of the Independent Decision-Making Body the power to determine whether a request for reconsideration meets the criteria? If not, why not?

Proposal 5: Confidentiality of reports and investigations

Summary of proposal

86. We will retain the duty on the BSB to keep reports and/or allegations assessed or investigated confidential. However, we will amend the exceptions to this duty of confidentiality so that it is clear that we are able to make disclosures for the purpose of furthering an investigation.

Background and current approach

87. The regulations currently impose a general duty on the BSB to keep reports and allegations assessed or investigated confidential[16]. The BSB must not disclose information about reports and allegations save as specified by the regulations, or as otherwise required by law.

88. The regulations provide a number of explicit exceptions to that general duty of confidentiality, including:
- for the purpose of the BSB's regulatory assurance, supervision or authorisations functions;
- for the purpose of keeping the barrister, or any source of information relating to the barrister, informed of the progress of the consideration of a report or allegation; or
- where the BSB considers it is in the public interest to disclose some or all of the details of the report or allegation.

89. We consider that the assessment of reports and the investigation of allegations of potential breaches of the BSB Handbook should ordinarily be kept confidential. Such an approach is broadly aligned with the position in the criminal law where a person under criminal investigation has, prior to being charged, a reasonable expectation of privacy in respect of information relating to that investigation.[17]

90. However, it is important that the regulations provide sufficient exceptions to the confidentiality provisions to allow the BSB to exercise its regulatory functions without unnecessary barriers and in a way that promotes efficiencies and allows for transparency in appropriate circumstances.

Proposal

91. We propose to clarify when a disclosure can be made by the BSB, for example where disclosure internally or externally is necessary for the purpose of an investigation (e.g. evidence gathering).

92. We therefore propose to add a new, standalone exception to the duty of confidentiality which will clarify that the BSB may disclose the existence of a report (or allegations) or details about it to further an investigation, for example

[16] rE63.
[17] *Bloomberg LP v ZXC* [2022] UKSC 5.

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by contacting third parties, including other regulators, to gather evidence. It will capture any action taken by the BSB that is preparatory to or in the pursuance of enforcing the requirements under the Handbook.

Benefits of the proposal

93. Clarifying the exceptions to the duty of confidentiality will help align the regulations with existing practice and will support a clearer understanding of when information can be shared by the BSB, without breaching the duty of confidentiality. This change will, therefore, make the regulations more effective and easier to apply in practice, whilst also removing any unnecessary impediments to our ability to progress investigations.

Equality impacts

94. We do not have any information to suggest that this would positively or adversely impact any particular protected characteristics, as it is primarily a clarification of the existing policy.

Do you agree with our proposal to amend the exceptions to the general duty of confidentiality imposed on the BSB to clarify the BSB's ability to make disclosures where necessary to further an investigation? If not, why not?

Part 5B of the Handbook: The Disciplinary Tribunals Regulations

95. The Disciplinary Tribunals Regulations (DTRs) govern the disciplinary tribunal process which is run and administered by the Bar Tribunals and Adjudication Service (BTAS). The regulations confer powers on BTAS in relation to case management, interlocutory applications and final hearings, as well as rights of appeal. The regulations also set out the roles, powers and duties of all parties to the disciplinary proceedings. BTAS manages the disciplinary process and takes decisions independently of the BSB.

Proposal 6: Introducing an overriding objective

Summary of the proposal

96. We will introduce an overriding objective to the DTRs that cases be dealt with justly and proportionately. We will also introduce a duty on the Disciplinary Tribunal to give effect to that overriding objective when exercising any power under, or interpreting, the regulations. The parties will be required to support the Disciplinary Tribunal to further the overriding objective.

Background and current approach

97. The current regulations require that the rules of natural justice apply to proceedings of the Disciplinary Tribunal.[18] Beyond this requirement, the Disciplinary Tribunal is not bound by an overriding objective when managing and conducting cases. However, Directions Judges or the Chair of the Disciplinary Tribunal do have existing powers to make such directions as they consider will expedite the just and efficient conduct of the case.[19]

Proposal

98. Our proposal is to introduce an overriding objective into the Regulations, in order to reinforce the importance of ensuring that cases are handled fairly, efficiently and expeditiously. The proposed objective will be "*to deal with cases justly and proportionately*". The regulations will clarify that, so far as is practicable, dealing with cases *justly and proportionately* will include ensuring that cases are dealt with efficiently and expeditiously, saving expense and in ways which are proportionate to the nature, importance and complexity of the issues.

99. One of the key messages arising from the Enforcement Review was the need for more active case management to ensure that cases are disposed of justly and expediently.[20] Our comparative research also indicated that overriding objectives are a common feature of other regulatory frameworks, including those of the

[18] rE165.
[19] rE129.
[20] Enforcement Review, at 2.8.14-2.8.19, for example.

Solicitors Disciplinary Tribunal,[21] Chartered Institute of Legal Executives,[22] General Medical Council[23] - as well as in both the civil and criminal court procedural rules.

100. As part of this proposal, the Tribunal will be required to give effect to the overriding objective when exercising any powers under the regulations and/or when interpreting any of the regulations. The parties will also be required to support the Tribunal to further the overriding objective.

Benefits of the proposal

101. Introducing an overriding objective will promote fairness and efficiency by guiding the Disciplinary Tribunal to ensure that cases are handled fairly, efficiently and expeditiously. It will also require Disciplinary Tribunals to manage the timely resolution of cases.

Equality impacts

102. Given the risk of coming into contact with the disciplinary process is statistically higher for barristers who are men, older, or from certain minority ethnic groups, barristers with the protected characteristics of race, sex, and age may be particularly impacted by this proposal. However, the impacts may be positive or negative depending on how the proposed new overriding objective is applied to cases in practice. For example, the requirement to ensure that cases are dealt with justly and proportionately may advance equality and overall fairness.

Do you agree with our proposal to introduce an overriding objective into the Disciplinary Tribunals Regulations? If not, why not?

Do you have any observations on our proposed formulation for an overriding objective?

[21] The overriding objective is to enable the Tribunal to deal with cases justly and at proportionate cost: s4 of the Solicitors (Disciplinary Proceedings) Rules 2019.
[22] CILEX Regulation has an “overriding objective of fairness” that must be considered through the enforcement process: see Rules 9, 19, 22, 31 & 35 of the CILEX Regulation Enforcement Rules 2023.
[23] s1A Medical Act 1983: "The over-arching objective of the General Council in exercising their functions is the protection of the public."

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Proposal 7: Introducing a power for BTAS to regulate its own procedure

Summary of proposal

103. We will introduce a power for the Disciplinary Tribunal to regulate its own procedure in relation to the management of individual cases, but strictly in accordance with the DTRs and any guidance issued.

Background and current approach

104. Currently, a Directions Judge or the Chair of the Disciplinary Tribunal has a power, at any stage, to make such directions for the management of a case or the hearing as they consider will expedite the just and efficient conduct of the case.[24]

Proposal

105. As part of a suite of proposals which are designed to give the Disciplinary Tribunal greater case management powers, we propose to introduce a power for the Disciplinary Tribunal to determine its own procedure in individual cases, strictly in accordance with and subject to the DTRs and in a way which gives effect to the overriding objective (see Proposal 6 above).

106. In our view, such a power would enable BTAS to be proactive and flexible in the way it manages and responds to issues that arise in cases. It would also align with other disciplinary tribunals that have comparable powers embedded in their regulatory frameworks (e.g. SDT, CILEX, GMC).

107. However, it is important to note that BTAS differs from some of these other statutory bodies as it does not possess a power to amend unilaterally the DTRs and must operate strictly within the scope of the BSB Handbook and any other of the BSB's regulatory arrangements. The proposal is not intended to, and does not, mean that BTAS will have a freestanding power to amend the DTRs of its own volition.

108. We recognise there may be concerns that this power may have unintended consequences, such as creating scope for inconsistency in how cases are handled by the Disciplinary Tribunal due to different panels determining different ways of approaching similar issues. However, the existing powers of the Disciplinary Tribunal already allow some flexibility in the handling of cases which is appropriate as novel issues may arise. We envisage that any power will be supported by guidance to ensure consistency in decision-making. Further, we are not aware of any evidence that the use of similar powers in other jurisdictions has led to unfairness or inconsistency in approach.

[24] rE129.

Benefits of the proposal

109. Introducing a power for the Disciplinary Tribunal to regulate its own procedure in relation to individual cases will provide greater flexibility to respond to novel or complex issues during proceedings. This will support fairer, more efficient case management and allow the Tribunal to adapt its approach, where necessary.

Equality impacts

110. Through our initial assessment we have identified that the protected characteristics of race, sex, and age may be more likely to be impacted by this proposal, as the data suggests that the risk of coming into contact with the disciplinary process is statistically higher for barristers who are men, older, or belong to minority ethnic groups. However, the proposal has the potential to introduce greater flexibility given to the Disciplinary Tribunal which may improve overall equality and fairness.

111. In order to mitigate any potentially adverse impact, such as inconsistent approaches to cases, we would propose to develop guidance to support the Disciplinary Tribunals in the exercise of this new power (if the proposal is adopted).

Do you agree with our proposal to introduce a power for BTAS to regulate its own procedure in individual cases, strictly in accordance with the Disciplinary Tribunals Regulations and the proposed new overriding objective? If not, why not?

Proposal 8: Greater case management by BTAS

Summary of proposal

112. We will introduce greater case management powers and responsibility for BTAS so they are able to set directions more quickly and actively manage proceedings, including a power to list case management hearings at any point.

Background and current approach

113. There is currently no single point of responsibility for setting and progressing case management directions in the DTRs. As reported in the Enforcement Review, between July 2020 and November 2022 50% of Tribunal cases took longer than the 6 months target, and 30% took longer than 12 months to progress through the DT. The BSB is required to serve standard or non-standard directions on the barrister, as soon as practicable after the service of charges.[25] The barrister then has 21 days to respond, which should include any proposed amendments to the directions sought and an indication of whether the barrister intends to make any interlocutory applications.[26]

114. Once the directions are agreed between the parties, they become binding and must be served on the barrister and filed with BTAS. The only exception is where the non-standard directions would prevent BTAS from carrying out any functions given to it under the DTRs. In such cases, the directions must be endorsed by a Directions Judge before they take effect.

115. Where directions are not agreed (or need endorsement), they will be sent to BTAS to appoint a Directions Judge. The Directions Judge will consider any submissions from the parties and then either set directions that apply to the case or, alternatively, list the matter for an oral directions hearing. Any directions order made by the Directions Judge is final and cannot be appealed.

116. Given the different roles for agreeing or making directions, the current regulations lack clarity over where responsibility and authority for case management lies. The Enforcement Review found that this has resulted in limited coordination and a lack of proactive case management by either the BSB or BTAS. As a result, there is no clear accountability for setting or enforcing case management directions, which leads to delays and cases not progressing as they should. Poor case management and monitoring often results in unresolved issues between the parties and inaccurate time estimates, leading to frequent adjournments of hearings – either before they begin or partway.

Proposal

117. We propose to give BTAS sole responsibility for case management and to confer powers which will enable cases to be referred for directions by BTAS more quickly, following the decision to refer allegations to a Disciplinary Tribunal.

[25] rE103.
[26] rE106.

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118. We propose to retain the current ten-week timeframe within which the BSB must serve disciplinary charges on the barrister (from the date of the decision to refer allegations to a Disciplinary Tribunal).[27] However, the BSB will no longer be required to agree directions with the barrister. Instead, BTAS will issue a case management questionnaire for the parties to complete. This will happen in all cases once charges have been served and after a period of 28 days for the service of evidence by the BSB has passed (regardless of whether evidence has in fact been served in this time)[28].

119. The case management questionnaire will cover issues such as identifying matters of fact or law in issue, hearing length, the number of anticipated witnesses, expert evidence and dates of availability for the substantive hearing, as well as any interlocutory applications that the parties intend to make. Based on the responses, BTAS will set case management directions (with or without a hearing), including, where necessary, listing further case management hearings or hearings to consider interlocutory applications.[29] This will provide an early opportunity to raise and resolve any key issues identified by the parties, any procedural directions given, and confirm the hearing time estimate.

120. To support compliance with directions and case timetables, we also propose to introduce a power for the Disciplinary Tribunal to list case management hearings at any point, as required, to ensure the just and efficient conduct of a case. This will not only apply at the stage of the initial response to the case management questionnaire but throughout the disciplinary process, for example where new issues arise or there is non-compliance with directions.

121. We also propose to grant the Chair of the Tribunals the power to make case management directions and decisions on interlocutory applications under the DTRs. The Chair of the Tribunals will be able to delegate this power to make certain case management directions, as appropriate. For example, the power to deal with straightforward directions or simply variation requests may be delegated to BTAS administrative staff, such as the Panel Secretary (see below). However, where there are issues that are contested or require the consideration of legal argument then those matters will be considered by a "Directions Judge" who will be drawn from the pool of legally qualified chairs (see Proposal 29 below). This distinction will be set out in BTAS' scheme of delegations and will be supported by clear guidance as to when decisions may be more appropriate for the BTAS executive or one of the members of the pool of legally qualified chairs.

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[27] rE102.

[28] This means we will retain the current requirement for the BSB to serve evidence within 28 days of the service of charges and if that does not happen to update the barrister on the evidence still being sought and when it is believed it will be practicable to supply that evidence (see rE103 and rE104).

[29] In the Enforcement Review, Fieldfisher LLP identified one potential area for BSB improvement was the use of a case management questionnaire or, where necessary, an online or remote case management hearing to confirm readiness before the hearing, to reduce the risk of late adjournments and other last-minute applications: 3.8.13.

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Benefits of the proposal

122. Our proposal will give BTAS greater powers to manage cases that have been referred to the Disciplinary Tribunal, in order to identify and resolve issues early in the process. This will reduce the risk of late adjournments and last-minute applications, which will ensure that matters progress without unnecessary delay. By clarifying and giving BTAS sole responsibility for case management, we will create certainty around the process and improve its efficiency.

Equality impacts

123. We have no data to suggest that this proposal will have any adverse impact on any particular protected characteristic. As this proposal is primarily concerned with increasing the efficiency of the disciplinary process, we consider that this proposal may introduce positive equality impacts for barristers, including more expedient management of cases.

Do you agree with our proposal to give BTAS responsibility for case management, including the setting of case management directions and the power to list a case management hearing at any time? If not, why not?

Do you agree that certain case management decisions can be delegated to the BTAS executive? If not, why not?

Proposal 9: Clarifying when sanctions come into effect and broadening powers to impose an immediate sanction, pending appeal

Summary of proposal

124. We will provide clarity in the DTRs that a decision on sanction will not come into effect until any appeal has concluded or the appeal period has passed (if no appeal is filed).

125. We will also give the Disciplinary Tribunal greater powers to impose an immediate interim suspension or conditions pending an appeal. In relation to disbarments, we will retain the current approach that requires the Disciplinary Tribunal to impose an immediate suspension or conditions, unless it is inappropriate to do so. In relation to all other cases, the Disciplinary Tribunal will be able to make an immediate order where it considers that it is necessary for the protection of the public or is otherwise in the public interest.

Background and current approach

126. When a Disciplinary Tribunal imposes a sanction, it often does not specify the date the sanction should come into effect. Practice varies, depending on the panel, as to whether the decision makes clear the date on which the sanction is said to take effect. This can sometimes cause confusion and uncertainty.

127. In relation to disbarment, the regulations provide that the Treasurer of the barrister's Inn must not pronounce the sanction of disbarment or take further steps to implement it until at least 21 days after the Tribunal's decision or, if an appeal is filed, until the appeal has concluded.[30]

128. However, in relation to other types of sanctions (e.g. suspension), the regulations provide that the BSB must take the appropriate steps to put the finding and/or sanction into effect, save that where an appeal is filed no steps may be taken until any appeal has concluded[31]. The exception is where the Disciplinary Tribunal has decided that the barrister should be subject to an immediate suspension and/or immediate imposition of conditions pending appeal.

129. The BSB has developed an internal practice of waiting until the appeal period has expired[32] or any appeal has concluded, before taking any steps to put the finding and/or sanction into effect.[33] This does not apply to cases where an immediate suspension or conditions is ordered.

130. As sanctions generally do not take effect until the appeal period has expired (or, where an appeal is filed, when the appeal is concluded), the Disciplinary Tribunal

[30] rE239.
[31] rE241.
[32] Appeals must be filed and served on the BSB within the time specified by Part 52 of the Civil Procedure Rules.
[33] This is broadly in line with rE241.

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has powers to suspend or withdraw practising rights during the appeal period. However, those powers are limited to certain types of cases.

131. At present, an immediate suspension or immediate conditions (pending an appeal) can only be imposed in cases involving disbarment or where a suspension or conditions on practising (i.e. a prohibition on public access work or conducting litigation) exceed 12 months.

132. In such cases, the regulations require the Disciplinary Tribunal to impose an immediate suspension or to decide that the conditions will take effect immediately, unless it considers it inappropriate, due to the specific circumstances of the case.[34] The Disciplinary Tribunal also has the power to require the barrister to suspend their practice or impose conditions from a specified date.[35] The barrister has the right to apply to vary these orders.

Proposal

133. Firstly, we propose to amend the regulations to provide further clarity that a decision on sanction does not come into effect until the period for appeal has expired (if no appeal is filed) or when the appeal has been concluded (if filed).

134. Secondly, we propose to amend the regulations to give the Disciplinary Tribunal broader powers to impose an immediate suspension or conditions, pending the appeal, where it considers that is necessary to protect the public or is in the public interest. This power will arise in any case where the Disciplinary Tribunal has found charges of professional misconduct proved and made its decision on sanction.

135. While the regulations currently only permit the Disciplinary Tribunal to make an immediate order pending appeal in cases of disbarment or suspension or conditions that exceed 12 months, there may be cases where imposing an immediate suspension or conditions would be in the public interest, even when the sanction is for 12 months or less. For example, it is difficult to see why there would no public protection need or public interest in the option to impose an immediate suspension or conditions in cases where a barrister has been suspended for 11 months. Similarly, where a barrister has been prohibited from conducting public access work for a period fewer than 12 months, there may be public protection reasons why the Disciplinary Tribunal would want the power to impose a similar condition immediately pending any appeal. However, the current regulations do not allow this flexibility and so we consider it is desirable for them to be amended.

136. The regulations will allow the Disciplinary Tribunal to decide in each case whether an immediate suspension or conditions is necessary for the protection of the public or otherwise in the public interest. The regulations will be drafted in a

[34] rE227.
[35] rE228.

way that makes it mandatory for the panel to consider the question of whether to impose an immediate suspension or conditions before the hearing is concluded.

137. In relation to disbarments, given the serious nature of the sanction, we will retain the current approach in the regulations which requires the Disciplinary Tribunal to impose an immediate suspension pending appeal unless, having heard representations, it considers it inappropriate to do so.

138. We also propose to retain the barrister's ability to seek a variation of any order made on an immediate basis pending the appeal due to a change in circumstances, or to appeal the immediate suspension or condition(s) alongside their substantive appeal against the sanction in the High Court.[36]

Benefits of the proposal

139. The proposal to give greater clarity as to the time for when a sanction comes into effect will codify existing practice and avoid unnecessary confusion and uncertainty.

140. The proposal to give the Disciplinary Tribunal wider powers to impose immediate suspension or conditions will also improve the overall effectiveness of the disciplinary process, and the Disciplinary Tribunal, to act for the protection of the public or in the public interest.

Equality impacts

141. We recognise that statistically barristers with certain protected characteristics may be more likely to be the subject of a report and, as a result, there is a risk that they may be more likely to be referred to the disciplinary process and receive a sanction. However, we do not consider that this proposal increases this risk, as that risk arises earlier in the process – specifically, when a sanction is determined, rather than when the sanction takes effect (including any immediate sanction). This proposal is primarily about the timing of the sanction. Where the broader powers to impose an immediate sanction may impact some groups more than others due to their potential overrepresentation in the disciplinary process, the broadened powers are justifiable to address perceived risks to the public or the public interest. Further, there are safeguards in place that allow barristers to appeal the sanction as well as to appeal and seek to vary the decision to impose an immediate sanction. Therefore, we assess the risk of the proposal resulting in a disproportionate impact on certain groups of barristers as low and believe that the proposal is proportionate.

[36] rE230 & rE238.

Do you agree with our proposal to clarify the timing of when a sanction imposed by the Disciplinary Tribunal comes into effect and that this is at the conclusion of any appeal period? If not, why not?

Do you agree with our proposal to widen the Disciplinary Tribunal's power to impose an immediate suspension or conditions, pending any appeal? If not, why not?

Proposal 10: Representations on sanction

Summary of the proposal

142. We will amend the DTRs to make it clear that both parties will have the right to make representations before the Disciplinary Tribunal on the question of sanction, where charges against the barrister have been found proved.

Background and current approach

143. Currently, the DTRs do not explicitly provide for the BSB to be heard on the issue of sanction before the Disciplinary Tribunal decides what sanction to impose.[37] However, it is often the case that the Disciplinary Tribunal will look to the BSB to make representations to assist at the point of sanction. This will involve the BSB setting out where, in the BSB's view, the conduct sits in terms of the relevant category and culpability and harm factors set out in the published BTAS Sanctions Guidance. However, the BSB does not make representations on the particular sanction that it thinks the Tribunal should impose.

144. While it is common practice for the BSB to make submissions on the question of sanction to assist the Tribunal, there have been cases where respondent barristers have challenged the BSB's ability to do so, as there is no specific power for the Tribunal to hear representations on behalf of the BSB before imposing its sanction.

Proposal

145. We are proposing to amend the DTRs to clarify that the Disciplinary Tribunal may hear representations from both parties before deciding what sanction to impose. This will codify existing practice and prevent future challenge if the Tribunal invites representations from the BSB. The BSB will continue to make representations on where the conduct sits in terms of the BTAS Sanctions Guidance, rather than the particular sanction that should be imposed. This recognises that the decision on sanction is ultimately a matter for the Tribunal to determine.

Benefits of the proposal

146. Our proposal will avoid the risk of unnecessary challenge where the Tribunal looks to the BSB for representations on the question of sanction, by clarifying and codifying existing practice. It is important from a public confidence point of view that the BSB's view is represented during the hearing and that both parties are able to assist the Tribunal.

Equality impacts

147. We have no data to suggest that this proposal will have any positive or adverse impact on any particular protected characteristic.

[37] rE204.

Do you agree with our proposal to amend the Disciplinary Tribunals Regulations to clarify that the Disciplinary Tribunal may hear representations from the BSB on the issue of sanction? If not, why not?

Proposal 11: Service by email

Summary of proposal

148. We will amend the regulations to allow service by e-mail without the prior consent of the barrister, where the barrister's e-mail address is already known to the BSB. This is likely to result in service by e-mail becoming the default method of service in most cases.

Background and current approach

149. In the procedural rules of courts and tribunals, "service" refers to the official delivery of documents to another party, ensuring that they are aware of the proceedings and have an opportunity to respond. Procedural rules usually set out the ways in which documents may be validly "served", as well as rules governing the date by which, if certain steps are followed, the documents are "deemed" to have been validly served on the other party (even if actual delivery is not confirmed). Deemed service provides a reliable date for the commencement of legal timeframes, ensuring a case proceeds efficiently.

150. Under the DTRs, service of documents is permitted in the following ways:
- by guaranteed post, or other guaranteed or acknowledged delivery, or receipted hand delivery;
- by e-mail – where the respondent asks for or agrees to service by e-mail or it is not possible to serve by other means;
- if actually served (physically); or
- in any way which may be directed by the Directions Judge[38].

151. Service of documents may therefore only be effected by the BSB by email where the barrister asks for or agrees to service by email, or where it is not possible to serve by other means. Although email is now the primary method of communication with the barristers in relation to investigations and disciplinary proceedings, we have experience of barristers not engaging with requests to agree to service by email which limits our ability to rely on this form of service.

152. There can also be issues with effecting service by post. For example, often in the case of barristers not practising (particularly where they have never practised) any postal details we have are likely to be out of date. This means that service can be ineffective, despite complying with the regulations. This may also give rise to data protection concerns and the risk of sending confidential information to an address where t the barrister may no longer be residing.

153. Further, where a barrister is not engaging with us, we sometimes need to use tracing agents to confirm their current postal address even when we are aware of an email address which the barrister is using. This not only adds time but, in the case of overseas tracing, can add significant financial cost in progressing the case.

[38] rE249.

154. It is not uncommon therefore for the BSB to have to apply for an order of a Directions Judge to permit service by email, which can contribute to unnecessary delays, use of resources and overall inefficiencies.

155. Under the Civil Procedure Rules service by email may only be effected where there has been a previous indication in writing that a party is willing to accept service by email and the email address to which it must be sent.[39] While we acknowledge that the CPRs do not currently permit service by email without prior indication of a willingness to accept service by email, we are aware of a recent High Court case that recommended a narrow review of the rules on electronic service to modernise the Civil Procedure Rules.[40]

Proposal

156. We propose to amend the regulations governing service so that service may be validly effected by email without the requirement for the barrister's prior consent or where it is not possible to serve by other means (as is currently required). Service by email will be possible where the barrister's e-mail address is known to the BSB.

157. A barrister's e-mail address is likely to be known to the BSB at the point of disciplinary proceedings either because we will have already been in contact with the barrister by e-mail (e.g. during the course of an investigation) or because we may hold a registered email address for them as part of their MyBar profile. Cases are now managed electronically rather than on paper. In most cases, correspondence with respondents and witnesses is electronic. Electronic communication is also increasingly the primary method of communication (even in civil proceedings).

158. Where service is effected by e-mail, we propose to amend the regulations so that it is deemed to be served, if sent within working hours (i.e. before 16:30), on the day the email is sent, or otherwise if sent after working hours (i.e. after 16:30), on the next working day. This proposal in relation to deemed service aligns with the position under the Civil Procedure Rules regarding deemed service in relation to documents other than claim forms.[41]

159. If this proposal is taken forward, we propose to adopt the same approach to service of documents across all the enforcement regulations in Part 5 of the Handbook (including interim suspension and fitness to practise) to ensure consistency of approach.

160. Valid service will still include the other mechanisms for service provided by the current regulations where this is more appropriate – e.g. where we do not have a known email address (as may be the case in relation to unregistered barristers).

[39] Part 6 of the Civil Procedure Rules.
[40] *Chehaib v. King's College London Hospital NHS Foundation Trust & Ors* [2024] EWHC 2 (KB).
[41] Rule 6.26 of the Civil Procedure Rules.

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However, in practice, we anticipate that email service is likely to become the most common form of service.

Benefits of the proposal

161. Our view is that moving towards greater use of email as a means of effecting valid service of documents can modernise our approach and enable us to be more efficient, without the need to rely on a barrister's prior consent.

162. This approach will remove unnecessary procedural steps where a barrister's email address is already known to the BSB, helping to reduce any associated delays and administrative burden. We see email as a fair and proportionate method of service as it will be reserved for those cases where the email address has been previously used by the barrister, supporting a reasonable expectation of continued use.

Equality impacts

163. We recognise that the proposal to move towards email service, by default, may have disproportionate impacts on barristers with certain protected characteristics. In particular, this impact may be felt by age, disability, religion and belief, amongst other protected groups. However, we believe that any impacts are mitigated by the fact that the regulations will allow for other forms of service, where email is not appropriate or viable.

Do you agree with our proposal to allow service by email where a barrister's e-mail address is known to the BSB, without requiring the consent of the barrister? If not, why not?

Proposal 12: Clarifying the BSB's entitlement to costs

Summary of proposal

164. We will clarify the position that the BSB is entitled to seek to recover the costs we incur in relation to the conduct of disciplinary proceedings from the point a barrister is referred to a Disciplinary Tribunal.

Background and current approach

165. A Disciplinary Tribunal or Directions Judge has the power to make such order for costs, whether against or in favour of the barrister, as it shall think fit.[42] However, the regulations go on to say that all costs incurred by the BSB "*preparatory to the hearing before the Disciplinary Tribunal*" must be borne by the BSB.[43]

166. However, the current wording causes some confusion as to the extent to which the BSB is entitled to claim costs incurred prior to the hearing itself, when charges are proved. If the BSB is successful it currently seeks to recover costs incurred for the disciplinary hearing and prior to the hearing, such as costs for legal advice and attending interlocutory hearings. Due to the lack of clarity under the current regulations, these costs claims can be challenged.

Proposal

167. We propose to amend the regulations to make clear that the BSB may make a claim to recover costs it incurs relating to the conduct of the disciplinary proceedings from the point of referral of allegations to a Disciplinary Tribunal. In our view, it is fair and appropriate for the BSB to be able to recover the costs that are incurred following a referral of allegations to a Disciplinary Tribunal (including dealing with interlocutory applications, for example) and it is the case that we already seek such costs.

168. The Disciplinary Tribunal would retain the broad discretion to award such costs "as they think fit". This means that any decision to award costs will involve an assessment of proportionality and can take into account the individual's financial circumstances, ensuring fairness in each case.

169. The BSB does not currently intend to seek to recover its internal costs for staff time incurred in handling cases and the proposal is limited to recovering external costs – e.g. those of external lawyers, any witness or expert costs, or expenses such as transcripts. Internal staff costs are part of our baseline operational expenditure and this avoids complexity and subjectivity in costs assessments.

170. The approach to costs recovery creates a potential for discrepancy between cases prepared for the Disciplinary Tribunal internally by BSB staff and cases where external firms are engaged (due to capacity issues, conflicts or other issues), as the latter's costs may be regarded as recoverable. To avoid unfairness, we would set a policy not to recover costs where they would have

[42] rE244.
[43] rE248.

been incurred internally in comparable circumstances, and any potential discrepancy is mitigated by the fact that any costs orders are discretionary, determined by an independent tribunal and may be subject to objection by the barrister. We will keep this under review and assess whether future changes to our approach are needed to ensure consistency and fairness.

Benefits of the proposal

171. Clarifying that the BSB is entitled to externally incurred costs once charges have been referred to the Disciplinary Tribunal will help eliminate any uncertainty around costs applications. It will reduce procedural disputes or delays that may otherwise arise. We believe that this proposal will ensure consistency and transparency in relation to costs, improving the overall efficiency of the process.

Equality impacts

172. Whilst the impacts of this policy have the potential to impact on a broad number of protected characteristics, there are some mitigations which would ensure that the tangible, financial, consequences on any of these characteristics are managed or limited – for example, the fact that costs orders are at the discretion of an independent Disciplinary Tribunal panel.

Do you agree with our proposal to clarify the Disciplinary Tribunal Regulations relating to the BSB's entitlement to claim costs relating to the conduct of disciplinary proceedings? If not, why not?

Proposal 13: The BSB's right of appeal

Summary of the proposal

173. We will clarify the BSB's right to appeal to the High Court in cases where charges are partially dismissed.

Background and current approach

174. Currently, the BSB can lodge an appeal to the High Court in any case where the Disciplinary Tribunal has dismissed any charge of professional misconduct.[44]

175. However, the current wording of this regulation could be read as meaning the BSB does not have a right of appeal where part of a charge has been proved, and part has been dismissed. For example, the Tribunal may find a charge of recklessly misleading proved, rather than the dishonesty element, or that one core duty is breached but not another.

176. As a result, the BSB has adapted its approach to drafting charges by including several charges on each charge sheet to preserve the right to appeal if some charges are dismissed but others are proved. However, this practice leads to unnecessarily repetitive and inefficient charge drafting. The Enforcement Review highlighted that this practice directly increases the number of charges brought before the Tribunal and recommended reviewing the appeal powers.[45]

Proposal

177. We are proposing to give the BSB the right to appeal charges that have been wholly or partially dismissed.

Benefits of the proposal

178. Our proposal will reduce the need to draft repetitious charges, improving operational efficiency for both the BSB and the Tribunal.

Equality impacts

179. We have no data to suggest that if this proposal is adopted it will have any positive or adverse impact on any particular protected characteristics.

Do you agree with our proposal to clarify the BSB's right to appeal in cases where a charge is only partially dismissed? If not, why not?

[44] rE237.
[45] The Enforcement Review, 3.6.3 & 3.9.5.

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Proposal 14: Presumption of anonymity

Summary of proposal

180. We will introduce a presumption that, by default, any witness making an allegation of a sexual or violent nature, will be anonymised in the disciplinary proceedings.

Background and current approach

181. Currently, the DTRs provide that witnesses making an allegation of a sexual or violent nature fall into a category of "vulnerable witnesses".[46]

182. The Disciplinary Tribunal may adopt 'special measures' (such as the use of screens or other measures to prevent the identity of witnesses being revealed to the press or general public) when receiving evidence from a "vulnerable witness"[47]. However, these special measures are discretionary and cannot be confirmed until the proceedings are in progress and directions are made. They are also not necessarily the equivalent of anonymisation, and there is no guarantee that all of the relevant measures will be put in place by the Tribunal.

183. Any further protections for witnesses who make allegations of a sexual or violent nature outside of the BSB's regulations are very limited. Statutory protections are only available in restricted circumstances to complainants of sexual offences, and do not include sexual harassment.[48] We are not aware of any statutory protections for complainants making allegations of violence, including domestic violence.

184. As a result, it is common practice for the BSB to seek non-standard directions for the anonymisation of those making an allegation of a sexual or violent nature.

185. However, BSB staff who handle such cases have reported that all of this means they can provide limited assurance to these witnesses as to how their identities will be protected during the disciplinary process. This is because it requires a decision to be taken once disciplinary proceedings have commenced, a decision that they cannot prejudge.

186. The current approach risks dissuading witnesses from assisting the BSB. This is particularly important given the voluntary basis on which witnesses cooperate with the BSB's enforcement proceedings. Unlike the courts, the BSB and BTAS do not have powers to compel witnesses to attend their hearings.

Proposal

187. We are proposing to introduce a presumption of anonymity for any witness making an allegation of a sexual or violent nature. In this context, anonymity

[46] rE176.5
[47] rE179.
[48] See, for example, the *Sexual Offences (Amendment) Act 1992*.

effectively means that the witness will not be referred to in the public domain or named in the charges. However, the identity of the witness may still be known to those participating in the proceedings, namely the BSB, the barrister and the tribunal panel.

188. We see this as a practical step towards improving the BSB's enforcement system, recognising that protecting the identities of witnesses who make allegations of a sexual or violent nature is a proportionate and appropriate safeguard. In the case of witnesses making allegations of a sexual or violent nature, their individual Article 8 right to privacy is a compelling reason why their identities should be withheld from the public. It is also important for the Tribunal in securing the administration of justice that these witnesses should have their identities protected from the public.

Benefits of the proposal

189. By introducing a presumption in favour of anonymity for witnesses who make allegations of a sexual or violent nature, we intend to provide reassurance to these witnesses and safeguard their interests. This measure will also encourage the participation of such witnesses in disciplinary proceedings, improving public confidence in the proper regulation of barristers.

Equality impacts

190. Barristers with the protected characteristics of race, sex, age, sexual orientation and gender reassignment are from groups more likely to experience sexual assault, violence and harassment and, therefore, may be impacted by this proposal. We also identified that people with the protected characteristics of religion and belief may also experience disproportionate consequences if it is known that they have been a victim of a sexual act.

191. By extending the protection of anonymity, this proposal will remove significant barriers for those who make an allegation of a violent or sexual nature. It will have a positive impact for all individuals who are victims of a violent or sexual allegation, regardless of their protected characteristics. Whilst there may be some negative impacts on those who are falsely accused, the percentage of false allegations is exceptionally small[49] and, therefore, the likelihood of this risk is also exceptionally low.

Do you agree with our proposal to introduce a presumption in favour of anonymity in disciplinary proceedings for any witness making an allegation of a sexual or violent nature? If not, why not?

[49] Research suggests that only 4% of cases of sexual violence reported to the police in the UK are found of suspected to be false, Open University (see Here's the truth about false accusations of sexual violence).

Part 5C of the Handbook: The Interim Suspension and Disqualification Regulations

192. Our interim suspension regime is governed by the Interim Suspension and Disqualification Regulations (Part 5C of the BSB Handbook) (ISDRs). The primary purpose of the BSB's interim suspension regime is to enable us to take prompt action to address a risk in relation to a practising barrister pending consideration by a Disciplinary Tribunal.

193. The ISDRs allow the BSB to refer a practising barrister to an independent three-person panel[50] (an "interim panel") to consider whether the barrister should be suspended from practice, or conditions put on their practice, pending the outcome of related disciplinary proceedings for professional misconduct.

194. The ISDRs also allow for an immediate interim suspension to be imposed in certain cases. Following the referral of a practising barrister to an interim panel, the Chair of the Independent Decision-Making Body must consider whether to impose an immediate interim suspension, pending consideration by an interim panel. In effect, an immediate interim suspension will prevent a barrister from practising while the referral is awaiting consideration by an interim panel. An immediate interim suspension remains in force until (i) such time as an interim panel has considered the matter; or (ii) four weeks after the date on which it was imposed.[51]

Proposal 15: Simplifying the grounds for referral to an interim panel and imposition of interim orders

Summary of the proposal

195. We will simplify and reduce the grounds for referring a practising barrister to an interim panel to decide whether to impose an interim suspension pending the outcome of disciplinary proceedings. The grounds will be reduced from five to two, being where a referral is necessary:

a) to protect the interests of clients (or former or potential clients); or
b) to protect the public or is otherwise in the public interest.

196. Once a matter has been referred to an interim panel, the panel will have the power to decide whether or not an interim suspension (or other order) is necessary on the same two grounds.

Background and current approach

197. Currently, we may refer a practising barrister to an interim panel on five grounds, which are as follows:[52]

[50] The independent panel is appointed and convened by BTAS.
[51] rE272.
[52] rE268.1.

a) the barrister has been convicted of, or charged with, a criminal offence in any jurisdiction (other than a minor criminal offence[53]);
b) the barrister has been convicted by another approved regulator, for which they have been sentenced to a period of suspension or termination of the right to practise;
c) the barrister has been intervened into by the BSB;
d) the referral is necessary to protect the interest of clients (including former or potential clients); or
e) the referral is necessary to protect the public or is otherwise in the public interest.[54]

198. The BSB can only refer a practising barrister to an interim panel if we are satisfied that an interim suspension is appropriate, having regard to the regulatory objectives and that the disciplinary proceedings the referral relate to would warrant a charge of professional misconduct and referral to a Disciplinary Tribunal.[55]

199. Once a matter has been referred to an interim panel for consideration, the panel has the power to impose an interim suspension (or conditions in lieu) on the barrister, pending the hearing before a Disciplinary Tribunal. Currently, the interim panel may only impose an interim suspension where it is satisfied that an interim suspension is in the public interest and, were a Disciplinary Tribunal to find a related charge of professional misconduct proven, the barrister would likely receive a sentence of disbarment or suspension at any final hearing.[56]

200. In our view, the grounds for referring a matter to an interim panel are overly prescriptive and could be streamlined. We also think that, having regard to the approach of other regulators, the grounds for imposition of an interim suspension (or other order) should be aligned with the referral grounds so there is a consistent and uniform test at both stages which is rooted in the public interest or the interests of clients.

Proposal

201. We propose to simplify and reduce the current grounds for referral to an interim panel. Our proposal is to reduce the current five grounds to two, namely where a referral is necessary:

a) to protect the interests of clients (or former or potential clients); or
b) to protect the public or is otherwise in the public interest.

[53] "Minor criminal offence" is defined in Part 6 of the BSB Handbook.
[54] We introduced ground (e) (to protect the public or otherwise in the public interest) as a new ground for referral in May 2024 in version 4.8 of the Handbook.
[55] rE268.2 and rE269.
[56] rE278.2.

202. We also propose to remove the second limb of the current referral test[57] (i.e. that, having regard to the regulatory objectives, pursuing an interim suspension is appropriate in all the circumstances) on the basis it is unnecessary.

203. The public protection and public interest ground reflects the core purpose of the interim suspension regime: to take prompt action to address any risk posed to the public in relation to a practising barrister. We note that many professional regulators rely solely only on public interest and public protection grounds for taking interim action. We consider that the other grounds currently set out in the regulations (e.g. criminal charges/convictions, findings by other legal regulators and intervention by the BSB) are capable of being captured by the public protection or public interest ground, and so are unnecessary to retain.

204. However, we propose to retain the interests of clients as a standalone referral ground because, in response to a previous consultation when we proposed the introduction of public interest/public protection as a new ground for referral in the ISDRs, we received feedback from the Legal Services Consumer Panel that highlighted that the interests of clients and the public interest may not always be aligned. We can envisage that there may be circumstances where the two interests do not fully align and we consider it important that client interests may be considered as a separate basis for referral, having regard to the separate regulatory objective to protect and promote the interests of consumers.

205. Our reasons for proposing to remove the second limb of the current referral test (i.e. that, having regard to the regulatory objectives, pursuing an interim suspension is appropriate in all the circumstances) are twofold:

a) First, our proposal is that any referral may only made where it is <u>necessary</u> to protect the public/in the public interest or to protect the interests of clients (or former or potential clients). In judging whether a referral is "necessary", the decision-maker will need to have regard to "all the circumstances". The reference to the referral being "appropriate in all the circumstances" is therefore unnecessary as it is difficult to envisage a situation where it is judged to be "necessary" to take action but taking that action would be inappropriate in all the circumstances.

b) Second, the BSB already has a statutory duty to act, so far as is reasonably practicable, in a way which is compatible with the regulatory objectives in the discharge of its regulatory functions. In the context of interim measures, the applicable regulatory objectives would likely be "protecting and promoting the public interest" and "protecting and promoting the interests of consumers", which are already covered by the proposed grounds of referral.

206. Although the proposal is to simplify the current regulations, the intention is not to narrow the types of cases that may be referred to an interim panel. Serious

[57] *Ibid.*

matters, such as criminal convictions or findings by another regulatory body leading to a period of suspension or termination of the right to practise, would still justify referral under the revised grounds. Supporting guidance will be provided to ensure clarity on this point.

207. The final aspect of this proposal is to align the grounds on which an interim suspension (or other order in lieu) may be imposed by an interim panel with the grounds of referral. This ensures a consistent and uniform test at both stages which is rooted in the public interest or the interests of clients.

Benefits of the proposal

208. This proposal will simplify and streamline the current framework for interim suspensions, making it easier to apply and understand in practice, while still ensuring that serious misconduct can be appropriately addressed. It will also align the grounds used at both the referral and determination stages, promoting consistency and clarity throughout the process.

Equality impacts

209. Given the proposal to reduce the current grounds from five to two (rather than change the grounds themselves), we have no data to suggest that this proposal will have any positive or adverse impact on any particular protected characteristic.

Do you agree with our proposal to simplify the grounds for referral to an interim panel and the imposition of interim orders? If not, why not?

Proposal 16: Grounds for the imposition of an immediate interim suspension

Summary of the proposal

210. We will broaden the power of the Chair of the Independent Decision-Making Body to impose an immediate interim suspension (following referral to, and pending consideration by, an interim panel) so that one may be imposed where it is justified having considered the risk to the public or the public interest if one were not imposed.

Background and current approach

211. Following the referral of a practising barrister to an interim panel, the Chair of the Independent Decision-Making Body must consider whether to impose an immediate interim suspension, pending consideration by an interim panel.

212. Currently, an immediate interim suspension can only be imposed by the Chair of the Independent Decision-Making Body when "*satisfied that such a course of action is* justified *having considered the risk posed to the public if such interim suspension or disqualification were not implemented having regard to the regulatory directives".*[58] This narrow formulation limits the circumstances in which an immediate suspension can be imposed to one where there is sufficient risk to the public.

213. While immediate interim suspensions should be reserved for the most serious cases, we consider the current threshold is too restrictive. For example, if the BSB became aware that a barrister had been remanded in custody and was likely to receive a custodial sentence, the Chair could only impose an immediate interim suspension where there is a perceived risk to the public if no action were taken. However, in such a scenario, it may be difficult to demonstrate an active risk to the public, due to the barrister's detention, even though we consider the public interest would support an immediate suspension from practice.

Proposal

214. The proposal is to broaden the Chair's power to impose an immediate interim suspension so that it includes a power to impose one where it is justified having regard not only to the risk to the public, but also the public interest, if one were not imposed.

Benefits of the proposal

215. The main benefit of this proposal is that it will give the Chair of the Independent Decision-Making Body broader powers to respond swiftly in urgent cases to protect the public/the public interest.

[58] rE271.

Equality impacts

216. Immediate interim suspensions may be used to address the risk to the public in cases involving criminal convictions. As a result, we have identified that this proposal may have a disproportionate impact on barristers from minority ethnic groups and men, as individuals from these groups are over-represented at all levels in the criminal justice system.

217. We suggest that the potential impact on some barristers does not necessarily stem from the BSB's approach, but rather from other external factors, such as convictions in the criminal justice system. The BSB's enforcement process is reactive and responds to conduct that is brought to our attention, often by third parties. Nevertheless, external factors may influence the frequency with which barristers from these protected groups appear in our internal data for immediate interim suspensions. It remains difficult for the BSB to propose measures to mitigate the potential negative impacts on barristers in these protected categories as they are largely outside our control.

218. One safeguard in the interim suspension process is that barristers who are subjected to an immediate interim suspension will have the opportunity to provide further evidence and make representations, when their matter is being considered by an interim panel. In addition, barristers will retain the right to appeal and the right to request a review any decision made by the interim panel.

Do you agree with our proposal to broaden the power of the Chair of the Independent Decision-Making Body to impose an immediate interim suspension? If not, why not?

Proposal 17: Listing process

Summary of the proposal

219. We will streamline the listing process for interim suspension cases. All interim suspension cases will be listed for hearing within a specified number of days (e.g. 21) following a referral to an interim panel and reasonable notice of the hearing will be given to the barrister. This approach to listing will also apply to review and appeal hearings.

Background and current approach

220. The ISDRs currently provide for a somewhat convoluted and time-consuming process in relation to listing the matter for a hearing before an interim panel following a referral by the BSB. We believe the current regulations militate against a streamlined and efficient process that operates in the public interest.

221. The main listing provisions currently involve a fixed date being set for the hearing not less than 14 days and not more than 21 days after the referral by the BSB. Barristers must also be given an alternate date and be invited to accept one of the dates or provide written objections to both dates. If the barrister objects to both dates, they must be provided with two further alternate dates not more than 21 days from the date of the letter informing them of the interim panel hearing. The President of the Council of the Inns of Court (COIC) (or their delegate) then makes a decision on the appropriate date for the hearing[59]. Similar provisions apply to the listing of hearings of review and appeal hearings.

222. The current process is too convoluted and builds too much time into the process before a hearing date can be fixed. It can generate a considerable amount of correspondence within a short period solely for the purpose of fixing a date to hear a matter which, by definition, is considered to be necessary for the protection of the public or in the public interest and should therefore be considered urgently. Our research did not find any other regulator that has an interim orders regime that allows choices of dates for hearings and formal opportunities to provide written objections to proposed dates built into the regulations.

223. While we recognise the importance of building in flexibility to accommodate the individual needs of a barrister where appropriate (e.g. to accommodate any requirements related to a disability or to avoid listing hearings on days of religious significance to a barrister), we propose to simplify the process.

Proposal

224. Our proposal is to streamline the listing process to remove the detail and complexity. The regulations will provide simply that hearings must normally be listed to take place within a specified number of days (e.g. 21) following referral to an interim panel by the BSB. The regulations will also provide for reasonable

[59] rE274.

notice of the hearing to be given to the barrister and the BSB. If the barrister is unavailable on the date fixed, BTAS will be able to consider the reasons for unavailability and consider whether to re-list it. However, we do not believe that the current level of procedural detail needs to be retained in the regulations.

225. We therefore propose to remove the other requirements currently provided for, for example giving alternative hearing dates and a requirement for the barrister to accept the date offered or provide written objections (and alternate dates) with a final decision to be made by the President of COIC.

226. Our intention is to adopt a similar approach to the listing of review and appeal hearings, ensuring uniformity of approach under the ISDRs.

Benefits of the proposal

227. Our proposal allows for the listing process to be streamlined, thus promoting speedier outcomes, efficiency, flexibility and effective use of resources.

Equality impacts

228. We recognise that removing the level of prescription in the regulations in relation to listing could be perceived as having a potential adverse impact on some barristers, for example those who have the following protected characteristics: disability, pregnancy and maternity, gender reassignment, age, religion and belief. However, we believe that any potential adverse impact can be mitigated through the practical management of cases by BTAS. For example, hearings may nevertheless be re-arranged due to a barrister's unavailability (e.g. to offer reasonable adjustments or accommodate days of religious significance). Hearings can also be offered remotely and with flexibility as to their timing.

229. Further, while (as is currently the case) a hearing may proceed in the barrister's absence where the panel judges that is appropriate, there are additional safeguards in that a barrister has the right to appeal and the right to request a review of the decision made at the hearing.

Do you agree with our proposal to streamline and simplify the listing process for hearings? If not, why not?

Proposal 18: Direct referral powers

Summary of the proposal

230. Panels considering interim suspension cases will no longer have the power to refer matters before them directly to a Disciplinary Tribunal.

Background and current approach

231. The BSB can refer matters to an interim panel to consider an interim order during the early stages of an investigation. At the point that a referral is made the investigation may be incomplete, the barrister may not have had an opportunity to respond to the allegations and the BSB may not have decided whether to refer the allegations to the Disciplinary Tribunal. However, interim panels considering the question of interim suspension currently have the power to refer matters directly to a Disciplinary Tribunal at the conclusion of a hearing, where such a referral has not already been made.[60] This can be an issue because the investigation may be incomplete. While this power has not been used in practice, the consequence of exercising this power would be that our usual enforcement procedures may effectively be bypassed.

232. In theory, the exercise of this power could mean that a barrister could find themselves subject to disciplinary action without ever having had any formal allegations put to them or an opportunity to respond to those allegations.[61] In our view, this is inconsistent with the principles of fairness.

233. In any event, there is no process available under the DTRs by which the Tribunal could progress any referral made by panels under the ISDRs. The only route by which a Tribunal can consider a matter is by the service of charges by the BSB and charges can only be served by the BSB following an investigation and a referral to disciplinary action within the terms of the EDRs.

Proposal

234. We propose to remove the power for panels to refer matters directly to a Disciplinary Tribunal. As outlined above, the direct referral powers bypass the usual procedures that the BSB is required to follow, which could result in unfair treatment of some barristers as well as inconsistency.

235. While we recognise that the power of direct referral was intended to reduce procedural delay, we do not see any strong evidence or reason for taking these matters out of the usual investigation process. The most appropriate way of reducing delay is to ensure that the matters progress through the regular process as quickly and effectively as possible, rather than permitting panels who are independent of the BSB to directly refer matters to a Disciplinary Tribunal.

[60] Under rE278.6 and rE287.5.
[61] This is a requirement under rE15.

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Benefits of the proposal

236. As panels will no longer have the power to refer directly matters to the Disciplinary Tribunal, we will remove the potential for panels to override the usual procedural requirements. This will ensure greater consistency in how matters are handled, improving the overall effectiveness of the disciplinary process. Our proposal will also ensure the proper administration of justice by ensuring barristers are treated more fairly.

Equality impacts

237. We have no data to suggest that this proposal will have any positive or adverse impact on any particular protected characteristic.

Do you agree with our proposal to remove the power given to panels under the ISDRs to refer cases directly to a Disciplinary Tribunal? If not, why not?

Proposal 19: Right of review

Summary of the proposal

238. We will extend the right to request a review of an interim order, which is currently only afforded to the barrister, so that the BSB also has a right to request a review.

239. We will also amend the regulations to allow both parties to make representations in relation to a review request and to be notified of the outcome of BTAS' decision as to whether to convene a review panel.

Background and current approach

240. Once an interim order is made by the panel, it is generally in place until the Disciplinary Tribunal makes a decision on the charges in the disciplinary proceedings, unless it is reviewed. The ISDRs confer a right on the barrister to request a review of an interim order at any time while it is in place where there is a significant change in circumstances or other good reason.

241. Further, on receipt of a review request the President of COIC currently has a discretion as to whether to seek representations from the BSB on the review request and is only obliged to notify the barrister of the decision as to whether to convene a review panel to carry out the review.[62]

Proposal

242. We are proposing to extend the right to request a review of an interim order so that it applies equally to both the barrister and the BSB. The BSB needs a mechanism to seek a review of existing interim orders, in order to respond to new evidence or changed circumstances. For example, the BSB may need to request a review if further evidence is obtained that suggests there may be a greater (or perhaps lower) risk to the public such that the nature of the interim order ought to change. The primary justification for this change is, therefore, to allow the BSB to be agile and reactive in the public interest to changing circumstances.

243. We will also make it a mandatory requirement that the other party to the review should be given an opportunity to make representations on it before BTAS decide whether to convene a review panel, and for both parties to be notified of the decision as to whether to convene a review panel (as well as the date fixed for the hearing). It is in the interests of fairness to give both parties the right to make representations and be notified of any decision, rather than relying on the discretionary powers of the President of COIC.

Benefits of the proposal

244. Our proposal will ensure that the review process applies equally to both parties – including the right to make a request, to be heard and to be notified of the

[62] rE280.

outcome. By amending the regulations in this way, rather than relying on the discretion of the President in individual cases, we will ensure that a consistent approach to reviews is adopted in each matter. This uniform approach will ultimately improve the fairness and effectiveness of the system.

Equality impacts

245. We recognise that introducing powers for the BSB to request reviews also introduces a potential risk of unconscious bias in the decision to seek a review, which may be felt more acutely by barristers with certain protected characteristics. However, we consider the proposed change to be proportionate and we assess the risk of it resulting in a disproportionate impact on certain groups to be low.

Do you agree with our proposal to allow the BSB the right to request a review of an interim order? If not, why not?

Do you agree with our proposal to allow both parties to make representations in relation to an interim order review request? If not, why not?

Proposal 20: Granting powers to the Disciplinary Tribunal panel to consider requests to review interim orders

Summary of the proposal

246. Disciplinary Tribunal panels will be given the power to consider and decide on a request to review an interim order made by an interim panel once the substantive disciplinary hearing of related charges has commenced.

Background and current approach

247. Currently, where a barrister requests a review of an interim order under the ISDRs, any pending review hearing will be vacated if the hearing of related charges of professional misconduct before the Disciplinary Tribunal has already commenced.[63]

248. The effect of this regulation is to remove the jurisdiction of a review panel to consider a review request once the substantive hearing of charges of professional misconduct before the Disciplinary Tribunal has commenced. However, the Disciplinary Tribunal has no power to review interim orders made by an interim panel under the ISDRs. This means that the interim order will continue until the Disciplinary Tribunal has made a finding on the charges, even when a review is requested.

249. Disciplinary Tribunals have separate powers under the DTRs to make interim orders between their decision on finding and sanction. However, this power only arises where the Disciplinary Tribunal finds charges proved but decides to adjourn the hearing before deciding what sanction to impose.[64]

250. All of this creates a gap where a barrister's request for a review of an interim order made by an interim panel will go unaddressed once the disciplinary hearing has commenced (even if that hearing is then itself adjourned). As a result, the barrister can potentially be left without any mechanism to change an interim order that is in place for a significant time period.

251. There is a need for this power to review interim orders once the substantive hearing is already underway because, in practice, there may be a time lapse between the commencement of the substantive hearing and the final decision on the charges and sanction (e.g. as a result of adjournments).

Proposal

252. To address the gap in the current regulations, we propose to grant Disciplinary Tribunal panels the power to consider a request to review an interim order once the substantive hearing has commenced. Such powers will be available until such time as the Disciplinary Tribunal has made a decision on whether the charges of professional misconduct are proved. At that point, if charges are

[63] See rE282 & 283.
[64] See rE202A.

found proved and the Tribunal hearing is adjourned pending a decision on sanction, the Tribunal can utilise the existing powers to impose interim orders pending sanction to address any immediate public interest concerns.[65]

253. We considered whether the review request ought to be considered by a review panel as they usually have powers to review an interim order before the Disciplinary Tribunal hearing has commenced. However, in our view, it is not desirable, once the substantive hearing of related charges has commenced, to have two different panels considering substantively similar issues in relation to the same barrister in the interests of fairness, consistency and timeliness. Once the hearing before the Disciplinary Tribunal has commenced, the Tribunal panel will be appraised of all relevant facts and, therefore, best placed to review any interim orders. The Tribunal is an independent, impartial and robust decision-maker.

Benefits of the proposal

254. The proposal will empower Disciplinary Tribunal panels to respond to changed circumstances that may warrant an interim order being reviewed, once the substantive hearing has commenced. We believe that the proposal will improve the fairness of the system and the barrister's access to justice, whilst ensuring that the public is properly protected.

Equality impacts

255. We have no data to suggest that this proposal will have any positive or adverse impact on any particular protected characteristic.

Do you agree with our proposal to allow Disciplinary Tribunal panel to consider requests to review an interim order as part of the substantive hearing? If not, why not?

[65] These powers were introduced in May 2024 in version 4.8 of the Handbook.

Part 5D of the Handbook: The Fitness to Practise Regulations

256. Our fitness to practise (FtP) regime is governed by the Fitness to Practise Regulations (FtPRs) and is a non-disciplinary regime which is designed to deal with health issues that may affect a barrister's ability to practise. The BSB can refer a practising barrister to a FtP panel where we receive information which may suggest that an individual may be "unfit to practise"[66].

257. FtP panels hold preliminary and full hearings to consider the issue of fitness to practise, which may involve ordering an examination by a Medical Examiner to assist the panel's assessment.

258. Where an individual is found to be "unfit to practise", a FtP panel may impose a period of restriction (i.e. suspension or disqualification) indefinitely or for a period not exceeding six months. Additionally or alternatively, panels may direct that the individual's right to practise, or to resume practise, be subject to conditions (or they may accept undertakings in lieu). There is right of review and appeal against any restriction or conditions.

259. Our FtP regime is one that is rooted in the public interest and public protection. However, although in place for some time, it has been rarely used and, in the last five years, none of the small number of cases that have been initiated (of which there have been five) have progressed to a final hearing. Although we therefore have limited recent experience of the FtP process working in practice, we consider it is timely to review and refresh the approach.

Proposal 21: Rebranding the Fitness to Practise regime and the grounds for referral

Summary of the proposal

260. We are proposing to "rebrand" the Fitness to Practise regime as the "health regime" and to make consequential changes to the regulations. We also intend to update the criteria for referring a matter under the health regime by removing the current requirement for "incapacitation" and for the same test to apply to panels deciding whether to impose orders either for the protection of the public or otherwise in the public interest.

[66] A term which is currently defined in Part 6 of the Handbook as follows
"when used to describe a BSB authorised individual means that the individual:
is incapacitated due to their physical or mental condition (including any addiction); and, as a result, the Individual's fitness to practise is impaired; and, the imposition of a restriction, or the acceptance of undertakings in lieu, is necessary for the protection of the public, is otherwise in the public interest or is in the Individual's own interests."

Background and current approach

261. We can refer a practising barrister to a fitness to practise panel where we receive information suggesting that they are "unfit to practise" [67]. In the BSB Handbook, "unfit to practise" means that the barrister is "incapacitated" due to a health condition which impairs their fitness to practise and a restriction is necessary to protect the public.

262. Following a referral, a fitness to practise panel will ultimately determine whether an individual is "unfit to practise" and, if so, what, if any, restrictions (e.g. suspension) or conditions ought to be imposed.

263. The current fitness to practise regime is not often used in practice. Our experience indicates that the current requirement for *incapacitation* in the definition of "unfit to practise" may well act as a barrier to our ability to refer individuals into the fitness to practise regime, notwithstanding there may be health concerns that may impact their ability to practise.

Proposal

264. Having reviewed our fitness to practise regime, we propose to retain it as a standalone regime for responding to health conditions which may affect a barrister's ability to practise.

265. With the exception of CILEX Regulation, we are not aware of any other regulators that have a standalone health regime which is similar to the BSB's. However, without the FtPRs, we would be unable to respond effectively, and in the public interest, in instances where we become aware of a health condition that may be impacting a barrister's ability to practise absent a breach of the Handbook. This is in part because we do not currently consider health as part of the annual renewal of practising certificates. A barrister's entitlement to a practising certificate is determined under the BSB's Practising Certificate Rules in Part 3 of the Handbook and does not include any requirement for the re-declaration of their ongoing fitness to practise.

266. We propose to introduce a suite of changes that will effectively "rebrand" the BSB's current fitness to practise regime. We intend to move away from the concept of "fitness to practise" and rename the regulations as the "Health Regulations", to better reflect the nature and purpose of the regime. This change will reflect the non-disciplinary nature of the regime and will differentiate it, improving clarity of purpose for the profession and public, from the fitness to practise model that is common in healthcare regulation.

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[67] The full definition of "unfit to practise" in Part 6 of the Handbook is as follows:
"when used to describe a BSB authorised individual means that the individual:
is incapacitated due to their physical or mental condition (including any addiction); and, as a result, the Individual's fitness to practise is impaired; and, the imposition of a restriction, or the acceptance of undertakings in lieu, is necessary for the protection of the public, is otherwise in the public interest or is in the Individual's own interests."

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267. As a consequence, we will change existing terminology that is associated with the concept of "fitness to practise", including for example:

- removing the defined term "unfit to practise" from the regulations;
- replacing the current references to "Fitness to Practise panel" with "Health Panel"; and
- replacing references to a "preliminary hearing" and "full hearing" with "preliminary meeting" and "full meeting" respectively.

268. We also propose to amend the criteria that must be met before a referral can be made to a health panel under the Health Regulations, removing the requirement for *incapacitation*. A referral to a health panel will be possible where the BSB receives information suggesting that:

a) there is a health condition;
b) the barrister's ability to practise is impaired[68] on the ground of that health condition; and
c) the imposition of a restriction or conditions (or undertakings in lieu) is **necessary** for the protection of the public or is otherwise in the public interest.

269. We explore each of these criteria in some more detail below.

"Health condition"

270. We will define the term "health condition" in the regulations as "*a physical or mental* health *condition (including addiction)*". This aligns with the approach in the current regulations. We have chosen to retain the reference to addiction to ensure that it is clearly captured by the health regime.

Ability to practise is "impaired"

271. The second criterion that must be met for an individual to be referred to a health panel is that information we receive must suggest that the barrister's ability to practise is "impaired" by their health condition.

272. The current definition of "unfit to practise" requires that the individual's "fitness to practise" is impaired as a result of their physical or mental condition. Given we are moving away from the concept of "fitness to practise", we propose to say "ability to practise" instead. However, we will retain the requirement for impairment as a result of their health condition.

273. As foreshadowed above, we also propose to remove the requirement for incapacitation. This is too a high threshold and anecdotally has acted as a barrier to our ability to refer barristers to a panel under the current Fitness to Practise

[68] While impairment does not have a statutory definition, the key indicators of "impairment" are set out in Dame Janet Smith's guidance in the Fifth Shipman report, as adopted by the High Court in *CHRE v NMC & Grant* [2011] EWHC 927 (Admin). We note that the caselaw principles mostly arise in the context of medical regulation but still have some import into the BSB's FtP regime (see *Council for Healthcare Regulatory Excellence v NMC* [2011] EWHC 927.

Regulations. We believe the change is appropriate to ensure that we have the tools available to take regulatory action that is appropriate and proportionate in the public interest or for the protection of the public.

274. However, we do not intend this change to amount to the lowering of the threshold for referral to the extent that it would be capable of capturing individuals with insignificant or temporary health conditions that may affect their ability to practise in the short term. We recognise that the burden is on the BSB to justify putting an individual through the process and this underlines the importance of the third and final criterion for a referral (below).

Necessary for the protection of the public or otherwise in the public interest

275. The third criterion requires a referral only where the imposition of a restriction (i.e. suspension or disqualification) or conditions (or undertakings in lieu) is necessary for the protection of the public or otherwise in the public interest.

276. We see this as an important safeguard to prevent barristers being referred to a health panel where they have a temporary health condition or a longer-term condition that is being managed. The BSB must have evidence that a restriction or conditions (or undertakings in lieu) is necessary to protect the public or in the public interest, which will prevent an individual being referred to a health panel for minor impairments.

277. Further, while the current regulations allow the BSB to refer an individual to a fitness to practise panel where a restriction is necessary in the "individual's own interests", we do not see that there is any need for this criterion to be retained in the health regulations.

278. We understand that there is a need for the "individual's own interests" to be a basis for the imposition of health orders in other regulatory contexts – for example, in relation to the regulation of pharmacists where a restriction on an individual's access to certain prescribed medicines may be in their own interests because of an addiction. However, we are not persuaded that there are any circumstances in which the BSB would be justified in imposing restrictions or conditions on a barrister's practice where it is in their "own interests", that would not be for the protection of the public or otherwise in the public interest.

279. We also propose that a similar test will be applied to health panels when deciding whether to impose restrictions or other orders.

Benefits of the proposal

280. By "re-branding" the regulations and focusing on the issue of "health", we hope to make clearer the role of the regime as a non-disciplinary means of addressing health issues, better reflecting the purpose of the health regime. Our aim is to move away from terminology that may be associated with a more disciplinary process and to make the regime one that is more accessible and less intimidating to those who need to engage with it (who may also be vulnerable as

a result of a health condition). Our proposals also ensure that the BSB can effectively use the health regime to respond proportionately and appropriately in health cases, while ensuring fairness to barristers.

Equality impacts

281. As we are updating the threshold for referring matters under the health regime, we recognise that a greater proportion of barristers may be affected by these provisions. We have identified that this change may disproportionately impact some barristers, for example those with the protected characteristics of disability, pregnancy and maternity and age, who may be more likely to experience health conditions. As a result, there is a risk that barristers in these groups may be more likely to meet the criteria for referral under the health regime.

282. However, to mitigate this risk, we intend to draft the regulations or supporting guidance in such a way that they contain clear guidance on the issue of "impairment", which does not set too low a threshold, and emphasising the need for any referral to be "necessary" for the protection of the public or in the public interest. This will avoid instances where those with chronic illnesses, managed conditions, or minor impairments are being referred without need.

Do you agree with our proposal to re-brand the fitness to practise regime to a "health" regime and to make consequential amendments to the regulations to align with that re-branding? If not, why not?

Do you agree with our proposal to amend the threshold for referral into the health process by removing the requirement for incapacitation? If not, why not?

Proposal 22: Convening a panel and fixing a hearing date

Summary of the proposal

283. We will impose a duty on BTAS, following a referral by the BSB of a barrister to a health panel, to convene a panel, fix a hearing date and notify both parties of the date.

Background and current approach

284. The FtPRs are currently silent as to who will convene a fitness to practise panel and fix hearing dates, following a referral of a barrister by the BSB.

285. After referral, the current regulations simply provide that the Chair of the panel will send a written notice to the barrister which will include the time and date of a preliminary hearing and also the final hearing. However, on a practical level, a panel needs to be convened and a hearing date fixed before a preliminary or full hearing can take place. Further, the BSB ought to be notified of the hearing as well as the barrister.

Proposal

286. Our proposal is to amend the regulations to require BTAS to convene a panel and list the matter for a hearing (or "meeting"), following a referral by the BSB. This needs to happen before a full or preliminary meeting can take place and before meeting dates can be notified.

287. Both parties should also be notified of the meeting date that has been set. This will codify existing practice.

288. However, we do not think the function of notifying the parties of the time and date of a meeting should be carried out by the Chair of the panel, as is currently the case. As such, we propose to amend the regulations so that the duty to notify the parties of the time and date of a meeting is on BTAS, rather than the Chair of the individual health panel.

289. We intend to mirror these provisions in relation to review and appeal hearings.

Benefits of the proposal

290. Our proposal will ensure that there is a clear responsibility for progressing health matters under the process and for notifying both parties of the progression of a case, so there can be full participation with sufficient notice. By setting this responsibility out in the regulations, we will create certainty and clarity around the listing process and codify existing practice.

Equality impacts

291. We have no data to suggest that this proposal has any positive or adverse impact on any particular protected characteristic.

Do you agree with our proposal to introduce an explicit duty for BTAS to convene a panel, fix a hearing date and notify both parties of the meeting date, following the referral of a barrister to a health panel by the BSB? If not, why not?

Proposal 23: Introducing a power to accept undertakings prior to a referral to a health panel

Summary of the proposal

292. The BSB will have the power to agree conditions which are intended to manage a barrister's health issues in clear and straightforward cases before and instead of a referral being made to a health panel.

Background and current approach

293. "Undertakings" are a formal commitment made by a party to do something, or not to do, certain things. In the context of the health regime, an undertaking might involve a barrister agreeing to comply with a treatment plan, in order to continue practising as a barrister. Currently, undertakings can be given to the FtP panel itself. They can be agreed to by the barrister, instead of formal orders being imposed. A breach of an undertaking is also likely to be a breach of the BSB Handbook (and potentially constitute professional misconduct) and can be dealt with using our enforcement tools.

294. The Fitness to Practise regulations only provide a framework for undertakings to be accepted by fitness to practise panels, once the formal process has commenced.

295. Currently, the BSB does not have the ability to accept undertakings when it receives information suggesting that a health condition may be impacting an individual's ability to practise. If the BSB determines that an individual may be "unfit to practise" a referral is made to a panel and the power to resolve the matter by accepting undertakings is not available until the final hearing stage.

Proposal

296. We propose to introduce a new power for the BSB to accept undertakings (in the form of conditions) prior to and instead of a referral of a barrister to a health panel. The proposed new power will allow the BSB to accept undertakings (for example, in relation to conditions of practice), where doing so is appropriate and in the public interest, before the formal process has commenced. Our intention is for undertakings to be reserved for clear and simple cases.

297. We see value in introducing such a power to manage cases effectively, efficiently and proportionately where both the practising barrister and the BSB are agreed as to:

a. the health issue and its impact (or potential impact) on the individual's ability to practise and the public;
b. the nature of the conditions which might mitigate that impact and are appropriate for the protection of the public or otherwise in the public interest; and
c. a referral to the formal process not being a proportionate response and/or being potentially detrimental to the individual's wellbeing.

298. In our view, there is no need for an independent panel to oversee the terms of the undertakings that may need to be given, as there will be agreement between the parties and medical evidence can be provided if available in support.

299. The BSB will retain the option to make a referral to a panel, for example if the individual fails to comply with the agreed undertakings.

300. We propose that the power of the BSB to accept undertakings at this early stage will be limited to undertakings with conditions. This is because undertakings that are in essence a form of suspension are unnecessary given the barrister can voluntarily give up their practising certificate. If a barrister goes on to renew their practising certificate, then any ongoing health concerns can be managed at that time using the health process.

301. We will develop guidance for decision-makers which will set out the criteria on which it would be appropriate for the BSB to accept undertakings.

Benefits of the proposal

302. By introducing these new powers, the BSB will be able to respond proportionately where the parties are in a position to agree relevant undertakings in the public interest/to protect the public and avoid the need to engage in the formal process.

303. We consider that the benefits of this proposal are twofold:
- There will be no need to convene a panel or progress the matter through the full process (including a preliminary and full meeting). This will likely result in a more expedient process, saving time and resources; and
- The BSB will have appropriate powers available to it to adopt a more compassionate response to reduce unnecessary stress on individuals (which we consider is a relevant consideration in health cases) in appropriate cases.

Equality impacts

304. We have identified that this proposal could disproportionately impact barristers with the protected characteristics of disability, age and pregnancy and maternity on the basis that they are more likely to experience long term health conditions, complications and disabilities. However, we believe that the proposal would likely introduce positive impacts, by allowing barristers to agree to undertakings and bypass a referral into the process, reducing any associated stress or delays.

Do you agree with our proposal to give the BSB the power to agree undertakings before and instead of a referral being made to a health panel? If not, why not?

Proposal 24: Length of orders

Summary

305. We will remove the current six-month time limit on suspensions and disqualifications that can be imposed under the FtPRs, and we seek feedback on whether:

a. there should be no upper time limit on any period of suspension or disqualification that may be imposed by a health panel; or
b. we should set a maximum time limit of 36 months on all suspensions or disqualifications that may be imposed by a health panel.

Background and current approach

306. Under the FtPRs, where a panel has decided that an individual is unfit to practise, the panel may direct that the individual be subject to a *restriction* (defined as a suspension or disqualification) which may be imposed indefinitely or for such period, not exceeding six months, as specified in the panel's decision.[69]

Proposal

307. We propose to remove the current six-month time limit on suspensions or disqualifications that can be imposed under the FtPRs. Although the six-month time limit has been included in the regulations for many years, we think it is likely to be too short a period to address some health conditions, given the potential need to access and complete treatment. We therefore do not consider a six-month time limit on restrictions is a relevant or helpful measure.

308. However, we also seek feedback on the options we have identified in relation to how to frame the panel's powers to impose a suspension or disqualification to address concerns arising from a barrister's health condition.

309. We have identified two options as follows:

- **Option 1:** We will remove any time limit on the period of suspension or disqualification that panels can impose. The regulations will instead confer discretion on panels to determine the appropriate period on a case-by-case basis and in light of the medical evidence with no upper limit. This could mean that a restriction may be imposed for a fixed period (with no prescribed upper limit) or indefinitely.
- **Option 2:** Alternatively, we will impose a maximum upper limit of 36 months for any suspensions or disqualifications imposed under the regulations.

Option 1

310. Retaining a panel's ability to impose a suspension or disqualification for such period as they consider appropriate (which may be indefinite) means that panels

[69] rE320.1.

will have the discretion to determine the appropriate period, based on the circumstances of the individual case and any available medical evidence. The unknown and potentially long-standing nature of some health conditions may mean it is difficult to identify a point in time when any suspension or disqualification should fall away. However, we recognise that the imposition of a suspension or disqualification for a potentially indefinite period is a draconian measure, which could lead to uncertainty and restrictions being imposed for potentially long periods. It is therefore preferable that panels only impose indefinite suspensions or disqualifications in exceptional cases and we would propose to make this clear in supporting guidance.

311. There is also a safeguard against any risk of abuse or unfairness in that any period of suspension or disqualification is subject always to the right for either the barrister or the BSB to request a review at any time[70] and the right to appeal[71] (which is an appeal as of right within 14 days of any decision to impose, extend, vary or replace a period of restriction).

Option 2

312. One way of resolving the issues that arise from Option 1 is to introduce a proposed maximum length to all suspensions or disqualifications imposed under the regulations - for example, 36 months. We anticipate that a period of 36 months should be sufficient to allow for progress in the management of a health condition and we note that some other regulators can impose orders of up to 36 months, when health issues arise.[72]

313. While this approach would safeguard against some of the risks identified above of an indefinite restriction, this approach may create additional and unnecessary burdens for individuals with long-term health conditions, as well as associated resource implications, where a new order may be required because the health issues have not resolved within 36 months.

Additional proposal that applies to both options 1 & 2

314. Whether we adopt Option 1 or Option 2 (or something else), there needs to be sufficient checks and balances to ensure that an individual is ready to resume practice, once any order has expired. We therefore propose to introduce an option for panels to hold a further meeting to assess whether there are any ongoing public protection or public interest concerns that need to be addressed, before the individual resumes their practice. One way to achieve this is to require

[70] Under re324, a review can be made at any time and the threshold for a review is where there is a significant change in circumstances or for some other good reason
[71] Under rE328, an appeal is as of right within 14 days of any decision to impose, extend, vary or replace a period of restriction.
[72] For example, the Health and Care Professions Council can make orders initially for a period not exceeding 18 months and then may extend (and further extend) such orders by 12 months and the Association of Chartered Certified Accountants may impose orders under health regulations that are reviewed at 12-month intervals up to the end of a 3-year period, when exclusion from the register is considered.

the individual to return before a panel, before an individual can resume practice. In doing so, we would need to introduce accompanying regulations that grant panels additional powers to make orders at that stage in the process.

Benefits of the proposal

315. Our proposals seek to balance fairness to the individual with the need to give panels sufficient powers to respond appropriately to the specific health concerns presented in each individual case. This flexible approach will improve the effectiveness of the system by allowing tailored outcomes that better reflect individual circumstances.

316. The proposal to introduce a mechanism for reviewing whether there are any residual public protection or public interest concerns before a barrister resumes their practice addresses a gap in the current framework. It will provide an opportunity to ensure that any ongoing health concerns are properly considered in the public interest.

Equality impacts

317. We have identified that the proposal to change the length of orders that can be imposed under the health regime may disproportionately affect some barristers. For example, barristers with protected characteristics such as disability, age, pregnancy and maternity may be more likely to experience health conditions and therefore may be impacted by this change. Additionally, while socio-economic status is not a protected characteristic, barristers without an established practice may be disproportionately impacted by any order imposed, which could limit their earning potential.

318. To mitigate any potential adverse impact, we propose to develop additional guidance to support panels to ensure that careful and appropriate consideration is given to the circumstances in which an order is imposed. In particular, the imposition of an order with an indefinite term should be considered with extreme caution. Moreover, additional safeguards are in place, including a barrister's right to appeal and right to request a review of the decision made at the hearing.

Do you agree that six months is no longer an appropriate time limit to impose on fixed term suspensions or disqualifications that may be imposed by health panels? If not, why not?

Do you prefer Option 1 or Option 2 and why? If you prefer neither option, please let us have your views on any alternative formulations that we should consider.

Do you agree with our proposal to introduce powers for health panels to review a barrister's health and ability to practise before they resume practice, to ensure there are no ongoing public protection or public interest concerns? If not, why not?

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Proposal 25: Giving panels the power to impose interim conditions at Preliminary Meetings

Summary of the proposal

319. We will give health panels the power, at preliminary meetings, to impose interim conditions to protect the public or in the public interest (in addition to the existing power to impose an interim suspension or disqualification).

Background and current approach

320. At a preliminary hearing, fitness to practise panels have the power to impose a period of interim suspension or disqualification pending determination at a full hearing. These interim orders can only be imposed where it is necessary to protect the public, in the public interest, or in the individual's own interests.

321. Any interim suspension or disqualification can be imposed subject to conditions. These orders are in place until a finding is made at a full hearing and cannot exceed three months.[73]

Proposal

322. We propose to amend the regulations to give health panels at preliminary meetings the power to impose interim conditions (in addition to the existing power to impose an interim suspension or disqualification).

323. In some cases, we think that it may be more appropriate for a panel to allow a barrister to continue practising subject to conditions only, rather than a suspension or disqualification, pending the full meeting. We recognise that an interim suspension or disqualification is a draconian measure and conditions may adequately address any risks or concerns held by a panel at the preliminary meeting stage.

324. The types of interim conditions that could be imposed are wide ranging, for example, a condition not to carry out public access work or a condition to be subject to medical testing. We recognise that this proposal may introduce an added degree of complexity, in terms of monitoring conditions, and create added administrative burden and resource implications.

325. We are also proposing to amend the grounds on which an interim order can be made at a preliminary meeting. We will retain the current grounds where it is "*necessary* for *the protection of the public or is otherwise in the public interest*" but will remove the ground where it is "*in the individual's own interests*". This is for the same reason as described in Proposal 21 – which is essentially because we see no need for this ground in the context of a barrister's work.

[73] rE314.

Benefits of the proposal

326. This proposal will give panels powers to impose a wider range of interim measures pending determination of the matter at a full meeting, thus allowing panels to respond more proportionately and appropriately on a case-by-case basis. It will help protect the public while avoiding unnecessarily harsh restrictions on a barrister's ability to practise.

Equality impacts

327. As this proposal will introduce powers that exist elsewhere under the regulations, we have no data to suggest that this proposal could disproportionately impact barristers with any particular protected characteristic.

Do you agree with our proposal to introduce a power for health panels to impose interim conditions (in addition to the existing power to impose an interim suspension or disqualification) at a preliminary meeting to protect the public or in the public interest? If not, why not?

Proposal 26: Rights of review and clarifying the review process

Summary of the proposal

328. We will simplify the regulations by providing for a single right of review of any restriction or conditions. The right of review may be requested at any time during the period of any restriction or conditions where there has been a significant change in circumstances or some other good reason. Review requests will be submitted to BTAS, who will decide whether to refer them onto the panel. The review process will be streamlined, with the review panel empowered to issue directions as needed.

Background and current approach

329. Currently, the regulations provide for two review rights in relation to decisions made by fitness to practise panels.

330. The first right of review arises where a panel has imposed an interim restriction (i.e. suspension or disqualification), or accepted undertakings at a preliminary hearing. In those circumstances, the regulations allow the barrister to request a review by the panel at any time, when the interim restriction is in place. [74]

331. The second right of review applies at any time during a period of restriction or conditions (including interim restrictions), where there has been a significant change of circumstances or for some other good reason.[75] However, a review can only be initiated if the BSB refers the matters - either on its own initiative or following a request from the barrister. This means that the barrister cannot make a review request directly, without it first going through the BSB.

332. Once a review request has been referred to the panel for consideration, the regulations currently provide that the entire process is essentially repeated, except in cases where the panel and the barrister agree in writing that a preliminary hearing is not required[76]. In our view, this is overly burdensome and some flexibility should be built into the process.

333. If the barrister cannot show that there has been a significant change of circumstances or some other good reason to request a review, the barrister nevertheless has the option to bring an appeal within 14 days of the date of the decision.[77]

Proposal

334. We propose to streamline the rights of review so that there is a single right to request a review of interim or final orders at any time during their duration, where there is a “significant change in circumstances” or “some other good reason”.

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[74] rE316.1.
[75] rE324.
[76] rE325.
[77] rE328.

335. It is unnecessarily complex to have two separate but potentially overlapping review rights.

336. In relation to the right to request a review of an interim restriction imposed at a preliminary hearing, we have considered whether there are any circumstances where an individual's reasons for a review would not be capable of being caught by the general right to a review. We concluded that the general right to a review – where there is a "significant change of circumstances" or "some other good reason" – ought to be sufficiently broad. We see no need to retain the two separate review rights and so propose to remove the right to request a review of an interim restriction only.

337. We also think it is inappropriate that the current process requires the BSB to refer a matter to a review panel at the request of the barrister. Following an initial referral to a health panel by the BSB, further decisions are made independently by BTAS. We therefore propose to amend the regulations to require all review requests to be made directly to BTAS[78], without first needing it to be submitted to the BSB. BTAS will decide whether the request meets the threshold for a review and, therefore, whether it should be referred onto the panel for consideration. We think it is appropriate for BTAS to first consider whether a review request is genuine and well-founded to avoid abuse of the review process and the unnecessary use of resources where a review request is not warranted.

338. We are also proposing to streamline how the review process operates. Once a review request is received, BTAS will be required to set a date for the review hearing and notify the parties of the date, rather than requiring that the full process to be repeated. As a consequence of this change, we intend to give the panel considering a review greater powers to ensure that they can make appropriate directions, including ordering further medical evidence.

Benefits of the proposal

339. The proposal will simplify and clarify the review process by relying on a single right of review throughout the duration of the health process, making it easier to understand and navigate in practice. Our proposal will also ensure that the review process will avoid unnecessary repetition, allowing for a more streamlined and efficient process with reduced delays.

Equality impacts

340. We recognise that barristers with disability, age and maternity and pregnancy protected characteristics may be disproportionately impacted by this proposal as they are more likely to experience health concerns.

341. To mitigate the risk of adverse impacts from the new process, we plan to produce supporting guidance to ensure that review requests are considered thoroughly and consistently, regardless of their frequency.

[78] As mentioned elsewhere, we are reviewing the appropriate role on whom to confer powers on behalf of BTAS across Part 5 of the Handbook and will revisit this issue when we consult on drafting changes.

Do you agree with our proposal to simplify the rights to review and the review process under the regulations? If not, why not?

Other issues: Disciplinary Tribunal Panel and Independent Decision-Making Panel composition and support

Proposal 27: Changes to Disciplinary Panel composition

Summary of the issue

342. Whether all Disciplinary Tribunal panels should consist of three members with a *legal* majority or whether the option to refer more serious cases to a five-member panel with a *barrister* majority should be retained.

Background and current approach

343. Under the current regime, there are two types of Disciplinary Tribunal panels:
- a five-person panel, comprising a judge (as Chair), two lay members and two practising barristers; or
- a three-person panel comprising a King's Counsel or judge (as Chair), one lay member and one practising barrister with no less than seven years' standing.

344. Both the five-person panel and the three-person panel have a barrister majority. Judges and King's Counsel have provided excellent, high-quality services on and to Tribunals, which the BSB fully acknowledges and for which the BSB is very appreciative.

345. Five-person panels may impose the full range of available sanctions, including suspensions of more than 12 months and disbarment, whereas three-person panels have sanctioning powers up to 12 months' suspension. Although sanctioning powers differ, three-person panels still deal with a range of cases involving complex legal and evidential issues. Where a three-person panel considers its available sanctioning powers are inadequate for the case before it, or the case is complex enough to warrant sentencing by a five-person panel, it may refer the charges to a five-person panel for a decision on sanction, which can create delays in the process.[79]

346. Whether allegations are referred to a three or five person-panel is determined at the time of referral to a Disciplinary Tribunal and will depend on a number of factors, including the perceived seriousness of the alleged misconduct, the likely sanction (having regard to the published BTAS Sanctions Guidance) and the respondent's previous disciplinary record.[80]

Proposal

347. We are considering the introduction of three-person panels only for all Disciplinary Tribunal proceedings. Three-person panels would likely consist of a practising barrister member, a lay member and a legally qualified chair (the requirements for which are discussed at Proposal 29 below).

[79] rE211.
[80] rE46-47.

348. This change would address the practical difficulties and delays that can be caused by the need to schedule hearings around the availability of a five-person panel, particularly the judge and barrister members. These scheduling difficulties are amplified when there is a need to list longer hearings or make last-minute changes due to the judge or King's Counsel no longer being available. The availability of five-person panels can also be an ongoing issue, for example if a hearing goes part-heard and in relation to reviewing and agreeing written decisions.

349. The introduction of three-person panels only would also address the inherent inefficiencies if a three-person panel is initially appointed but considers it has inadequate sanctioning powers available and refers a case to a five-person panel.

350. The Enforcement Review noted that *"convening and recalling five person panels is time* consuming *and causes additional delay, given the challenge of aligning busy diaries across five individuals*".[81] Reducing the number of panel members will give greater flexibility in setting hearing dates and, where necessary, reconvening in good time.

351. Research into the approach taken by other regulators demonstrates that the BSB's five-person panels are an outlier, when compared to other regulators. Our comparative research highlighted that many other regulators (both legal services and other sectors[82]) use panels of up to three people to preside over their disciplinary matters and such panels have a full remit of sanctioning powers, including the ability to remove a practitioner's registration. Therefore, this approach would better align the BSB's approach with other regulatory regimes.

352. Most other regulators have at least one member of the profession on the panel, to represent the profession. We think this is an important part of any panel composition. However, it is also important to have at least one lay member, to represent the public interest.

353. Three-person panels could therefore have a lay majority i.e. only one barrister member. However, to recognise the professional context, we see some value in having a legal (but not necessarily barrister) majority to ensure our panels are seen to be robust and command the confidence of the public and the profession. Further, as part of wider reforms (see Proposal 29 below), if we require a legally qualified chair (who could either be a barrister, solicitor or CILEX lawyer) there is no realistic configuration that would allow for a lay majority, on the basis that solicitors or other authorised persons cannot be classified as "lay" members[83], whilst also ensuring that a member of the profession is on the panel.

[81] The Enforcement Review, 2.8.8
[82] The following regulators use three person panels in disciplinary tribunals: SRA, GMC, Social Work England, NMC, ICAEW, RICS & ACCA.
[83] Applying the definition of "lay person" under paragraph 2(4) of Schedule 1 to the Legal Services Act 2007.

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354. This three-person model strikes a balance between ensuring panels are efficient, credible and legally rigorous, while also maintaining appropriate lay input, as a public interest regulator. In our view, the proposal to introduce three-person panels would not jeopardise the quality of panel decision-making, which remains a priority for the BSB. However, we recognise that the barrister profession may be concerned that a three-person panel may not be sufficiently experienced or robust to determine matters which may lead to disbarment and career ending outcomes, particularly in cases involving senior members of the profession. It may be the case that the present five-person panel is seen as a necessary safeguard to ensure the robustness of panel decisions and to retain confidence of the profession. In our view, these concerns can be addressed by the fact that the panel member recruitment and selection processes would still ensure that panels maintain a high level of experience and robustness, regardless of their size.

355. Such changes to panel composition could also apply across other parts of the Handbook to ensure there is consistency in our approach (including in relation to health panels, as discussed below at Proposal 31).

Benefits of the proposal

356. The change to three-person panels would preserve the quality of decision-making in disciplinary proceedings, whilst improving the overall efficiency of the process. Our proposal will reduce the delays and practical difficulties that arise when scheduling hearings around the availability of five panel members, particularly judges and barrister members. This will help to reduce delays and difficulty in assembling a panel, reassembling panel members for any adjourned hearings, as well as reviewing and agreeing written decisions, which will ultimately improve the speed and efficiency of the disciplinary process.

357. By retaining a legal majority across panels, even if the chair is not always a member of the Bar, we recognise the professional context of the proceedings against barristers. It is a way of maintaining robust decision-making and reducing any risk of unfair outcomes, whilst maintaining the confidence of the public and the profession in our disciplinary panels.

Equality impacts

358. The primary potential impact that we envisage of this proposal is the risk that any unconscious bias of a panel member affecting decisions could be stronger, given the reduction in the number of panel members. With a larger decision-making body, the impact of any one person's unconscious bias can be diluted and checked by other members (although this is not guaranteed and there is a chance that bias can be shared across the whole panel). Further, we acknowledge that, by reducing the number of panel members, there is also potential to reduce the likelihood of diversity among the panel members.

359. However, given the prevalence of three person panels across other regulators, and the additional benefits of the proposal, we believe that the change is

proportional and would not significantly adversely impact on some barristers. Any impact on protected characteristics could be mitigated by training (including unconscious bias training) for panel members and highlighting discrimination policies. We would keep the effect of any changes under review to monitor the impacts under the Equality Act 2010.

Do you agree with the introduction of a three-person panels for all disciplinary tribunals? If not, why not?

Do you agree with our proposal for panels to have a legal (not necessarily barrister) majority, rather than a lay majority? If not, why not?

Proposal 28: Changes to the Independent Decision-Making Panel

Summary of the proposal

360. Independent Decision-Making Panels considering enforcement cases will consist of three members with a lay majority.

Background and current approach

361. Currently, Independent Decision-Making Panels considering enforcement cases are composed of five members with a lay majority.

Proposal

362. We propose to move to three-person Independent Decision-Making Panels considering enforcement cases – but retain a lay majority. This proposal is not dependent on the approach to Disciplinary Tribunal Panels (see Proposal 27 above).

363. As with Proposal 27, this change is intended to address the practical difficulties and delays associated with convening a five-person panel. Scheduling around the availability of all five members can cause delays, particularly if a meeting needs to be adjourned or when panel members need to review and agree written decisions. The availability of five person-panels can also affect the speed at which decisions can be reconsidered where there is a review request, which can create particular issues in cases where there is the strict ten-week timetable to serve charges following a referral to the Disciplinary Tribunal. Reducing the number of panel members will give greater flexibility in setting and rescheduling hearings, helping to improve the overall efficiency of the process.

364. We propose to retain the lay majority on the Independent Decision-Making Panel to ensure the process remains efficient, credible and robust, while maintaining appropriate lay input, in line with our role as a public interest regulator.

Benefits of the proposal

365. Although it is difficult to reconcile retaining a five-member panel, if the Disciplinary Tribunal comprises three members, our proposal to introduce three-person Independent Decision-Making Panels will primarily allow for quicker and more efficient assembling of panels and reassembling panels for any adjourned hearings. This proposal will ultimately improve the efficiency and expediency of the enforcement process. The use of three member panels, with a lay majority, will also mirror the existing composition of panels considering reviews of Authorisations decisions.

Equality impacts

366. In a similar way as Proposal 27 (above), this proposal may impact some groups more than others as it potentially increases the risk of a panel member's unconscious bias affecting the decision. With a larger decision-making body, the impact of any one person's unconscious bias can be diluted and checked by other members (although this is not guaranteed and there is a chance that bias

can be shared across the whole panel). However, we believe the proposal is nevertheless proportionate and can be mitigated in similar ways as set out in Proposal 27.

Do you agree with altering the composition of IDB panels considering enforcement cases from five to three-person panels, with a lay majority? If not, why not?

Proposal 29: Changing the requirements for panel chairs

Summary of the proposal

367. We propose that chairs of Disciplinary Tribunal panels need not be a Judge or King's Counsel, but may be an experienced legal practitioner with at least 15 years' practising experience.

Background and current approach

368. Under the current regulations, the chair of the Disciplinary Tribunal panel must either be a judge (for five member panels) or a judge or a King's Counsel (for three member panels).[84] This creates a small pool of persons who are eligible to act as a panel chair, which can lead to scheduling issues and delays in the disciplinary process. In addition, requiring a judge or KC to chair the panel can be an inefficient use of resources and contribute to delay – both in terms of scheduling and in the timely delivery of written decisions.

369. One of the key principles underpinning our review of these requirements is that any change to broaden the eligibility criteria must preserve robust safeguards to ensure the quality of decision-making and maintain the integrity of tribunal proceedings.

The proposal

370. We propose to remove the requirement for panel chairs to be either a judge or King's Counsel. To set some minimum requirements for panel chairs, in order to maintain the confidence of the profession and the public, we propose a "legally qualified chair" for all Disciplinary Tribunal panels. To meet the requirements for the role, the legally qualified chair would be a barrister, solicitor or CILEX lawyer[85] with at least 15 years' practising experience.

371. In the context of the Bar, we considered that it was more appropriate and efficient to use a legally qualified individual to act as the chair of the panel, rather than appointing a separate legal advisor to provide legal guidance and advice. In the setting of legal regulation, placing legal expertise within the panel itself (as the chair) avoids duplication, reduces costs and minimises potential confusion around the separation of roles. For these reasons, we do not intend to provide for a separate legal advisor to panels in the regulations. However, it would be open to panels to seek independent legal advice (beyond the legal expertise of the panel) on a case-by-case basis, should the need arise.

372. As part of our proposal, we also propose to draw from the same pool people to act as a "Directions Judge", who is responsible for setting directions and dealing with case-management and interlocutory applications, including stay applications, strike out applications and other applications. This means that those

[84] rE140-141.
[85] We favour the use of solicitor or barrister rather than "lawyer", as lawyer is a term that could capture unregulated persons.

eligible to be legally qualified chairs will also need to be suitably qualified to manage proceedings and potentially complex or involved legal argument independently (without a panel) if acting in the capacity of a Directions Judge. In particular, Directions Judges may need to make determinations in contentious and complex applications, such as strike out applications (which are final determinations). This need for a person eligible to act as a legally qualified chair or Directions Judge to have substantial legal experience and to be capable of sitting alone has been central to shaping our proposal.

373. In developing the eligibility criteria for legally qualified chairs (and Directions Judges), we considered both practical and equality-related factors.

374. Our data shows that individuals are typically appointed King's Counsel after approximately 20 years from Call to the Bar. However, women and barristers from minority ethnic groups are under-represented at King's Counsel level, compared to their representation across the profession as a whole. Accordingly, moving away from the requirement for a judge or King's Counsel to act as the legally qualified chair would broaden the pool of eligible candidates which may have a positive impact in terms of equality of opportunity and representation.

375. To achieve an equivalent level of experience (to command confidence as a panel Chair), we considered setting the threshold for eligibility at 20 years, given this appears to be a proxy for the level at which a barrister might typically be made a King's Counsel. However, we are concerned that this could inadvertently disadvantage certain groups, such as women, who are more likely to take extended career breaks than men and therefore more likely to reach that level of experience over a longer period of time.

376. To support greater equality of opportunity and avoid disproportionately excluding underrepresented groups, we propose to set the eligibility level at 15 years' practising experience. This threshold remains high enough to ensure appropriate seniority and legal experience, while allowing for a more inclusive and diverse pool of potentially eligible candidates.

377. We have framed the requirement around years of practise, rather than based on Call, to ensure both solicitors and CILEX lawyers are also eligible. Including solicitors and CILEX lawyers within the eligibility pool recognises that other members of the wider legal profession, who can also be judges, may bring highly relevant experience to the role of panel chair and also encourages greater equality of opportunity. However, importantly, this approach will not exclude judges or King's Counsel who can meet the 15-year eligibility threshold and remain within the eligible pool.

378. Further, it is also important to stress that a set number of years' practising experience is not the sole requirement to be a legally qualified chair. While the regulations would not prescribe all the additional eligibility requirements, we would work with BTAS to ensure recruitment and selection processes remain

robust and that candidates hold sufficient other experience, as well as suitable skillsets, and receive appropriate training.

Benefits of the proposal

379. The primary benefit of the proposal is that, by removing the requirement for a panel chair to be a Judge or King's Counsel, it may broaden the pool of potentially eligible candidates, helping to ease availability pressure, reduce delays in listing and progressing cases and encourage greater equality of opportunity and representation. The role will still require a high level of legal experience, which we think is an important safeguard to ensure a strong and diverse pool.

Equality impacts

380. The removal of the requirement for the panel chair to be a judge or King's Counsel will allow access to a more diverse pool of potential chairs, as the pool of KCs and judges contains a significantly higher percentage of those who are white, male or older. Broadening access to this role to those who are not judges or King's Counsel will therefore provide a greater equality of opportunity, including for women and those from minority ethnic groups.

381. Whilst setting the eligibility criteria at 15 years' practising experience may have some impact on equality, we consider it necessary to set a standard that ensures legally qualified chairs have sufficient seniority and experience. On balance, we believe the new requirements for panel chairs will enhance the equality of opportunity overall and have a net positive impact on diversity.

Do you agree with our proposal to change the existing requirements for a panel chair to a requirement for a legally qualified chair with at least 15 years' practising experience? If not, please indicate why this criteria is insufficient?

Proposal 30: Panel secretary role

Summary of the proposal

382. Disciplinary Tribunals will be supported by a Panel Secretary, rather than a clerk (as now), who will be a BTAS employee.

Background and current approach

383. Under the current regime, panels in disciplinary proceedings are supported by a clerk and BTAS relies on junior barristers to fill this role.[86] However, this model has proven increasingly inefficient and unsustainable in recent years. Data shows a decline in the number of hearings staffed by clerks, while the proportion of hearing days covered by BTAS staff has risen sharply.

384. In practice, sourcing junior barristers to act as clerks – particularly for longer hearings – has proved challenging. As a result, BTAS staff have frequently had to step in to fulfil the role to ensure hearings proceed. In 2025, BTAS staff covered 82% of all hearing days. This has placed additional strain on the small BTAS team, diverting resources from other essential functions and highlighting the need for a more effective and sustainable solution.

385. In BSB hearings, the current role of the clerk is primarily administrative and does not involve assisting the panel with decision-making. Their responsibilities include facilitating the smooth running of the hearing, liaising with parties, managing documents, reading charges to the respondent and assisting with the administration of oaths. It may also assist the issuing of decisions. In our view, these functions can be effectively delivered by a member of the BTAS team and do not require junior counsel to perform them.

Proposal

386. We propose to replace the clerk with a new Panel Secretary role. The Panel Secretary role will formally be a BTAS staff member, rather than a practising barrister. The intention would be that a person will specifically be recruited for this role.

387. As part of this proposal, the Panel Secretary would provide additional support to Disciplinary Tribunal panels. For example, it is already common internal practice for our Independent Decision-Making Panels to receive support with drafting their decisions and we envisage that Disciplinary Tribunal panels may be assisted by the Panel Secretary in a similar way.

388. Comparative research shows that many healthcare regulators use panel secretaries for drafting decisions, although these secretaries do not provide procedural or legal advice. The Solicitors Disciplinary Tribunal, by contrast, uses a panel secretary who provides both legal and process advice, requiring a

[86] rE136-138.

minimum of 10 years' legal experience. However, we do not propose that the Panel Secretary in BSB proceedings will give legal advice but, if required, it will be for the Tribunal to arrange with BTAS on an ad hoc basis.

Benefits of the proposal

389. Removing the requirement for barristers to fill the existing clerk role and replacing it with a Panel Secretary, who will be a member of BTAS, reflects the primarily administrative (not advisory) nature of the role and offers a more sustainable solution, given the growing difficulty in sourcing barristers to fill reliably the position. It also allows BTAS to build internal capacity for the role and reduce reliance on external availability. This will ultimately reduce delays and improve efficiency of the system.

Equality impacts

390. We have identified that this proposal could impact on barristers with the protected characteristic of age. BTAS has historically relied on junior barristers to fulfil this role and it is possible that some used the opportunity to supplement their practice and develop valuable skills before progressing to other work. However, given the frequency with which BTAS staff have performed this role in recent years, we consider that any potential impact of this proposal on junior barristers would be minimal.

Do you agree with our proposal to replace the role of a clerk in disciplinary tribunals with that of a Panel Secretary who will be a BTAS employee? If not, why not?

Proposal 31: Panel composition in health proceedings

Summary of the proposal

391. The composition of panels in health proceedings will consist of either:
- Three panel members supported by a medical advisor; or
- Three panel members, including a medical member.

Background and current approach

392. Currently, panels in fitness to practise proceedings consist of five members as follows:
- a Chair;
- two practising barristers;
- a medical member; and
- a lay member.

The proposal

393. We are exploring a move to three-person panels across all of our panel decision-making in enforcement cases (see Proposals 27-28 above). If adopted, this change would also apply to panels in health proceedings.

394. In relation to health panels specifically, we consider five person panels are unnecessary and may be daunting for an individual practising barrister to appear before to explore sensitive issues related to their health.

395. We have considered the composition of health panels under a new three-person model and have identified two options on which we seek feedback:

a) Option 1: the panel will comprise a legally qualified chair, a barrister and a lay member. The panel members will be supported by a medical advisor, as required, but there will no longer be a medical member involved in the decision-making.
b) Option 2: the panel will comprise a lay chair, a barrister member and a medical member.

Option 1

396. Consistent with our considerations for panel composition in relation to Disciplinary Tribunals (see Proposal 27 above), option one is a health panel which comprises a legally qualified chair, a barrister and a lay member. This represents a shift away from the current model, where a medical member sits on the fitness to practise panel as a decision-maker. Instead, we propose to introduce a medical advisor role to support and assist the panel in health cases. It would be for the panel to decide whether to release the advisor if not required in any particular case.

397. Under option one, the medical advisor would use their medical expertise to assist the panel in (i) understanding and interpreting medical reports; (ii) identifying

what questions the panel ought to ask the respondent or any medical expert; and (iii) understanding the significance of the medical condition and how it might be managed in a way which protects the public or the public interest.

398. The medical member will not be acting in the capacity as a medical expert for either (or both) of the parties. A further important distinction is that the medical advisor would not be a decision-maker. Instead, any advice or contributions would be given openly during the hearing, with all parties having an opportunity to respond and challenge, if appropriate. Any advice provided during private deliberations would be disclosed to the parties, for an opportunity to comment, to ensure transparency and fairness. It is also important to stress that the medical advisor may not be an expert on the particular health conditions in a case, nor act as a substitute for the use of the "Medical Examiner" who may provide independent, medical reports about the barrister and who may be called upon to answer questions before the panel.

399. Our comparative research indicated that medical advisors have been used in some regulatory regimes. However, we recognise that this model is no longer used by many healthcare regulators, who have moved towards models where "fitness to practise" on the grounds of health is integrated differently within regulatory decision-making processes.

400. The approach also presents some practical challenges for the BSB and BTAS, including the availability of suitably qualified medical professionals with relevant expertise, as well as the potential cost implications of securing their input on a case-by-case basis.

Option 2

401. In the alternative, we propose to introduce three person panels consisting of a lay chair, a medical member and a barrister member. This approach would remove the need to appoint an external medical advisor and would integrate the medical expertise directly into the decision-making panel. There may be some flexibility to select a medical member who has experience with health conditions under examination.

402. In our view, a legally qualified chair may be unnecessary in health proceedings given their non-disciplinary nature. Having a lay chair would also reflect the principal purpose of the regime being one to protect the public or the public interest. On that basis, this model could potentially be more efficient and proportionate, while also aligning with our aim to make health-related proceedings more accessible, compassionate and less akin to a disciplinary process.

403. Alternatively, the Chair could be open to be determined case by case between the lay, medical and barrister panel members.

Benefits of the proposal

404. Both options seek to avoid the need for larger, five-person panels, while still allowing the panel to draw on specialist medical knowledge and experience either by using a medical advisor or medical member. This will support more focussed and efficient decision-making.

Equality impacts

405. As with our proposal to change panel composition in disciplinary proceedings, the potential cause for concern in relation to this proposal is the risk of unconscious bias affecting a decision due to the reduction in panel size. However, as with Proposal 27, there are a number of ways to mitigate this risk from affecting decisions, including unconscious bias training to panel members.

Do you agree with our proposal to change the composition of panels in health proceedings? If not, why not? If you do, do you prefer option 1 or option 2?

Other Issues: Open justice and the principles of transparency and accountability

406. The open justice principle is an important principle. It involves two key aspects:

a) that the public should be free to attend court proceedings; and
b) that proceedings should be freely reportable.[87]

407. Broadly speaking, the requirements of open justice apply to the courts and all tribunals exercising the judicial power of the state.[88]

408. Whether or not the open justice principle strictly applies to disciplinary proceedings before BTAS, our review of the enforcement regulations has nevertheless been guided by the following principles:

- our statutory duty to have regard to the principles under which regulatory activities should be transparent, accountable, proportionate, consistent and targeted only at cases in which action is needed;[89]
- the importance of upholding the principle of transparency, as a regulator, and that this principle should only be departed from where there is good reason;
- our role as a public interest regulator, including the need to build public trust and confidence by demonstrating the steps we take to protect and serve the public interest;
- the value of transparency in helping both barristers, as regulated professionals, and the public, understand our actions as a regulator, promoting consistency and fairness in our decision-making; and
- the need to balance transparency with fairness to individuals, particularly where they may be potential prejudice.

409. In light of those guiding principles, we have identified a number of proposals to amend the enforcement regulations in a way that will improve the transparency and openness of our disciplinary process. These are:
- bringing forward the timing of the publication of details of disciplinary cases that we are pursuing; and
- moving more of our hearings to being in public.

Proposal 32: Bringing forward the timing of publication of disciplinary cases

Summary of the proposal

[87] The open justice principle is set out in caselaw, such as *Scott v Scott* [1913] AC 417 and *Spector v SRA* [2016] EWHC 37 (Admin).
[88] *Guardian News and Media Ltd) v City of Westminster Magistrates Court* [2013] QB 618.
[89] Section 28(3) Legal Services Act 2007.

410. We propose to bring forward the publication of the fact that disciplinary proceedings are underway by publishing a summary of charges, either:
- upon the service of charges by the BSB; or
- following the setting of case management directions by BTAS.

Background and current approach

411. Currently, the point at which disciplinary proceedings are usually put into the public domain is when a date is formally set for the substantive hearing before the Disciplinary Tribunal and a 'convening order' is signed by the President of COIC. The convening order is normally issued 14 days before the Tribunal hearing and, once it is issued, details of the hearing are posted on the BTAS website. Those details are usually limited to the name of the barrister and the provisions of the Code of Conduct that have allegedly been breached. They do not disclose the particulars of the charges, which are only made public at the start of the substantive hearing.

412. The current regulations do not expressly address the publication of hearings. However, BTAS publishes details of substantive hearings as a matter of policy, in line with its Publication Policy and the general requirement for such hearings to be held in public.[90]

413. While caselaw in the criminal context recognises that publication of the fact that someone is under investigation may impact an individual's reputation and potentially interfere with their Article 8 rights, there is generally no reasonable expectation of privacy once formal charges have been brought.[91] We have seen similar approaches adopted by some other regulators too, including the SRA, who publish the decision to refer a matter to the Tribunal.[92]

414. In comparison to the approach under the criminal law and of some other regulators, there is room to move towards greater transparency in relation to the disciplinary cases that we are pursuing We consider there is a public interest in bringing forward the date of publication of details about disciplinary cases. Earlier publication of the fact that disciplinary proceedings have commenced and the nature of the disciplinary charges would increase awareness of the cases that the BSB is prosecuting and improve trust and confidence in the BSB's regulation.

Proposal

415. Our proposal is to bring forward the publication of the fact that disciplinary proceedings are underway by publishing a summary of charges at an earlier date. However, we are seeking views on the options for the timing of publication.

416. In considering the appropriate point at which publication may occur, we have taken the view that it is important to link publication to a clear and fixed point in the process that will occur in every case (unless there are exceptional

[90] In accordance with rE156.
[91] *Bloomberg LP v ZXC* [2022] UKSC 5; *Scott v Scott [1913] AC 417*.
[92] SRA Guidance: "*Publishing regulatory and disciplinary decisions*".

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circumstances), to promote transparency, consistency and equality. With these principles in mind, we have identified the following options for the timing of publication of details about disciplinary proceedings:

- Option 1: publication by the BSB, upon the service of charges; or
- Option 2: publication by BTAS, following the setting of case management directions.

Option 1

417. The first option would involve the BSB publishing brief details of a case (i.e. the barrister's identity and a brief summary of the charges) at the point of the service of charges. Charges are served by the BSB no later than ten weeks from the date of the decision to refer allegations of breaches of the Handbook to a Disciplinary Tribunal[93]. Such an approach appears to be broadly aligned with the approach under the criminal law and by the SRA. If we adopt this approach, we would fix the time of publication in the regulations and we would be explicit as to the limited circumstances in which publication may not occur, for example, where it risks prejudicing other investigations or legal proceedings or may have a disproportionate impact on the individual barrister's Article 8 right to a private life.

418. As a consequence of publishing charges at the point they are served on a barrister, the fact that charges are being brought against the barrister would already be in the public domain, before any case management hearing. This means that the entire case management process could be heard in public by default, unless the Tribunal orders otherwise.

Option 2

419. The alternative approach is for publication by BTAS to follow the setting of case management directions. This second option would involve BTAS publishing brief details of a case (i.e. the barrister's identity and a brief summary of the charges) and we envisage that publication would occur at the point directions are issued or within a set timeframe after that (e.g. 7-14 days).

420. The benefit of option 2 is that it would allow BTAS and the parties to engage in initial case management in private, during which any preliminary issues which may also be relevant to the issue of publication, may be considered before setting directions.

421. For example, as we are proposing to introduce the use of case management questionnaires prior to the setting of directions by BTAS (see Proposal 8 above), completion of the questionnaire would be an opportunity for barristers to raise any objections to publication or indicate their intention to make an interim application, e.g. for anonymity or the hearing to be in private.

422. This would give BTAS the opportunity to consider the impact of those preliminary issues before the charges are put into the public domain. In exceptional cases,

[93] rE102.

such as where a barrister is making an application for anonymity, BTAS may delay or anonymise publication as part of the setting of case management directions.

423. Finally, we propose to retain the current position under the DTRs, which provides that the directions order is final and that there is no right of appeal against it[94]. The only mechanism to challenge case management decisions, including any decisions on publication, will be by judicial review.

Benefits of the proposal

424. Bringing forward the point of publication promotes transparency and ensures that the public is informed earlier about disciplinary cases that are being pursued by the BSB and can help build public trust in the disciplinary process.

Equality impacts

425. We have identified that this proposal may have a disproportionate impact on some barristers. For example, while gender and ethnicity were not a significant predictor of whether reports were referred to the disciplinary tribunal or whether reports were upheld at the tribunal stage, barristers who are male and from minority ethnic groups are more likely to be subject to a report.[95] Similarly, barristers with protected characteristics of age and disability are proportionally more likely to be the subject of a report. While this does not necessarily mean they will be referred to a Tribunal, it does increase the likelihood that this proposal could have an impact on barristers with certain protected characteristics (for example race, sex, disability and age). As a result, earlier publication may affect these groups more significantly.

426. To mitigate this impact, we have identified a number of remedies, which include limited exceptions to publication in certain circumstances and/or building in an opportunity for barristers to object to publication or make applications for anonymity to be considered by the Disciplinary Tribunal.

Do you agree in principle that the point of publication of the fact that disciplinary proceedings are underway should be brought forward? If not, why not?

If the point of publication is brought forward, do you prefer option 1 or 2 and why? Please explain why.

What are the circumstances in which you think the rights of a barrister will outweigh the principles of transparency such that publication will not be appropriate?

[94] rE125.
[95] BSB Regulatory Action Diversity Analysis Report, 2025.

Proposal 33: Public vs private hearings across the enforcement process

Summary of the current position and proposals

427. Consistent with the principle of transparency, we believe that hearings should generally be held in public, unless there is good reason otherwise. We have therefore undertaken a review of the current approach to hearings across the enforcement process. A summary of the outcome of our review is provided in the table below, including an outline of the position under the current regulations for context. Proposals for change are highlighted in grey for ease of reference.

Type of hearing	Is the "hearing" currently public or private?	Is the outcome currently published?	Proposal for public or private hearing in the future?	Will the outcome be published in the future?
Administrative sanction appeal[96]	Private	No	Private (no proposed change)	No (no proposed change)
Determination by consent[97]	Private	Yes	Private (no proposed change)	Yes (no proposed change)
Interim suspension hearings (including reviews and appeals)	Private, unless the barrister requests a public hearing	Yes	Private, unless the barrister requests a public hearing (no proposed change)	Yes (no proposed change)
Initial case management directions	Private	No	Private (no proposed change) OR **Public if charges have already been published by the BSB – see Proposal 27** **(proposed change)**	No (no proposed change - although a summary of the charges may be published – see Proposal 27)

[96] While an oral hearing can be requested, appeals against administrative sanctions are dealt with on the papers by default (see rE55 of Part 5A of the Handbook).
[97] Decisions on charges under the determination by consent procedure are made at a meeting of a panel of the Independent Decision-Making Body and do not strictly involve a "hearing".

Type of hearing	Is the "hearing" currently public or private?	Is the outcome currently published?	Proposal for public or private hearing in the future?	Will the outcome be published in the future?
Interlocutory applications (including applications for anonymity, stay and strike out) and any further case management hearings	Private[98]	No	Public, unless the Tribunal determines otherwise **(proposed change)**	Yes **(proposed change)**
Substantive tribunal hearing	Public, unless the Tribunal determines otherwise [99]	Yes	Public (no proposed change)	Yes
Fitness to Practise hearings (including Preliminary Hearings, Final Hearings, reviews and appeals)	Private, unless the barrister requests a public hearing	No	Private, unless the barrister requests a public hearing (no proposed change)	Yes **(proposed change)**

428. The main area where we anticipate making changes to the current regulations is in relation to the directions stage and the hearing of any interlocutory applications. These changes are aligned to, and must be considered alongside, our separate proposal to bring forward the date of publication of charges in a move towards greater transparency (see Proposal 32). If publication occurs at some point on or shortly after the service of charges, then the matter will already be in the public domain opening up the possibility for any case management/interlocutory application hearings to be heard in public, unless the Disciplinary Tribunal orders otherwise.

429. We summarise below our thinking in relation to each of the hearing types listed in the table.

Administrative sanctions and appeals

Background and current approach

[98] However, under rE128 the Directions Judge or Chair of the Disciplinary Tribunal has the power to consider how any interlocutory applications are to be dealt with (which could include on the papers or at a public hearing).
[99] Unless it has been directed that all or part of the hearing is not held in public (rE156).

430. An administrative sanction is a non-disciplinary sanction that can be imposed by BSB staff or by Independent Decision-Making Panels to mark lower-level breaches of the BSB Handbook, which are not serious enough to be referred for disciplinary action. The type of sanctions that can be imposed are an administrative warning, fine or both. An administrative sanction can only be imposed where there is sufficient evidence that there was a breach of the Handbook and that an administrative sanction is proportionate, sufficient and in the public interest.[100] The barrister may appeal the decision to impose an administrative sanction.[101] The appeal will be dealt with by an appeal panel administered by BTAS.

431. The administrative sanctions and appeals process is usually carried out in private, as decisions are not published. An administrative sanction is not a disciplinary finding and the fact that an administrative sanction has been imposed is not disclosed to any third parties, except where disclosure is permitted.[102]

432. It is important to note that we have not considered the administrative sanction regime itself but only the transparency of the process.

Proposal

433. We are proposing to retain the current approach so that the outcome of the administrative sanction is not public and any appeal process will remain in private.

Benefits of the proposal

434. We consider the benefits of retaining the current approach are:

- The administrative sanction process is non-disciplinary and, although the BSB will have decided in those cases that there has been a breach of the Handbook which is deserving of some form of low-level censure (e.g. a warning or low level fine), the imposition of an administrative sanction is not a finding of professional misconduct. Administrative sanctions are reserved for cases where the breach is more minor.
- There is a risk that publicising such outcomes could disproportionately damage the public perception of barristers and undermine the intended purpose of non-disciplinary sanctions. It should not carry consequences so severe that it effectively amounts to disciplinary action. A lighter touch process encourages speedier and more effective outcomes.
- Keeping the process private preserves its effectiveness as a tool for managing conduct and encouraging compliance, without imposing the same reputational consequences as formal disciplinary action. A move towards publication and public hearings would undermine the purpose of the regime.

Equality Impacts

[100] rE26.
[101] rE30-31.
[102] rE63-64.

435. We do not have any evidence which suggests that this approach will have an adverse or positive impact on any particular protected characteristics, as we are not proposing any change to the current approach.

Do you agree with our approach to holding administrative sanctions and appeals in private? If not, why not?

Determination by consent

Background and current approach

436. The 'Determination by Consent' process (DBC) is a paper-based procedure carried out by the BSB's Independent Decision-Making Panels, as an alternative to a referral of a case to a Disciplinary Tribunal. It is still a form of disciplinary action and involves the determination of charges of professional misconduct. It is reserved for cases where there is no dispute of fact and where the likely sanction would be lower than a term of suspension or disbarment.

437. The paper-based determination is carried out in private at a meeting of an Independent Decision-Making Panel, where the respondent is not present but has previously had the opportunity to agree the contents of the report that is presented to the panel and on which the panel's decision will be based. It is an entirely consensual process, and the barrister can withdraw consent at any stage. The consequence of the withdrawal of consent is that the matter would automatically be referred to a three-person panel of the Disciplinary Tribunal. The sanctioning powers under the DBC procedure are limited to a maximum of a fine/reprimand or advice. The outcome of the procedure is made public and carries the same status as a finding by a Disciplinary Tribunal.

Proposal

438. We consider that in circumstances where (i) the facts are agreed; (ii) the panel meeting is essentially the deliberation on finding and sanction, which would normally occur in private in courts and tribunals; and (iii) the outcome and reasons are published, keeping the meeting of the panel in private is appropriate.

Benefits of the proposal

439. This proposal balances principles of transparency with the rights of individuals, ensuring fairness to the individuals where the facts are agreed. It will also maintain public accountability through the publication of the outcomes and reasons.

Equality Impacts

440. We do not have any evidence which suggests that this approach will have an adverse or positive impact on any particular protected characteristics, as we are not proposing any change to the current approach.

Do you agree that determinations by consent should continue to be held in private? If not, why not?

Interim suspension proceedings

Background and current approach

441. The interim suspension process (including an appeal or review) is conducted entirely in private, except where the respondent asks for the hearing of the interim panel to be held in public.[103] If an interim suspension order is made, details of the order are published.[104]

Proposal

442. We propose to retain the current position that hearings before an interim panel be in private by default (unless the barrister asks otherwise), with the outcome published on the BSB's website.

443. One of our primary concerns about such hearings happening in public is that, at the stage a matter is sent to an interim panel, the report and evidence is unlikely to have been fully assessed and could include material that is not fully investigated or irrelevant to any ultimate charge that we may decide to pursue. Accordingly, we believe that there is a risk that holding interim suspension hearings in public may lead to unfair prejudice to the barrister.

Benefits of the proposal

444. This proposal ensures fairness to barristers by protecting their privacy at an early stage of the process, while still allowing for transparency through the publication of the outcome. It also introduces flexibility by allowing both parties to request a public hearing where appropriate, helping to balance individual rights with public interest.

Equality Impacts

445. We do not have any evidence which suggests that this approach will have an adverse or positive impact on any protected characteristics, as we are not proposing any change to the current approach.

Do you agree that interim suspension hearings should continue to be held in private (unless the barrister requests a public hearing)? If not, why not?

[103] rE276.5.
[104] rE278.

Directions and interlocutory applications

Background and current approach

446. Currently, directions are often agreed between the parties or decided by or endorsed by a Directions Judge (whether on the papers or at an oral hearing which is heard in private[105]). Details of disciplinary cases are not usually published until 14 days before the substantive hearing is listed to take place. Accordingly, case management and interlocutory applications are usually dealt with in private.

Proposal

447. The question of whether case management hearings or any hearing of interlocutory applications are held in public or private depends on what decision is reached on when disciplinary proceedings are made public (see Proposal 32 above). To reflect this dependency, we have identified two alternative options in relation to the nature of the hearing of case management and interlocutory applications. The options are:

- Option 1: if charges are published by the BSB at the point they are served on the barrister, the proposal is that the entire case management process (including initial case management hearings and any hearings of interlocutory applications) will be held in public (unless the Disciplinary Tribunal decides otherwise); or
- Option 2: if publication is to occur following the setting of case management directions by BTAS, the proposal is that the first case management hearing will be held in private. All subsequent case management hearings and any hearings of interlocutory applications will be held in public (unless the Disciplinary Tribunal decides otherwise).

Option 1

448. If charges are published by the BSB following service on the barrister, the fact that disciplinary proceedings are underway will already be in the public domain, prior to the first case management hearing. This means that all subsequent stages in the disciplinary process (including directions and interlocutory applications) can be in public, unless the Disciplinary Tribunal orders otherwise. We consider it is important that the Disciplinary Tribunal retains the discretion to order that a case management hearing be in private, or that one is not necessary at all, to ensure the Tribunal can respond proportionately and appropriately in individual cases.

Option 2

449. If publication does not occur until after case management directions have been set by BTAS, we propose that the first case management hearing will be held in private. We favour the first case management hearing being held in private because it is likely to be principally associated with timetabling and setting

[105] rE123.

directions for the substantive hearing. We believe the interests of the individual barrister in having the hearing in private outweigh the public interest in the first case management hearing being in public because:

- the hearing is principally administrative nature; and
- the hearing serves as the first opportunity for the parties to raise preliminary issues, such as anonymity and privacy, which it may be appropriate to air before matters are put into the public domain.

450. We propose that all subsequent hearings (including any further case management hearings or interlocutory applications) be held in public, unless the Tribunal orders otherwise. To give effect to this, BTAS would also need to publish details of forthcoming hearings in a similar way as they currently do with the substantive hearing.

451. For context, the type of interlocutory applications that can be made include applications to strike-out the charges, for a stay or for all or part of the substantive hearing to be held in private.[106] We consider, whatever the outcome of our proposals in relation to the timing of publication of charges, there is a clear public interest in making interlocutory application hearings (and their outcome) public, particularly where the outcome of such applications may be determinative of the case; for example, in applications for strike out, or a stay on the grounds of abuse of process. The public may also have a legitimate interest in seeing how such applications are handled.

452. Nevertheless, we recognise that there will be limited and specific exceptions to the general principle that interlocutory applications should be dealt with in public. In particular, applications relating to the admissibility or disclosure of certain documents (e.g. legally privileged documents), anonymity or requests for a hearing to be held in private may justifiably need to be considered in private. The rationale being that public consideration of such applications could undermine the object of the application itself or risk causing significant prejudice to the parties involved.

453. While the default position would be to hold these interlocutory hearings in public, there would be discretion for BTAS to order otherwise, in cases where a private hearing may be appropriate or necessary. We would also retain the power for BTAS to consider applications on the papers, ensuring that issues can be dealt with efficiently and expediently.

454. A consequence of these changes could be that we see an increase in anonymity applications made by barristers (or applications not to publish at all). To mitigate the risk of increased applications causing delay and resource issues, we intend to establish a robust framework for considering anonymity applications, which clearly sets out the threshold for when such applications will be granted, ensuring consistency and to avoid an overly cautious (or inconsistent) approach.

[106] rE127.

Benefits of the proposal

455. By potentially holding case management and interlocutory application hearings in public, we are effectively bringing forward the point of publication, promoting greater transparency and accountability. As the public will be informed earlier about breaches being pursued by the regulator, the proposal will support public trust and confidence in the disciplinary process.

Equality impacts

456. The proposals to move to more public hearings at the case management and interlocutory application stage may disproportionately impact some barristers. For example, barristers who are male, older, from a minority background or who identify as having a disability are statistically more likely to be subject to a report.[107] While this does not necessarily mean they will be referred to a Disciplinary Tribunal, it does increase the risk that the proposal for more public hearings may affect these barristers more significantly.

457. However, any impact may be mitigated for example by a barrister's ability to apply for anonymity or for hearings to be in private. Further, the proposal pursues a legitimate aim in having greater openness and transparency in the disciplinary process in the public interest.

Do you prefer Option 1 (that all case management and interlocutory application hearings are generally held in public) or (Option 2 (that the first case management hearing is in private but generally all further hearings will be in public unless the Tribunal orders otherwise)? Please explain why.

The substantive disciplinary tribunal hearing

Background and current approach

458. The default position for the substantive tribunal hearing is that it must be held in public unless it has been directed that all or part of the hearing be held in private.[108] The Tribunal outcomes must be published.[109]

459. In cases where all charges against a barrister have been dismissed, the Regulations provide for an anonymised summary or copy of the decision to be published on the BTAS website.[110]

[107] BSB Regulatory Action Diversity Analysis Report, 2025.
[108] rE156.
[109] rE243.
[110] rE243A.

Proposal

460. Our proposal is for the substantive hearings to remain in public (unless there is a successful application for a private hearing). The outcome of the substantive hearing will also continue to be published.

Benefits of the proposal

461. Keeping substantive disciplinary hearings in public upholds the principles of transparency and accountability. It also helps maintain trust in the profession as well as public confidence in the regulatory process.

Equality impacts

462. We do not have any evidence which suggests that this proposal will have an adverse or positive impact on any particular protected characteristics, as we are not proposing any change to the current approach.

Do you agree that substantive disciplinary tribunal proceedings should remain in public? If not, why not?

Fitness to Practise proceedings

Background and current approach

463. Under the current regime, fitness to practise hearings are held in private, unless the barrister requests a public hearing.[111] The outcome of the proceedings is not published but notice of the decision can be given to any person, if it is justified in the public interest.[112]

Proposal

464. Our proposal is that all hearings under the health process will remain in private, subject to the barrister's right to request a public hearing (as is currently the case)[113]. The rationale for this proposal is that such proceedings are primarily concerned with the barrister's health, which would warrant departure from the principle of transparency.

465. We are also considering whether the outcomes of health proceedings should be published. The factors that we are seeking to balance as part of this proposal are as follows:

- It is important that the public are aware of any restrictions or conditions that are imposed on a barrister's practice to the extent it is relevant to them.
- Publication may not always be appropriate and adequate safeguards may need to be put in place, for example, where conditions imposed relate to ongoing medical treatment, rather than restrictions on the ability to practise.

[111] rE335.
[112] rE348.
[113] rE335.4 of the Fitness to Practise Regulations.

- Publication of the outcome of health proceedings may inadvertently risk revealing that a barrister has been subject to health proceedings or disclose information about a barrister's health condition.

466. In light of the above considerations, we are interested in seeking views on whether it is appropriate for the BSB to publish details (or a summary, redacted as appropriate) of the outcome of health proceedings.

Benefits of the proposal

467. Holding health hearings in private helps protect the rights and privacy of barristers, recognising the sensitive and confidential nature of health-related information. This approach strikes a fair balance between the public interest and the rights of individual respondents.

468. In addition, if the outcome of health proceedings is published, the public would have more information available to them and greater awareness as to when a barrister's practice is subject to restrictions or conditions, providing greater transparency in the public interest.

Equality impacts

469. We recognise the publication of outcomes may raise issues of equality and privacy due to the nature of the proceedings, which we will need to assess before deciding how to proceed.

Do you agree with our approach to holding all fitness to practise hearings in private, subject to the barrister's right to request a public hearing? If not, why not?

In what circumstances should the outcome of fitness to practise/health decisions be published?

Proposal 34: Media and non-party access to documents

Summary of the proposal

470. To support further the principle of transparency and accountability, we propose to work on policies and guidance which will set out the approach to disclosure and access to documents for non-parties (including the media), without introducing explicit provisions in the regulations.

Background and current approach

471. A number of recent cases have given rise to questions about non-party access to documents and the media's right to make representations to BTAS; for example, in relation to applications for anonymity by barristers or for the substantive hearing to be heard in private. Concerns have been raised by members of the media that their rights to freedom of expression have been negatively affected by the lack of ability to make representations about privacy issues.

472. There are currently no provisions in the regulations governing a non-party's right access to documents filed with the Disciplinary Tribunal or otherwise referred to or served in the Disciplinary Tribunal hearing. While both the BSB and BTAS sometimes receive requests to disclose such documents, either generally or as a Freedom of Information Act request[114], there is no formal process by which a non-party (e.g. an interested member of the public, or a journalist) can access documents that may be referred to during a public hearing.

473. Further, the current regulations do not provide for the ability for non-parties, such as the press, to make representations to BTAS regarding private hearings or anonymity orders, nor for informing the press when such orders are being considered or made. However, the Disciplinary Tribunal does have the power at rE129 to make such directions for the management of the case or hearing as they consider will expedite the just and efficient conduct of the case.

474. We recognise the importance of transparency in the BSB's disciplinary process, given the public interest in attending hearings and the freedom of the press to report proceedings.

475. In considering other regulators' approaches and practices, we noted that the Solicitors Disciplinary Tribunal has policies in place dealing with non-party access to documents and the automatic disclosure of certain categories of documents (e.g. skeleton arguments), to give effect to the open justice principle.[115]

[114] Note, the BSB is not technically bound by FOIA 2000 but aims to act in the spirit of it in the interests of transparency.
[115] See the SDT's Automatic Disclosure Process Policy and Guidance and Policy on the Supply of Documents to Third Parties (Public and Press).

Proposal

476. Disciplinary Tribunals will consider the interests of the press and the impact on freedom of expression as part of routine decision-making, for example when deciding whether to allow an application for anonymity or for a substantive hearing to be in private.

477. We do not consider these issues warrant the creation of new regulations. However, an added benefit of our proposal to introduce the suite of new case management powers outlined above (see Proposal 8 above), including an overriding objective, is that the new proposed powers should provide a framework within which the Tribunal can act, reacting flexibly and proactively as novel issues arise in a case. This will include responding to requests by media and non-parties to access documents.

478. We therefore propose to work with BTAS to develop policies and guidance on issues like non-party access to documents, to ensure a consistent and fair approach to all cases.

Benefits of the proposal

479. The proposal to work with BTAS on the production of guidance on issues like non-party access to documents will provide a clearer framework for the Disciplinary Tribunal to manage requests.

Equality impacts

480. We have no data to suggest that this proposal will have an impact (positive or adverse) on any particular protected characteristic.

Do you agree with our proposal not to amend the regulations to address the issue of the media and non-party access to documents, but to work with BTAS in the future to produce guidance on the approach to such issues? If not, why not?

Part 4 – Assessments and how to respond

Equality Impact Assessment

481. As part of the development of the proposals for consultation, we have carried out preliminary Equality Impact Assessments (EIAs) to identify any early issues that may indicate a requirement for a different approach.

482. The majority of the proposals do not raise any issues. Our EIAs show that, overall, the proposals are likely to result in positive outcomes for many users, including individuals with protected characteristics such as disability and age. In particular, several proposals are expected to lead to quicker progression and resolution of cases before the Disciplinary Tribunal which may have especially positive impacts in certain cases, such as those involving sexual harassment complaints, thereby promoting greater equality for groups with certain protected characteristics. However, there are also some proposals which may adversely impact on one of more protected characteristic. In order to prevent any potential for disproportionate adverse impacts and to meet our obligations under the Public Sector Equality Duty, we have identified potential impacts and considered appropriate mitigations.

483. We are keen to understand further the equality impacts of our proposals and will continue our assessments. We welcome any comments or evidence in response to this consultation and will have regard to any feedback provided when considering next steps for implementation.

Do you have any comments or views in relation to our assessment of the equality impacts of our proposals? Where possible, please provide evidence.

Data Protection Impact Assessment

484. We are interested to understand external opinions as to whether any of the proposals being put forward are considered to materially alter or change an individual's rights and freedoms as recognised under current data protection legislation, notably the UK General Data Protection Regulation and the Data Protection Act 2018.

485. We invite responses to address any particular issues or concerns or risks. When providing feedback in relation to any perceived risks, we would request where possible that you include specific scenarios that illustrate how the risk could arise in practice.

486. Issues or concerns that are highlighted in response to this consultation will be considered as part of a formal Data Protection Impact Assessment.

Do you have any comments or views on the potential data protection and privacy issues raised by the proposals? Where possible please provide evidence.

How to respond to this consultation

487. The consultation is open for comment from **3 July 2025** to **15 October 2025**. You do not need to wait until the deadline to respond to this consultation. Responses can be submitted by using our online survey platform or emailed to enforcementregs@barstandardsboard.org.uk.

488. If you would like to access this consultation document in an alternative format, such as larger print or audio, please contact us at: enforcementregs@barstandardsboard.org.uk or by telephone at 020 7611 1444.

489. If you would like to provide your feedback via another method than a written response, please contact us using the same contact details above.

490. Whatever form your response 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.

491. We are planning events to discuss the proposals set out in this consultation paper, and hope that many barristers and other stakeholders and consumers interested in the regulation of the Bar will be able to join those sessions.

492. Whatever form your response 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.

Appendix 1 – overview of our enforcement process

1. There are four main stages to our enforcement process which apply when we receive information (e.g. a report) that suggests that a barrister may have breached the BSB Handbook. This section outlines this process. We follow the same process in all cases to ensure that we handle cases fairly and consistently. This consultation paper and the summary of our enforcement process that follows is principally concerned with the initial assessment, investigation and disciplinary process (and so does not, for example, engage with other regulatory tools that may be available to us such as supervision activity).

Stage 1 - Initial assessment

2. The first stage involves an initial assessment of information received by the BSB that may indicate that a breach of the BSB Handbook has occurred. It is part of the role of the BSB's Contact and Assessment Team, pursuant to rE2 of the EDRs, to gather information (including reports from third parties) for the purpose of assessing whether there is evidence of a potential breach of the BSB Handbook that is apt for further investigation.

3. If the Contact and Assessment Team considers that there is evidence of a potential breach which, after undertaking a risk assessment, warrants an investigation, they may recommend that the report be the subject of an investigation. The report is then referred to the Investigations and Enforcement Team, who may decide to treat the report as an "allegation" in accordance with rE12 of the EDRs, if they consider that the report discloses a potential breach of the Handbook or it potentially satisfies the disqualification condition. In making this determination under rE12, the team must have regard to a number of factors set out in rE13, including whether the disclosed conduct presents sufficient risk to the regulatory objectives and can be properly and fairly investigated.

Stage 2 – Investigation

4. If the Investigations and Enforcement Team decide to treat a report as an allegation, a formal investigation will commence. Under rE14, the BSB has the power to carry out the investigation of allegations as appropriate and to withdraw any allegation at any time (the effect of which would be as if a decision under rE12 had not been made). Where a case is accepted for investigation, staff in the Investigations and Enforcement Team are responsible for carrying out the investigation.

5. An investigation of an allegation cannot be finalised without first informing the person of the allegation and providing them with a reasonable opportunity to comment (rE15). Current practice is that the written allegation is usually sent at the start of the investigation at the same time as the barrister is first notified of the report and the decision to investigate potential breaches of the BSB Handbook.

Stage 3 - Decision by staff or an Independent Decision-Making Panel

6. At the conclusion of the investigation, staff are required to take a decision in accordance with rE19 of the EDRs, which currently provides that staff may decide that:

   a. The conduct alleged did not constitute a breach or there was insufficient evidence of a breach of the Handbook;
   b. While the conduct alleged did constitute a breach of the Handbook, in all the circumstances no enforcement action should be taken;
   c. The conduct alleged did constitute a breach of the Handbook and the breach should be dealt with by the imposition of an administrative sanction[116];
   d. The conduct alleged may constitute a breach of the Handbook and the matter should be referred to disciplinary action on the basis that:
      - if the breach were to be proved, an administrative sanction would not be appropriate; and
      - the subject matter of the allegation involves: a conviction for an offence of dishonesty or deception, certain driving offences under the Road Traffic Act 1988, a breach of Part 3 or 4 of the Handbook, any failure to pay an administrative fine, or a failure to comply with a disciplinary action sanction; or
   e. The allegation should be referred to an Independent Decision-Making Panel for a decision.

7. Where an administrative sanction is imposed, the barrister may appeal it in accordance with rE54 of the EDRs.

8. In conjunction with a decision to dismiss an allegation under (a) or (b) above, the BSB may also issue the barrister with advice (rE21 of the EDRs).

9. If a matter is referred to an Independent Decision-Making Panel, the panel has powers to take certain decisions under rE22. The powers available to Independent Decision-Making Panels largely mirror the powers available to staff under rE19 (as outlined above). However, one key point of difference is that Independent Decision-Making Panels have wider powers to refer any allegations to disciplinary action where they consider that there is a realistic prospect of a finding of professional misconduct being made and, having regard to the regulatory objectives, it is in the public interest to pursue disciplinary action.

10. Independent Decision-Making Panels also have a power to issue advice in circumstances where an allegation is dismissed on the basis of no breach (or insufficient evidence of a breach) or where a decision is taken that no enforcement action should be taken in respect of a breach (rE24 of the EDRs).

11. A decision to "dispose of" allegations – whether by BSB staff under rE19 or by the Independent Decision-Making Panel under rE22 – at the conclusion of an

[116] An administrative sanction means the imposition of an administrative warning, fine or both. It may be imposed under rE26 where there is sufficient evidence on the balance of probabilities of a breach of the Handbook and an administrative sanction is proportionate and sufficient, in the public interest.

investigation is subject to a review. A request for reconsideration can be made under rE61 where new evidence becomes available or for "some other good reason". If this threshold is met, the decision-maker can then reconsider the allegations and take any further or different action they consider appropriate. Requests for review can also be referred to an Independent Reviewer, who provide an independent mechanism for quality assuring the BSB's decision-making. It is important to note that the Independent Reviewer performs an advisory function with no direct decision-making powers and can only make non-binding recommendations, which help inform the decision-maker.

Stage 4 - Disciplinary action

12. Where, following the conclusion of an investigation, a decision is made to refer allegations to disciplinary action, the decision-maker will consider whether the allegation is suitable for determination by consent.

13. The 'Determination by Consent' process is a paper-based procedure carried out by an Independent Decision-Making Panel as an alternative to a referral of a case to a Disciplinary Tribunal. It is still a form of disciplinary action and involves the determination of charges of professional misconduct. However, it is reserved for cases where there is no dispute of fact and where the likely sanction would be lower than a term of suspension or disbarment.

14. It is an entirely consensual process, and the barrister can withdraw consent at any stage. The consequence of the withdrawal of consent is that the matter would automatically be referred to a three-person panel of the Disciplinary Tribunal. The sanctioning powers under the Determination by Consent procedure are limited to a maximum of a fine/reprimand or advice. The outcome of the procedure is published and carries the same status as a finding by a Disciplinary Tribunal.

15. If allegations are instead referred to a disciplinary tribunal, the decision-maker must decide whether the allegation(s) should be referred to a three or five-person tribunal panel (rE46 of the EDRs). The decision on which constitution of panel is appropriate to consider the allegations is determined by reference to the sanction that is likely to be imposed if the charges are proved, having regard to the BTAS Sanctions Guidance and the barrister's previous disciplinary record (rE47).

16. The Disciplinary Tribunal process is carried out by a body "independent" of the BSB, i.e. the Bar Tribunals and Adjudication Service (BTAS). BTAS operates under the auspices of the Council of the Inns of Court and provides its services under contract to the BSB. BTAS is responsible for appointing panels and administering Tribunals on behalf of the President of the Council of the Inns of Court.

17. BTAS panels are bound by the DTRs and carry out their functions and exercise their powers in accordance with them. However, the ownership and statutory responsibility for the content of the DTRs lies with the BSB and BTAS has no power to alter or introduce new regulations. The BSB therefore holds a dual role as "keeper" of the regulations and as the "prosecuting body". However, a Tribunal is independent in its interpretation and application of the relevant regulations and in its decision-making.

18. The DTRs set out the procedure to be followed in disciplinary proceedings. In summary, the procedure consists of three main stages:

(i) service of charges and BSB evidence;
(ii) agreement of Directions for the management of the case, including interlocutory applications, such as an application to strike out the charges; and
(iii) the substantive tribunal hearing.

19. The Disciplinary Tribunal applies the civil standard of proof (in relation to conduct on or after April 2019). At the conclusion of the hearing, the tribunal members much reach a finding on each charge or application, either unanimously or by majority. If any of the charges or applications against a respondent are proven, the Tribunal must then impose a sanction, which can include disbarment, suspension from practice, conditions and/or fines.

20. In cases where the Tribunal has imposed a sanction of disbarment, or a suspension or prohibition from accepting or carrying out public access work or conducting litigation for more than twelve months, the Tribunal must (unless in the circumstances of the case it appears to be inappropriate to do so) either impose an immediate suspension or an immediate prohibition from accepting public access instructions or conducting litigation (rE227 of the DTRs). If the Tribunal decides it would be inappropriate to require immediate suspension or the immediate prohibition from public access work/conducting litigation, the Tribunal may nonetheless require the barrister to suspend their practice or impose conditions from such date as they may specify.

21. Pursuant to rE244 of the DTRs, a Disciplinary Tribunal or Directions Judge may make such orders for costs, whether against or in favour of a respondent, as they think fit. However, rE248 provides that:

"*All costs incurred by the Bar Standards Board preparatory to the hearing before the Disciplinary Tribunal must be borne by the Bar Standards Board."*

Interim suspension: an overview

22. Our interim suspension regime is governed by the Interim Suspension and Disqualification Regulations (Part 5C of the BSB Handbook) (ISDRs). The primary purpose of the BSB's current interim suspension regime is to enable us to take prompt action to address a risk in relation to a practising barrister pending consideration by a Disciplinary Tribunal.

23. The ISDRs allow the BSB to refer a practising barrister to an independent three-person panel[117] to consider whether the barrister should be suspended from practice, or conditions put on their practice, pending the outcome of disciplinary proceedings for professional misconduct. To be able to make a referral, the BSB currently has to show that:

    a. one of the following criteria is met:
        - the Respondent has been convicted or charged with a criminal offence in any jurisdiction (other than a minor criminal offence);
        - the Respondent has received a conviction by another approved regulator, for which they have been sentenced to a period of suspension or termination of their right to practise;
        - the Respondent has been intervened into by the BSB;
        - the referral is necessary to protect the interest of clients (including former or potential clients); or
        - the referral is necessary to protect the public or is otherwise in the public interest; and
    b. that, having regard to the regulatory objectives, pursuing interim suspension is appropriate in all the circumstances in accordance with rE268.2; and
    c. in addition, that the relevant ground(s) of referral would warrant a charge of professional misconduct and referral to a Disciplinary Tribunal in accordance with rE269.

24. The ISDRs also allow for an immediate interim suspension to be imposed. The power to impose an immediate suspension lies solely with the Chair of the BSB's Independent Decision-Making Body. In all cases where a referral is made to an interim suspension panel, it is a requirement that the Chair considers whether an immediate interim suspension should be imposed.

25. Once a referral is made under the ISDRs, the progression of the case lies with BTAS and the ISDRs stipulate a listing process for the hearing. The powers given to panels under the ISDRs allow them to suspend a barrister or impose conditions pending the outcome of disciplinary proceedings. Any such decision made by a Panel is subject to review and/or appeal by the barrister as provided for in the ISDRs.

26. Any interim suspension/disqualification imposed by the Chair of the IDB or by an Interim Panel will be published on the BSB's website (rE272.6 and rE294).

27. The interim suspension process is not used often by the BSB. Since 2019, we have sought interim suspension orders in only seven cases. A review of these cases revealed that the ISDR powers were predominantly used to interim suspend barristers who had been charged or convicted of criminal offences, including sexual assault and conspiracy to defraud. The criminal offences were all serious, and more than minor (see rE268.1) and often the barrister was in custody at the time of the initial referral.

[117] The independent panel is appointed and convened by BTAS.

Fitness to Practise proceedings: an overview

28. Our fitness to practise (FtP) process is governed by the Fitness to Practise Regulations (Part 5D of the BSB Handbook) (FtPRs). The FtPRs are engaged when the BSB receives information suggesting that an individual is "unfit to practise" (as defined in Part 6 of the Handbook[118]), in accordance with rE303. There need not be any suggestion that the individual has breached the Handbook. The FtP process is entirely distinct from disciplinary proceedings and is viewed as non-disciplinary in nature, although it may run in parallel with a disciplinary process.

29. On receipt of information suggesting that an individual may be unfit, the BSB has powers to carry out an investigation (rE304), before ultimately determining whether the matter should be referred to a Fitness to Practise Panel (rE306). Following referral, and subsequent to a preliminary hearing and the obtaining of any medical evidence, the Fitness to Practise Panel will, at a full hearing, decide whether or not the barrister is unfit to practise. If the Fitness to Practise Panel makes a determination that a barrister is unfit to practise, the panel then has powers to make various orders, including an order that the individual is subject to a *restriction* (rE320). A "restriction" is defined in Part 6 of the Handbook as a suspension or disqualification.

[118] 'when used to describe a *BSB authorised individual* means that the individual: is incapacitated due to their physical or mental condition (including any addiction); and, as a result, the Individual's fitness to practise is impaired; and, the imposition of a restriction, or the acceptance of undertakings in lieu, is necessary for the protection of the public, is otherwise in the public interest or is in the Individual's own interests.'

Appendix 2 - Our consultation questions

1. Do you agree with our proposal to defer the point at which detailed, written allegations are formulated and sent to the barrister for comment to later in the investigation when relevant information has been gathered? If not, why not?

2. Do you envisage any issue (legal or practical) with our proposal to introduce the new approach to the communication of detailed, written allegations, before any change to the regulations?

3. Do you agree with our proposal to introduce powers to add to, or amend, the written allegation(s), without an opportunity for further comment from the barrister, in the circumstances described in Proposal 2? If not, why not?

4. Do you agree with the introduction of a power to add allegations of non-cooperation during an investigation, without requiring an opportunity for further comment from the barrister? If not, why not?

5. Do you agree that staff should be given the power to refer all types of criminal convictions cases directly for disciplinary action? If not, why not?

6. Do you agree with the proposal to allow a single member of the Independent Decision-Making Body the power to determine whether a request for reconsideration meets the criteria? If not, why not?

7. Do you agree with our proposal to amend the exceptions to the general duty of confidentiality imposed on the BSB to clarify the BSB's ability to make disclosures where necessary to further an investigation? If not, why not?

8. Do you agree with our proposal to introduce an overriding objective into the Disciplinary Tribunals Regulations? If not, why not?

9. Do you have any observations on our proposed formulation for an overriding objective?

10. Do you agree with our proposal to introduce a power for BTAS to regulate its own procedure in individual cases, strictly in accordance with the Disciplinary Tribunals Regulations and the proposed new overriding objective? If not, why not?

11. Do you agree with our proposal to give BTAS responsibility for case management, including the setting of case management directions and the power to list a case management hearing at any time? If not, why not?

12. Do you agree that certain case management decisions can be delegated to the BTAS executive? If not, why not?

13. Do you agree with our proposal to clarify the timing of when a sanction imposed by the Disciplinary Tribunal comes into effect and that this is at the conclusion of any appeal period? If not, why not?

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14. Do you agree with our proposal to widen the Disciplinary Tribunal's power to impose an immediate suspension or conditions, pending any appeal?

15. Do you agree with our proposal to amend the Disciplinary Tribunals Regulations to clarify that the Disciplinary Tribunal may hear representations from the BSB on the issue of sanction? If not, why not?

16. Do you agree with our proposal to allow service by email where a barrister's e-mail address is known to the BSB, without requiring the consent of the barrister? If not, why not?

17. Do you agree with our proposal to clarify the Disciplinary Tribunal Regulations relating to the BSB's entitlement to claim costs relating to the conduct of disciplinary proceedings? If not, why not?

18. Do you agree with our proposal to clarify the BSB's right to appeal in cases where a charge is only partially dismissed? If not, why not?

19. Do you agree with our proposal to introduce a presumption in favour of anonymity in disciplinary proceedings for any witness making an allegation of a sexual or violent nature? If not, why not?

20. Do you agree with our proposal to simplify the grounds for referral to an interim panel and the imposition of interim orders? If not, why not?

21. Do you agree with our proposal to broaden the power of the Chair of the Independent Decision-Making Body to impose an immediate interim suspension? If not, why not?

22. Do you agree with our proposal to streamline and simplify the listing process for hearings? If not, why not?

23. Do you agree with our proposal to remove the power given to panels under the ISDRs to refer cases directly to a Disciplinary Tribunal? If not, why not?

24. Do you agree with our proposal to allow the BSB the right to request a review of an interim order? If not, why not?

25. Do you agree with our proposal to allow both parties to make representations in relation to an interim order review request? If not, why not?

26. Do you agree with our proposal to allow Disciplinary Tribunal panel to consider requests to review an interim order as part of the substantive hearing? If not, why not?

27. Do you agree with our proposal to re-brand the fitness to practise regime to a "health" regime and to make consequential amendments to the regulations to align with that re-branding? If not, why not?

28. Do you agree with our proposal to amend the threshold for referral into the health process by removing the requirement for incapacitation? If not, why not?

29. Do you agree with our proposal to introduce an explicit duty for BTAS to convene a panel, fix a hearing date and notify both parties of the meeting date, following the referral of a barrister to a health panel by the BSB? If not, why not?

30. Do you agree with our proposal to give the BSB the power to agree undertakings before and instead of a referral being made to a health panel? If not, why not?

31. Do you agree that six months is no longer an appropriate time limit to impose on fixed term suspensions or disqualifications that may be imposed by health panels? If not, why not?

32. Do you prefer Option 1 or Option 2 and why? If you prefer neither option, please let us have your views on any alternative formulations that we should consider.

33. Do you agree with our proposal to introduce powers for health panels to review a barrister's health and ability to practise before they resume practice, to ensure there are no ongoing public protection or public interest concerns? If not, why not?

34. Do you agree with our proposal to introduce a power for health panels to impose interim conditions (in addition to the existing power to impose an interim suspension or disqualification) at a preliminary meeting to protect the public or in the public interest? If not, why not?

35. Do you agree with our proposal to simplify the rights to review and the review process under the regulations? If not, why not?

36. Do you agree with the introduction of a three-person panels for all disciplinary tribunals? If not, why not?

37. Do you agree with our proposal for panels to have a legal (not necessarily barrister) majority, rather than a lay majority? If not, why not?

38. Do you agree with altering the composition of IDB panels considering enforcement cases from five to three-person panels, with a lay majority? If not, why not?

39. Do you agree with our proposal to change the existing requirements for a panel chair to a requirement for a legally qualified chair with at least 15 years' practising experience? If not, please indicate why this criteria is insufficient?

40. Do you agree with our proposal to replace the role of a clerk in disciplinary tribunals with that of a Panel Secretary who will be a BTAS employee? If not, why not?

41. Do you agree with our proposal to change the composition of panels in health proceedings? If not, why not? If you do, do you prefer option 1 or option 2?

42. Do you agree in principle that the point of publication of the fact that disciplinary proceedings are underway should be brought forward? If not, why not?

43. If the point of publication is brought forward, do you prefer option 1 or 2 and why? Please explain why.

44. What are the circumstances in which you think the rights of a barrister will outweigh the principles of transparency such that publication will not be appropriate?

45. Do you agree with our approach to holding administrative sanctions and appeals in private? If not, why not?

46. Do you agree that determinations by consent should continue to be held in private? If not, why not?

47. Do you agree that interim suspension hearings should continue to be held in private (unless the barrister requests a public hearing)? If not, why not?

48. Do you prefer Option 1 (that all case management and interlocutory application hearings are generally held in public) or (Option 2 (that the first case management hearing is in private but generally all further hearings will be in public unless the Tribunal orders otherwise)? Please explain why.

49. Do you agree that substantive disciplinary tribunal proceedings should remain in public? If not, why not?

50. Do you agree with our approach to holding all fitness to practise hearings in private, subject to the barrister's right to request a public hearing? If not, why not?

51. In what circumstances should the outcome of fitness to practise/health decisions be published?

52. Do you agree with our proposal not to amend the regulations to address the issue of the media and non-party access to documents, but to work with BTAS in the future to produce guidance on the approach to such issues? If not, why not?

53. Do you have any comments or views in relation to our assessment of the equality impacts of our proposals? Where possible, please provide evidence.

54. Do you have any comments or views on the potential data protection and privacy issues raised by the proposals? Where possible please provide evidence.