

### Equality Analysis

<b>Date of Assessment</b>	04/03/2013
<b>Assessor Name &amp; Job Title</b>	Siân Mayhew, Policy and Projects Officer
<b>Name of Policy/Function to be Assessed</b>	<p><b>Revised Fitness to Practise Rules and Guidance (Annex O to the Code of Conduct).</b></p> <p>The Rules have been amended with a view to: ensuring that the Fitness to Practise process is fully compliant with the Human Rights Act 1998, and Equality Act 2010; increasing clarity; amending out of date references and technical complexities; softening references to adversarial terminology; and, modernising and streamlining the drafting style.</p> <p>The BSB have also produced supplementary guidance to support the application of the current Rules. The first version was issued in 2011 and has now been updated to reflect any changes to the Rules proposed as a result of this review of the Rules.</p>
<b>Aim/Purpose of Policy</b>	<p><b>Background and aims/purpose of the Rules and Guidance</b></p> <p><b>a.</b> The aim/purpose of the Rules, set out in Annex O to the Code of Conduct of the Bar of England &amp; Wales, is to prescribe the manner in which any issue concerning a barrister's fitness (or unfitness) to practise should be managed. The Rules give the BSB the ability to refer a practising barrister to a Fitness to Practise hearing where there are concerns that he/she may be:</p> <ul style="list-style-type: none"> <li><b>i)</b> incapacitated due to a physical or mental condition (including addiction); and,</li> <li><b>ii)</b> as a result, the barrister's fitness to practise is seriously impaired; and,</li> <li><b>iii)</b> suspension from practice, or the imposition of conditions on their practise, is necessary to protect the public.</li> </ul> <p><b>b.</b> Under this definition, therefore, Fitness to Practise does not include matters of professional conduct or discipline (these are managed under a separate conduct process).</p> <p><b>c.</b> The Rules are designed to achieve the following outcomes:</p> <ul style="list-style-type: none"> <li><b>i)</b> High level public protection from the risk of being exposed to barristers who, by reason of an incapacity, are not fit to provide legal services to the standard expected, that is, to understand instructions and to act appropriately for their clients;</li> <li><b>ii)</b> A supportive system that encourages affected barristers to</li> </ul>

address any physical or mental health issue successfully, and return to practice as soon as possible, or continue to do so alongside the provision of adequate safeguards/supervision where necessary;

- iii) Full clarity of processes for determining whether a barrister's fitness to practise is impaired by reason of his or her health, for members of Fitness to Practise Panels, complainants and members of the public, barristers and their representatives, as well as members of the Professional Conduct Committee, and COIC and BSB staff;
- iv) Consistency of approach in the application of the Fitness to Practise processes;
- v) Fairness and transparency in dealing with cases concerning a barrister's fitness to practise; and,
- vi) Promotion of adherence to the professional principles, including maintaining proper standards of work within a profession that acts in the best interests of clients.

#### **The current review**

- d. The existing Rules, having been in operation since 2005, have not been substantively revised since their original publication. As a result, some of the Rules are antiquated and use an outmoded drafting style in places. Additionally, the following problems have been identified:
  - i) The drafting of the Rules was considered overly complex and confusing;
  - ii) The criteria for decision making requires clarification;
  - iii) Some of the terms used in the Rules, on which Panel decisions are based, have not been properly defined; for example, the expression "seriously impaired", which comprises the definition of 'unfit to practise', could create ambiguity and leave the BSB exposed to challenges, given that the seriousness of an impairment is an opinion;
  - iv) The role of the medical practitioner, appointed by a Fitness to Practise Panel to advise on medical issues and conduct medical examinations, is not defined within the Rules;
  - v) The Equality Act 2010 has overhauled and enlarged the general law about discrimination on, among other areas, disability. Clarification is needed as to whether the powers granted to the Fitness to Practise (FTP) Panels, as set out in the Rules, and the FTP process operated by the BSB, remain reasonable and fully comply with Human Rights, and Equality legislation;
  - vi) Clarification is needed as to whether the procedure as set out in the Rules is an example of best practice, and continues to be fit for purpose;
  - vii) The Rules contain out of date technical references to internal processes and terminology, as a result of a restructure of the

Professional Conduct Department within the BSB, effective from January 2011 (the Department responsible for administering the initial processing of Fitness to Practise cases);

- viii)** No supplementary guidance or policy document was available to support the Rules, and therefore no further information was available regarding the operation of the Rules or the criteria to be taken into account by Panels when taking decisions.
- e.** The BSB have already produced supplementary guidance to support the application of the current Rules, and this was issued in 2011 (addressing issue viii above). The Guidance, however, is temporary, given that it is acknowledged that it needed to be updated to reflect any changes to the Rules proposed as a result of a review.
- f.** To address the remaining issues identified above, a Working Group was formed to support the project. It was agreed that the fundamental processes did not need to be altered, however, the revisions to the Rules and Guidance have centred on:
- i)** ensuring the Fitness to Practise process is fully compliant with the Human Rights Act, and the Equality Act 2010;
  - ii)** amending references to reflect changes within the Professional Conduct Department, following a departmental restructure in January 2011;
  - iii)** removing, where possible, references to technical complexities. For example, the descriptions of the application of interim suspensions and interim prohibitions have been unified into one concept, now named 'interim restriction';
  - iv)** softening references to adversarial terminology, given that the proceedings are not disciplinary, for example referencing the 'directing of restrictions' rather than 'imposing penalties', 'questioning' rather than 'cross-examining', and 'barrister' rather than 'defendant' (given that the fitness to practise process is not disciplinary in nature);
  - v)** modernising and streamlining the drafting style and terminology, for example, replacing "Chairman" for "Chair", and replacing "Complaints Committee" with "Professional Conduct Committee" (in light of the name change, effective from January 2012);
  - vi)** removing, where possible, details of administrative matters that might more appropriately appear in supplementary guidance; and,
  - vii)** increasing clarity, particularly in relation to the anticipated outcomes of the Rules.
- g.** A consultation paper, setting out the aims of the review and the changes that have been made, has been drafted. It is considered best practice to consult on both the proposed revised Rules and Guidance as set out above, and to obtain the views of any party

	<p>who has an interest in, or will potentially be impacted by, the changes to ensure that no areas have been overlooked.</p> <p><b>h.</b> Following receipt of feedback obtained by way of responses to the consultation paper, further revisions will be made to the new Rules, and the accompanying guidance documents if necessary. Any changes to these Rules will need to be overseen by COIC and approved by the BSB Board. The BSB will then make an application to the Legal Services Board for final approval.</p>
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## 1. Evidence

<b>What evidence will you use to assess impact on equality?</b>	
<p>1.1. This Equality Analysis (EA) has been prepared utilising the following evidence sources:</p> <ul style="list-style-type: none"> <li>• Diversity data of those previously subject to Fitness to Practise proceedings to establish whether there are any arising equality issues requiring further investigation (given that there have only been 35 cases concerning barristers in the last 12 years, it has been difficult to analyse statistically significant relationships); and,</li> <li>• The 'Bar Barometer 2012'.</li> </ul> <p>1.2. Advice was also sought throughout from the BSB Equality and Diversity Advisor, Lay and Barrister members with experience with equality and diversity issues in a regulatory environment, as well as a firm of Solicitors.</p> <p>1.3. The Professional Conduct Department will maintain this EA as a living document. Should any further equality issues, not already considered within this analysis, become known or any clear view put forward following the consultation process, the analysis will be amended to take into consideration any such issues. Further, once the revised Rules and Guidance become operational, internal data will continue to be monitored in order to ensure that the new Rules and Guidance are not adversely impacting on those from protected Groups.</p>	

## 2. Impact on Equality

<b>General</b>	
<p>2.1. Given the nature and subject of the Rules, particular attention has been paid to equality issues throughout the review. Specifically, it is understood that issues relating to the protected characteristics of disability, pregnancy and maternity and age (i.e. older age) are more likely to arise than other protected characteristics in Fitness to Practise proceedings (see Paragraph 9 of the Guidance) since barristers from these groups may be more likely to have health issues that could impact on their fitness to practise. As a result, the Rules and Guidance have been reviewed by the E&amp;D Adviser for the BSB to ensure they adequately address issues of equality.</p>	

	<p>2.2. This assessment has been based on internal data and other material relating to previous Fitness to Practise cases and barristers that have been subject to these proceedings. The number of barristers that have been subject to Fitness to Practise proceedings is small, totalling 35 over 12 years. This makes it challenging to draw conclusions from statistical data, given that the results can be easily skewed.</p> <p>2.3. There is no particular data or information obtained that shows potential for differential impact, either adverse or positive, for different groups subject to the current Fitness to Practise proceedings. There is also no reason to believe that this will change under the new Rules, since the revisions are largely a matter of presentation and no substantive changes have been made to the fundamental processes that have been in place since the previous review in 2005. For example, no new powers to immediately suspend a barrister have been included in the Rules since this potentially has implications for fairness and rights of the barrister concerned (given that a barrister would not be able to make representations before a hearing takes place).</p> <p>2.4. The new Rules and Guidance have been updated to ensure that they are fully compliant with the provisions of the Human Rights Act, and to make clear that Panels must exercise their functions in compliance with section 149 of the Equality Act 2010 (Rule 43 and Paragraph 11 of the Guidance); FTP Panel Members' training will reflect this. As a result, Panels should conduct hearings fairly, and not bias one particular group (unconsciously or otherwise) over another.</p> <p>2.5. Importantly, a case will not be referred to a Fitness to Practise Panel, simply because a barrister is unwell; a referral will rest on whether the barrister's practise is impaired to such a degree that the imposing of restrictions is necessary (Paragraph 15 of the Guidance). Further, in all cases, the revised Rules and Guidance seek to reduce any discrimination against any barristers from a protected Group by:</p> <ul style="list-style-type: none"> <li>i) alerting Panel members to their obligations under the Equality Act 2010;</li> <li>ii) dealing with a case in ways which are proportionate to the complexity of the issues and the resources of the parties;</li> <li>iii) seeking flexibility in proceedings wherever possible; and,</li> <li>iv) promoting a supportive approach, which will assist the barrister in returning to practise as soon as possible.</li> </ul>
<p><b>Race</b></p>	<ul style="list-style-type: none"> <li>a. Overall, 10.2% of barristers are BME. Ethnicity data on barristers previously subject to Fitness to Practise cases (where available) shows that 11% of barristers subject to Fitness to Practise proceedings between 2001 and 2013 were BME, which equates to 4 cases. Given the small sample size and the potential for the results to be easily skewed, it is not possible to decipher whether this slightly higher finding is due to chance or if there is a genuine statistical relationship; as a result, these statistics do not represent cause for concern.</li> <li>b. Barristers are also able to request that a different medical examiner examines them, should they object to being examined by the one</li> </ul>

	<p>nominated by the Fitness to Practise Panel for reasons relating to their race (Paragraph 24 of the Guidance).</p> <p>c. Based on the above analysis, there is no evidence to suggest that the Rules and Guidance will have a disproportionate impact upon BME practitioners since they are applicable to all barristers alike. Given that the processes will remain substantially the same, there is also no reason to consider that the revised Rules and Guidance will create any inherent disparities in treatment on the basis of race. However, the Professional Conduct Department will continue to monitor equality data on this basis.</p>
<b>Gender</b>	<p>a. Analysis of previous cases shows that 31.5% of barrister previously subject to Fitness to Practise proceedings between 2001 and 2013 were female whereas, overall 35.1% of all barristers are female. The data suggests that men may be slightly overrepresented in Fitness to Practise proceedings (with 68.5% of barristers being subject to these proceedings between 2001 and 2013 compared to 64.9% of the bar overall). Given the small sample size and the potential for the results to be easily skewed, it is not possible to decipher whether this finding is statistically relevant; accordingly, these statistics do not represent cause for concern.</p> <p>b. Barristers are able to request that a different medical examiner examines them, should they object to being examined by the examiner nominated by the Fitness to Practise Panel for reasons relating to their gender (Paragraph 24 of the Guidance).</p> <p>c. Based on the above analysis, there is no evidence to suggest that a barrister, on the basis of their gender, will be inherently impacted (adversely or otherwise) by the Rules and Guidance and the changes being introduced as part of the review. However, the Professional Conduct Department will continue to monitor equality data in relation to gender and take action should any trends (ie an overrepresentation of men) become sustained.</p>
<b>Disability</b>	<p>a. Analysis of previous cases reveals that the percentage of disabled barristers subject to Fitness to Practise proceedings in previous cases between 2001 and 2013 is higher than the profile of the bar would suggest at 8.5%; the Bar disability statistics reveal that 0.5% of barrister are disabled. This figure could suggest that disabled barristers are overrepresented in Fitness to Practise proceedings.</p> <p>b. However, this higher figure can be explained firstly by the nature of the issues the Rules deal with; it is understandable that those subject to Fitness to Practise proceedings may be more likely to have a disability. Secondly, the 8.5% figure amounts to only 3 cases over 13 years. Finally, it is difficult to benchmark this figure, as the disability statistics for the whole Bar may not be reliable; 99.5% of barristers have not disclosed to the BSB whether or not they have a disability. Further, the statistics for the general population of England and Wales from the <i>Office of Disability</i></p>

*Issues* estimates that 15% of working age adults has a disability.

- c.** The reviewed Rules and the development of the supporting Guidance have been Equality proofed with the view to preventing any unlawful discrimination against barristers who are subject to Fitness to Practise proceedings (and have therefore been improved in this respect). Specifically, the new Rules and Guidance:
- i)** define a disabled person as someone who has “a physical or mental impairment, which has a substantial and long term adverse effect on his or her ability to carry out normal day to day activities” (Paragraph 10 of the Guidance). Therefore, a short-term condition will be assessed differently from a long-term condition;
  - ii)** include reference to making reasonable adjustments. Panels must also consider whether a barrister coming before them with a disability is fit to practise on the assumption that reasonable adjustments have been or will be made (Paragraph 13 of the Guidance).
  - iii)** make clear that, where necessary, reasonable adjustments (as defined under the Equality Act) must be made for a barrister during the course of any Fitness to Practise hearing (Rule 43 and Paragraph 12 of the Guidance); reasonable adjustments may include limiting the length of the hearing where the barrister finds it difficult to concentrate for extended periods of time or allowing them more time to respond to initial communications;
  - iv)** ensure that the Panel are clear that the focus of the hearing should be on whether the barrister’s impairment actually impacts on their fitness to practise and consider this decision based on the assumption that reasonable adjustment have already been made. For example, if a barrister is unable to travel long distances because of his/her impairment this may restrict him/her to practising in a smaller geographical area, but this is not in itself an issue relating to Fitness to Practise (Paragraph 14 of the Guidance);
  - v)** have been revised with the view to increasing clarity of the processes (which will also be reflected in the communications provided to barristers subject to these proceedings);
  - vi)** are now less adversarial, so to distinguish these proceedings from complaints of misconduct.
- d.** It should also be noted that the BSB’s Disclosure and Publications Policy prevents publication or disclosure of information concerning the nature of the medical reason requiring these conditions or restrictions in order to protect the privacy of the barrister concerned. Panel Members will also be subject to appropriate equality training and the Rules also offer a level of flexibility to the Panel to ensure that each case can be dealt with individualistically.
- e.** Further, comparisons have been made with the processes adopted by other regulators, which revealed consistency within the regulatory environment.

	<p>f. The Rules are therefore unlikely to result in disability-related discrimination, especially since the motivating factor behind the Rules is to establish the barrister's fitness to practise and not whether the barrister is disabled. Particular and close attention will be paid to this issue on an ongoing basis.</p>
<b>Age</b>	<p>a. There are a number of age-related illnesses, which may make it understandable for older barristers to be more likely to be subject to Fitness to Practise proceedings.</p> <p>b. Analysis of previous Fitness to Practise cases (where the data is available) suggests that 34% (12) of barristers subject to proceedings between 2001 and 2013 were aged 30-39, 22% (12) were aged 40-49 and 2.86% (1) were aged 70 – 79.</p> <p>c. The data therefore does not reveal any discernible disparity of treatment in relation to any particular age group (specifically, older age groups) arising from the processes as set out in the Rules. Given that the processes will remain substantially the same, there is no reason to consider that the new Rules will create any inherent disparities in treatment relating to age. The BSB are committed to continuing to gather data in relation to the age of barristers subject to these proceedings, and monitoring any arising trends, taking action where necessary.</p>
<b>Sexual Orientation</b>	<p>a. The BSB does not have any available data on the sexual orientation of barristers subject to these proceedings in the past, however, there is no other evidence to suggest that barristers within this protected group will be affected disproportionately by the Rules, given that they are applicable to all barristers alike. Given that the processes will remain fundamentally the same under this review, there is no reason to consider that the new Rules will create any inherent disparities in treatment relating to sexual orientation.</p> <p>b. The BSB is committed to gathering data in relation to the sexual orientation of barristers subject to these proceedings in future where possible, monitoring any arising trends, and taking action where necessary.</p>
<b>Religion/Belief</b>	<p>a. Barristers are able to request that a different medical examiner examines them, should they object for reasons relating to their religion/belief to the one nominated at the Fitness to Practise hearing (Paragraph 24 of the Guidance). Barristers are also told in advance of the date of the hearing, and will be able to raise any concerns, should there be any conflict with particular religious festivals.</p> <p>b. The BSB does not have any available data on the religion/belief of barristers subject to these proceedings in the past; however, there is no other evidence to suggest that the Rules and Guidance will discriminate against different religion and belief structures, given that the Rules are applicable to all barristers alike. Since the processes will remain substantially the same under the revised Rules and Guidance, there is no</p>

	<p>reason to consider that the new Rules will create any inherent disparities in treatment relating to religion/belief.</p> <p>c. The BSB is committed to gathering data in relation to the religion/belief of barristers subject to these proceedings in future, monitoring any arising trends, and taking action where necessary.</p>
<b>Gender Reassignment</b>	<p>a. The BSB does not have any available data with regard to this protected group (in the context of Fitness to Practise proceedings); however, there is no other evidence to suggest that the Rules and Guidance will discriminate against different religion and belief structures, given that the Rules are applicable to all barristers alike. Since the processes will remain substantially the same under the new Rules and Guidance, there is no reason to consider that the new Rules will create any inherent disparities in treatment relating to gender reassignment.</p> <p>b. The BSB is committed to gathering data in relation to gender reassignment in future where possible, monitoring any arising trends, and taking action where necessary.</p>
<b>Pregnancy/ Maternity</b>	<p>a. There are a number of pregnancy-related illnesses, such as pre- or post-natal depression, which could mean that issues surrounding pregnancy or maternity may be more likely to arise in Fitness to Practise proceedings (see Paragraph 9 of the Guidance), although the BSB has no statistics it can draw upon that suggest this is the case.</p> <p>b. Flexibility in proceedings are sought at all times (see Paragraph 7 of the Guidance), to ensure that any family responsibilities that the barrister may have are taken into account.</p> <p>c. There is no evidence to suggest that a barrister who is pregnant or has recently given birth will be discriminated against by the Rules. Currently, the BSB holds no data with regard to pregnancy and maternity in this context, but is committed to gathering data in future, and monitoring any arising trends, taking action where necessary.</p>
<b>Marriage and Civil Partnership</b>	<p>a. Not applicable as not in employment setting.</p>
<b>Other Identified Groups</b>	<p>a. There is no evidence to suggest that those from lower socio-economic groups will be discriminated against under the new Fitness to Practise Rules and Guidance given that barristers will undertake proceedings at no cost.</p>

<b>How does the policy advance equality of opportunity?</b>
<ul style="list-style-type: none"> <li>• Written decision-making criteria (see Paragraphs 15 – 21 and 39 – 44 of the Guidance), as well as comprehensive guidance on the application of reasonable adjustments, will assist with promoting transparency, consistency, openness and accessibility in the processes: the Rules will also provide a benchmark against which individual decisions and actions can be assessed. The intention is that the Rules and Guidance will have a positive impact by mitigating any risks of potential discrimination in the system.</li> <li>• The process also encourages barristers to return to practice as soon as possible and provides a supportive environment for them to do so, by considering the need and extent of reasonable adjustments.</li> <li>• The existence of the Rules and Guidance is already and will continue to be publicised on the website in order to reach all those likely to be effected by the proceedings (and both can be provided in different formats on request).</li> </ul>

<b>How does the policy promote good relations between different groups?</b>
<ul style="list-style-type: none"> <li>• The Rules and Guidance will promote good relations between groups in that the same Rules are applicable to all barristers. The inclusion of reference to the Equality Act and the Human Rights Act, along with the further clarification of terminology will reduce the likelihood of any perceived unfairness.</li> </ul>

### 3. Summary of Analysis

Now you have considered the potential impacts on equality, what action are you taking? (Mark 'X' next to one option and give a reason for your decision)		
<b>a. No change to the policy (no impacts identified)</b>	Your analysis demonstrates that the policy is robust and the evidence shows no potential for discrimination. You have taken all appropriate steps to advance equality and foster good relations between groups.	X
<b>b. Continue the policy (impacts identified)</b>	You will continue with the proposal, despite any adverse impacts, provided it is not unlawfully discriminatory and is justified.	
<b>c. Adjust the policy and continue</b>	You will take steps to remove barriers, mitigate impacts or better advance equality before continuing with the policy.	
<b>d. Stop and remove the policy</b>	There are adverse effects that are not justified and cannot be mitigated. The policy is unlawfully discriminatory.	

**Reason for decision:**

Subject to adherence to the action plan below, the risks identified in this impact assessment are not unlawfully discriminatory and can be managed and monitored.

**4. Action Plan for Improvement**

Give an outline of the key actions that need taking based on any challenges, gaps and opportunities you have identified. Include here any action to address negative equality impacts or data gaps.		
<b>Action Required</b>	<b>Person responsible</b>	<b>Timescale</b>
Continue to gather monitoring data on barristers subject to Fitness to Practise proceedings, and take action to address any trends which suggest that certain barrister groups are being discriminated against.	Siân Mayhew (Professional Conduct Department)	Ongoing
EA to be reviewed following finalisations of Rules and Guidance and completion of the consultation process.	Siân Mayhew (Professional Conduct Department)	May 2013
Publicise the revisions to the new Rules and Guidance to barristers, the public, BSB staff, and the Fitness to Practise Panel Members on the website and directly to the Panel Members, through COIC.	Sara Down/Siân Mayhew/Communications (Professional Conduct Department)	May/June 2013
Ensure initial letter to barrister subject to these proceedings is updated to draw attention to new Rules and Guidance, and publicises the process of requesting reasonable adjustments.	Siân Mayhew (Professional Conduct Department)	May/June 2013
Ensure that 'lessons to learn' are logged following all Fitness to Practise cases, particularly where equality issues arise.	TBC (Professional Conduct Department)	Ongoing