

# BAR STANDARDS BOARD

REGULATING BARRISTERS

## Proposed Amendments to powers to take interim action – BSB Response

### Introduction

1. Between 22 June 2023 and 2 August 2023, the BSB undertook a public consultation on proposed changes to widen the powers of the BSB and its Disciplinary Tribunals in order to protect the public and the public interest.
2. The consultation paper can be found [here](#). This report summarises the responses received, the BSB's response, and next steps.

### The Consultation

3. In performing its functions, the BSB has specific regulatory objectives to protect and promote the public and consumer interest, as well as promoting and maintaining adherence to the professional principles. A key function is therefore taking appropriate enforcement action where there has been a finding of a breach of the BSB Handbook, and where this could amount to professional misconduct, to pursue disciplinary action against barristers<sup>1</sup>.
4. As set out in the BSB consultation paper, as a result of a case before the Disciplinary Tribunal last year, we identified gaps in the powers of Disciplinary Tribunals. Specifically, in relation to powers to impose interim restrictions on a barrister's practice following a finding of professional misconduct but before sanction and in the BSB's ability to refer barristers to an independent panel for consideration of an interim suspension.
5. The current Interim Suspension and Disqualification Regulations allow the BSB to refer a barrister to an independent interim suspension panel on a number of bases. However, they do not include rules where it is necessary for the protection of the public or public interest. This was of a concern to the BSB. As the consultation noted, although it is rare, there will be circumstances where there is a risk to the public of a barrister continuing to practise due to alleged or confirmed misconduct. These can include, for instance, cases of sexual misconduct, discrimination, harassment, and dishonesty.
6. The BSB therefore proposed to address these gaps by introducing new powers to take interim action by:
  - a. Amending the Disciplinary Tribunals Regulations to introduce new powers for Disciplinary Tribunals to impose interim restrictions on a barrister's ability to practise following a finding of professional misconduct, but pending a decision on sanction, where it is in the public interest to do so.

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<sup>1</sup> By barristers, we refer to authorised persons and entities more broadly.

- b. Widening the BSB's existing powers to refer a barrister to an interim suspension panel, under the Interim Suspension and Disqualification Regulations, by replacing the current ground that such action is necessary to protect the interests of clients, with a wider ground that it is necessary to protect the public or the public interest.
7. The consultation asked two questions on our proposals, sought views and comments on how the proposed changes further the BSB's regulatory objectives, and the BSB's Equality Impact Assessment of the proposals. Additional comments on our proposals were also invited.
8. We received four responses to our consultation. Respondents included the Bar Council, Legal Services Consumer Panel (LSCP), and two barristers. Respondents answered all the questions on our proposals and provided some further comments and views to our additional questions around our regulatory objectives and the consultation stage Equality Impact Assessment.
9. All the respondents were supportive of our proposals to extend the Disciplinary Tribunal powers, and to amend the BSB's powers to refer a barrister to an interim suspension panel, to protect the public and the public interest. However, there was some variance of opinion on drafting proposals to the BSB's Handbook to give effect to our second proposal to give BSB new powers to refer a barrister to the interim suspension panel.
10. Following stakeholder feedback, the BSB has decided to proceed with its proposed changes, albeit with some minor changes to reflect stakeholder suggestions. The changes to the BSB Handbook will be made once the Legal Services Board has approved the proposals.

#### **Summary of responses: Proposed amendments to powers to take interim action**

#### **Question 1: Do you agree that a Disciplinary Tribunal should be able, in the public interest, to order a suspension of a barrister's practice, or impose conditions on their practice, following a finding of professional misconduct and pending a decision on sanction? Please give reasons for your answer.**

11. All the respondents agreed with the BSB's proposal and rationale for the proposed changes. Respondents agreed that there was a gap in the Disciplinary Tribunal's powers, and that it was important to protect the public – not just the barrister's client – where there could be potential harm.
12. The LSCP highlighted that as it may take time to consider and decide on a particular sanction, that does not mean others should not be protected during that timeframe.
13. Another respondent, a barrister, provided illustrations of when the public needs to be protected. These include cases such as parties against whom the barrister is acting in litigation, who are being exposed to inappropriate conduct by the barrister, or professional colleagues of the barrister. The barrister also noted that there may be a need to protect the public, even if the harm cannot be readily identified. Another barrister respondent agreed the proposals were a good idea.
14. The Bar Council agreed that these proposals were proportionate to protect the public, but were also needed in order to protect the reputation of the profession.
15. The LSCP provided further comments around transparency. They noted that consumers and the public should be able to find out when a finding of professional misconduct has been made, and where the circumstances warrant it, that interim action has been taken against the barrister in question.

## **BSB's response**

16. Following the positive response from stakeholders, and their agreement with the BSB's rationale for changes, the BSB has decided to proceed with the changes as set out in Annex A of the consultation document. The Disciplinary Tribunal Regulations will be amended to include the new rules E202A to E202F.
17. The BSB notes the LSCP's comments around the publication of information for consumers and the public when interim action has been taken. The BSB currently publishes this information on its website: <https://www.barstandardsboard.org.uk/for-the-public/search-a-barristers-record/interim-suspended-barristers.html>, providing a list of interim suspended barristers. Furthermore, all past disciplinary findings against practising barristers are also available to consumers and the public via an up to date register on the BSB's website: <https://www.barstandardsboard.org.uk/for-the-public/search-a-barristers-record/past-disciplinary-findings.html>.

### **Question 2: Do you agree that the BSB should be able to refer a barrister to an interim suspension panel because it is necessary for the protection of the public or in the public interest to do so? Please give reasons for your answer.**

18. Similarly, as with responses to question 1 above, all the respondents agreed with this proposal, although there was variance of opinion on how to achieve the changes.
19. A respondent, a barrister, noted that the rationale for the proposals in relation to amending the Disciplinary Tribunal's powers can also be applicable in cases before the finding of professional misconduct. Furthermore, the barrister was of the view that the BSB's current power to refer a barrister to an interim suspension panel where it is necessary to protect the interests of clients was too narrow, and that the gap should be addressed. The barrister also highlighted examples of risks to the public which would necessitate suspension, for instance, if a barrister has acted dishonestly, and there is a risk of continued dishonesty.
20. The Bar Council were also supportive of extending the criteria for referral, agreeing with the BSB's rationale for change.
21. The LSCP, whilst agreeing with the case for change, had divergent views on the drafting of the criterion in the Interim Suspension and Disqualification Regulations to effect the change. They were of the view that the existing criterion to protect the interest of clients (rE268.1.e) should be left unchanged, and instead, a new criterion added to protect the interest of the wider public as a reason for BSB intervention. The reasoning for this position was that the client interest and wider public interest may not always align.
22. The LSCP also provided further views and comments on this proposal. It noted that it may have been helpful for the BSB's consultation to have included data on how often interim orders are confirmed after a final Disciplinary Tribunal decision has been made.
23. The LSCP also suggested that additional wording is considered to ensure this new power is used when serious harm may occur, and restrictions considered to mitigate any unintended consequences to existing clients in cases of interim suspension.

## **BSB's response**

24. As responses to our proposals have been positive, the BSB has decided to amend its Handbook to allow it to refer a barrister to an interim suspension panel where it is necessary for the protection of the public or it is in the public interest.
25. In the light of the consultation responses, we have, however, decided to retain rE268.1.e (for the protection of the interests of clients) of the Interim Suspension and Disqualification Regulations, and introduce a new criterion where a referral is necessary for the protection of the public or where it is in the public interest. This will create a separate basis to refer barristers to an interim suspension panel, whilst retaining the criterion relating to protecting the interests of clients. This reformulation does not alter the substance of the change we consulted on but is a helpful clarification.
26. We note the LSCP's comments regarding inserting additional wording into the rules so that referral is only made in serious misconduct cases. The existing regulations (E269) provide that a referral can only be made where there the relevant grounds of referral would warrant a charge of professional misconduct and referral to a Disciplinary Tribunal. The decision to impose an interim suspension or conditions is then made by an independent panel after a hearing. We consider these are sufficient safeguards to ensure that suspensions are only imposed in serious matters, and it is not necessary to introduce a new concept of "serious misconduct" as threshold for referral.

### **Question 3: Do you have any comment to make on our analysis of the regulatory objectives or wish to raise any potential equality impacts of these proposals?**

27. Several comments were made in relation to this question by the respondents.

#### *Potential equality impacts*

28. The Bar Council noted that the "Equality Impact Assessment (EIA) the BSB was able to identify, "that barristers aged 65+, barristers from minority ethnic backgrounds, and male barristers may be slightly more likely to be subject to these interim measures". As the BSB acknowledges, the data pool we used for the EIA was small. They noted that, however, this trend is one seen across different sectors. The Bar Council indicated that it is important for the BSB to closely monitor data and disparate outcomes of the proposed amendments, particularly given that interim suspension is a severe measure.
29. The LSCP noted that if barristers from ethnic minority backgrounds are more likely to be reported for discipline, then these proposals are likely to impact them at a higher rate. They suggested that the BSB should make it explicit what is being done to mitigate and minimise this risk. Furthermore, the LSCP highlighted consumers with protected characteristics should also be considered in the EIA to ensure they are protected by Disciplinary Tribunals.
30. The Bar Council suggested that the BSB should put in place training for its staff and tribunal members on the new measures and equality and diversity, to ensure that suspensions are applied appropriately and in a non-discriminatory way.

#### *Regulatory objectives*

31. As regards the regulatory objectives, the LSCP made several comments and observations. They highlighted that they would like to see analysis where each regulatory objective is addressed, rather than the BSB assuming measures that helps the public interest also supports other regulatory objectives.

32. The LSCP stressed that the distinctive objectives should be considered separately, including the consumer interest, access to justice, professional standards, in addition to the public interest. They also suggested there should be amendments to the BSB handbook to reflect this position.
33. A barrister respondent, whilst welcoming the proposals broadly, questioned how these proposals would protect the public interest more generally. They could see these new powers protecting court users encountering relevant persons in a professional setting, but not how it could protect their colleagues, for example because suspension would not stop someone from entering chambers.

### ***BSB's response***

34. We welcome the further comments provided by respondents.

#### *Potential equality impacts*

35. The BSB has updated its EIA to take account of the points raised by the respondents to this consultation. Key and relevant updates have been set out below.
36. We have analysed two new data sets as part of the updated EIA. The findings in relation to Race and Sex are consistent with the findings from the initial EIA, such that no new impact has been identified. In relation to Age, it appears that:
  - a. Barristers aged 45+ may be more likely to be subject to the new powers for the BSB to refer a barrister to interim suspension proceedings than barristers of other ages; and
  - b. In addition to barristers aged 65+ identified in the initial EIA, barristers aged 35-44 may also be more likely to be subject to the Disciplinary Tribunal's new powers to suspend a barrister between a finding of professional misconduct and sanction than other barristers of other ages.
37. However, we cannot draw reliable conclusions about the significance of the findings as the data pools are very small.
38. Once the new powers are in place, the BSB will monitor their use and impact to identify and mitigate against negative effects on barristers.
39. In response to the LSCP's comment that consumers with protected characteristics should also be considered in the EIA, we do not hold information about the protected characteristics of consumers who access barristers' services (i.e., lay clients) to enable us to conduct such an analysis. We do hold limited protected characteristic information about people who make reports to the BSB (when they choose to disclose this information to us). However, these people are not always consumers who access barristers' services (e.g., the reporter may be a solicitor or member of the public). Nonetheless, we have interrogated the internal data extracted for the initial EIA further and extracted new data sets to attempt to identify potential impacts on consumers, and particularly vulnerable<sup>2</sup> consumers.

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<sup>2</sup> As a general proposition, consumers could be considered "vulnerable" due to either their personal circumstances, or the situations they have found themselves in, or both.

40. Across the data sets, it appears that employed barristers are less likely to be the subject to the new powers for the BSB to refer a barrister to interim suspension proceedings than other barristers. There are no further observations we can make on the internal data due to the very small numbers making conclusions unreliable.
41. However, the limited data that we do hold has indicated that self-employed barristers who practise in the areas of family law, crime and immigration may have been more likely to be the subject of an interim suspension. We note that consumers accessing the services of self-employed barristers in those practice areas, who may often be vulnerable, and/or via the public access route (i.e., where there is no professional client) may be more likely to be adversely affected by their barrister being the subject of an interim suspension because, in those circumstances, the consumer would lose their legal representation at short notice. These consumers may therefore be negatively affected by the proposed BSB Handbook amendments.
42. The BSB also recognises that clients from practice areas that are not traditionally considered to have “vulnerable” clients may nonetheless become vulnerable (because of, for example, the BSB’s actions in interim suspending their barrister) and could also therefore be negatively affected by the BSB Handbook amendments.
43. To mitigate such potential negative impacts on consumers, the BSB already does and will continue to take appropriate Supervisory activities in relation to a barrister’s practice to ensure that consumers, and particularly vulnerable or public access consumers, are protected. The BSB’s Supervision Team currently has a process in place when a practising barrister is suspended, interim suspended, or disbarred. This includes contacting the barrister to:
  - a. get assurance that their cases are being managed appropriately (including requesting a list of their current cases);
  - b. confirm that their clients (both professional and direct access) have been informed of the interim suspension (and where appropriate, have been signposted to a relevant contact and/or supported to find an alternative barrister or solicitor) to ensure continuity of representation; and
  - c. confirm that any websites advertising the barrister’s legal services are changed to reflect the fact of their interim suspension.
44. If the barrister is practising within chambers or employed at a BSB entity, the BSB’s Supervision Team would also contact the barrister’s chambers or the BSB entity to confirm that they are aware of the interim suspension and are not allocating them any further work while they are suspended.
45. However, it is important to note that these consumers could also be positively affected because the BSB may take interim action to prevent the barrister from practising in circumstances where the client may also be at risk (particularly if they are already vulnerable).
46. In response to the Bar Council’s comment regarding the need for training:
  - a. BSB decision-makers (including members of the Independent Decision-Making Body) and Panel members who sit on Bar Tribunal and Adjudication Services Disciplinary Tribunals already periodically receive (and will continue to receive) training on equality, diversity, and inclusion issues.

- b. The BSB will ensure that all its decision-makers involved in the enforcement process (including members of the Independent Decision-Making Body) are appropriately trained on the new powers and BTAS will ensure that its Tribunal panel members are similarly trained.

#### *Regulatory objectives*

47. We note the LSCP's comments on the regulatory objectives. The BSB is committed to promoting the regulatory objectives – we are of the view that our proposals would help us achieve both the protection of consumers and the wider public. These have been considered individually, although we appreciate that further clarity and presentation on how respective objectives are impacted individually would be appropriate in future consultations.
48. We also note the comments on how these proposals would protect the public and the public interest. Whilst we appreciate that the BSB's enforcement action will not prevent all potential harm to the public from the conduct of a barrister, they seek to reduce their exposure to clients, colleagues, and others in a professional setting through suspension.

#### **Question 4: Do you wish to make any further comment on the proposals?**

49. There were a few further comments provided by respondents.
50. One respondent, a barrister, noted that the proposed changes should be implemented as a matter of urgency and that the BSB should be ready to carefully consider the use of interim suspension powers in appropriate cases. Another barrister was of the view that the proposals have no downside, but that the benefits are marginal as they noted that the powers would only protect other court users.
51. The LSCP reiterated their comments around the BSB considering its regulatory objectives separately, and how each party may be affected by taking interim actions before and after disciplinary proceedings. They also expressed their view that the BSB should consider how these changes affect consumers in relation to the Public Sector Equality Duty.
52. A further suggestion was made by the LSCP, namely that the BSB should consult other legal services regulatory bodies to gain an understanding of lessons learned in the use of interim measures.

#### ***BSB's response***

53. We welcome the additional comments and insights from stakeholders. The BSB aims to implement these changes as soon as possible once the Legal Services Board approves them, in recognition of the gap and potential harm to the public.
54. As part of our ongoing engagement with other legal services regulators, we will share insights and best practice to further our understanding of the use of interim measures for the protection of the public.
55. More broadly, the BSB will monitor the use of these new powers to keep track of the potential impacts on both barristers and consumers. Our monitoring of the impacts of these powers will include barristers and their clients.