

# BAR STANDARDS BOARD

REGULATING BARRISTERS

## 1. INTRODUCTION

- 1.1. This pack has been prepared for chambers or other authorised organisations wishing to apply to be on the Bar Standards Board's (BSB) Tribunal Representation Panel (TRP) and provides information about: the BSB; the representation we require; the criteria against we will select organisations to join the TRP; and the remuneration we are offering for the required services. We welcome applications from any organisations with the range of knowledge, experience and capability to act on behalf of the BSB in tribunal and other proceedings arising from our disciplinary work.
- 1.2. We have tried to cover all the information applicants will need to make an application but if you would like to speak to us about any aspect of the application process or our work, please contact Paul Pretty, the Head of Investigations and Enforcement at: [ppretty@barstandardsboard.org.uk](mailto:ppretty@barstandardsboard.org.uk).

## 2. BACKGROUND INFORMATION

### Bar Standards Board

- 2.1. The BSB is the approved regulator for barristers in England and Wales. The Legal Services Board, established by the Legal Services Act 2007, oversees the activities of the BSB. One of the main functions of the BSB is to investigate and take appropriate action relating to allegations<sup>1</sup> that barristers may have breached the BSB Handbook, including the Code of Conduct. The Legal and Enforcement Department<sup>2</sup> is responsible for regulatory investigations and, where necessary, bringing cases to disciplinary tribunal as well conducting any appeals that arise.
- 2.2. The BSB must comply with the regulatory objectives which derive from the Legal Services Act 2007. These can be summarised as follows:

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<sup>1</sup> "Allegation" is the term to describe what was known as "complaint" under formal investigation for a potential breach(es) of the BSB Handbook.

<sup>2</sup> The Legal and Enforcement Department is a the department that came into existence on 15 October 2019 – it replaced, in part, the Professional Conduct Department.

- protecting and promoting the public interest;
- supporting the constitutional principles of the rule of law;
- improving access to justice;
- protecting and promoting the interests of consumers;
- promoting competition in the provision of the services;
- encouraging an independent, strong, diverse and effective legal profession;
- increasing public understanding of the citizen's legal rights and duties; and
- promoting and maintaining adherence to the following professional principles:
  - that authorised persons act with independence and integrity;
  - that authorised persons maintain proper standards of work;
  - that authorised persons act in the best interests of their clients;
  - that authorised persons comply with their duty to the court to act with independence in the interests of justice; and that the affairs of clients are kept confidential.

2.3. The objectives of the enforcement disciplinary system are to:

- a. promote adherence to the regulatory objectives as set out in section 1 of the Legal Services Act 2007 and to the BSB's regulatory arrangements as set out in our Handbook;
- b. provide a credible deterrence to non-compliance with our regulatory arrangements;
- c. prevent further breaches; and
- d. prevent those who represent a serious risk to the public from practising or working with people or entities regulated by the BSB.

2.4. Until January 2020, the BSB operated a pro bono Prosecution Panel to provide us with representation at Disciplinary Tribunals, appeals and other hearings. This panel provided us with expert and high-quality representation for many years. However, the pro bono model was no longer considered appropriate in the modern era and is not the best way to ensure that the BSB has ready access to suitable counsel for all our cases. The BSB Board decided that, as from January 2020, we would commence remunerating those who represent us.

Following a first application process in 2019, a single chambers, 11 Kings Bench Walk, was identified and appointed to the Tribunal Representation Panel. At that time, it was considered that one chambers could meet the anticipated volume of work. However, a review of the work in the first year has identified that there is a need for one or more additional organisations

to ensure that there is sufficient provision at all levels of experience that the BSB require.

- 2.5. We are therefore inviting chambers or other authorised organisations to apply to be added to our Tribunal Representation Panel, who can work in partnership with the BSB to ensure that the quality of the Bar's disciplinary proceedings remains high.

## **The Regulatory Framework**

- 2.6. The BSB Handbook sets out the regulatory framework for those the BSB regulates and includes the Code of Conduct, Practising Regulations, Authorisation Regulations and essential guidance. The Equality and Diversity Rules and Guidance are published separately but the principles run through all the BSB's work.
- 2.7. The regulations covering the investigation of allegations of breaches of the Handbook, as well as the disciplinary tribunal process, are set out in Part 5 of the Handbook. The regulations applicable to the investigation of allegations are contained in Part 5 Section A, titled The Enforcement Decision Regulations 2019(EDR's). The regulations in relation to Disciplinary Tribunals can be found in Part 5: Section B of the BSB Handbook. These Regulations are titled The Disciplinary Tribunal Regulations 2017 (DTR's).
- 2.8. Disciplinary Tribunals are managed and administered independently, under a services agreement with the BSB, by the Bar Tribunal and Adjudication Service<sup>3</sup> (BTAS). BTAS recruits the pool of panel members eligible to sit on Disciplinary Tribunal and other panels. BTAS, via the President of the Council of the Inns of Court (COIC), is also responsible for nominating the individual members of panels to hear cases. The BSB has no involvement in these decisions.

## **The Disciplinary Tribunal Process**

- 2.9. The paragraphs below provide an overview of the BSB's disciplinary process and counsel's involvement in it.
- 2.10. **Investigation and referral:** where the BSB determines that a report<sup>4</sup> discloses a potential breach of the BSB Handbook by someone we

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<sup>3</sup> <https://www.tbtas.org.uk/>

<sup>4</sup> "Report" is the term that applies to all information received by the BSB. In the enforcement context, it covers information that may indicate that a breach of the BSB Handbook has occurred.

regulate it will be investigated as an allegation. Following the completion of the investigation a decision is taken as to the appropriate action, if any, that the BSB should take. The decision may be to take no action and “dismiss” the allegation. Another available outcome is to impose administrative sanctions, which are non-disciplinary. Where the investigation indicates that the breach is serious and, if proved, amounts to professional misconduct, we will refer the case to disciplinary action. This will happen in those cases where 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.

- 2.11. Decisions on whether to refer an allegation to disciplinary action can be taken by the executive staff in certain circumstances but will more usually be taken by a five-person panel of the Independent Decision-Making Body (IDB).<sup>5</sup>
- 2.12. **Standard of proof:** the standard of proof for findings of professional misconduct is the civil standard for conduct occurring on or after 1 April 2019, and the criminal standard for conduct arising before 1 April 2019. As there will be a relatively long transition period to get to the stage where the civil standard applies in all cases, the issue of which standard of proof will apply in relation to individual allegations/cases will remain a live one for some time to come.
- 2.13. **Instructing counsel:** after an allegation is referred to a Disciplinary Tribunal, counsel from the TRP will be instructed. The BSB will expect counsel to finalise the disciplinary charges to allow them to be served and the proposed bundle of evidence, within 10 weeks of the referral, as required under the regulations. Counsel will also be expected to provide initial advice on evidence, directions and any issues on the merits of the case. Further advice may be needed during the course of the preparation for the Tribunal hearing. The preparation process will also usually involve drafting skeleton arguments, opening notes or other submissions as directed by the Tribunal. The Officer in the BSB responsible for the case will provide assistance in drafting such documents. Most Officers are legally qualified and hold practising certificates either as solicitors or barristers.
- 2.14. **Directions:** directions for submission of evidence and the timetable for the hearing are usually agreed on paper. However, counsel may also need to represent the BSB at contested directions hearings or other

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<sup>5</sup> The Independent Decision-Making Body replaced the Professional Conduct Committee on 15 October 2019. The IDB is pool of appointed barristers and lay persons from which panels will be nominated to consider allegations that may require referral to disciplinary action.

hearings, such as applications to strike out charges. If this is the case, a separate brief and refresher fee will be paid for the hearing.

- 2.15. **Disciplinary Tribunal hearings:** Disciplinary Tribunal hearings are not normally lengthy and substantive hearings usually last one day. Where there is challenged live evidence they can take longer, but it is unusual for Tribunal hearings to take longer than two days. Hearings take place at the BTAS Tribunal suite in central London, albeit that there have been remote hearings since the restrictions imposed by the coronavirus pandemic.
- 2.16. If charges are found proved, the respondent has a right of appeal to the High Court on the finding and/or sanction. Barristers who have been disbarred also have a right of appeal from the High Court to the Court of Appeal. Usually the BSB will seek to retain the same counsel to conduct any appeal. It is less common, but also possible that new counsel will be asked to advise on and conduct an appeal.
- 2.17. From time to time we may also seek advice earlier in our processes before a decision to refer to disciplinary action is made. This is likely to be in cases where the investigation, or indeed the initial assessment, is complex and we need to establish how best to approach the case to support any potential later disciplinary action.
- 2.18. Outside the Disciplinary Tribunal process, there are also other types of hearings where the BSB may require representation. This might be in relation to:
  - Interim Suspension Hearings;
  - Fitness to Practise Hearings (relating to the health of a barrister); and/or
  - Appeals against the imposition of administrative sanctions.

### **3. LEVEL OF WORK ANTICIPATED**

- 3.1. It is difficult to predict the level of representation services the BSB will require each year as it fluctuates and the BSB cannot guarantee any level of work. It should also be noted that the work will be split between the successful applicant organisation and 11 KBW. The figures given are an indication of the overall number of hearings per year. Recent statistics show that there has been an average of 39 hearings per year in the last three years at an average length of 1.3 days per case. However, the number of tribunal cases is rising as are their complexity. It is anticipated

that the number of hearings in 2021/22 will be greater and is likely to exceed 40.

- 3.2. In recent years, High Court appeals have stood at around six to seven a year and these hearings normally last a day. In terms of other types of hearings, such as interim suspensions and fitness to practise hearings, these are not common and there are usually only an average total of four cases of these types per year.
- 3.3. There are also, rarely, associated public law challenges to cases, where counsel instructed in a case, or other appropriate counsel, may be required to represent or advise us.
- 3.4. The seniority of counsel required to represent us will depend not only on the complexity of the allegations, but also the seniority of the respondent and whether the issues in the case have wider implications for the regulation of the Bar and/or have attracted media attention. A review of the current system has indicated a need for a wider pool of representatives, particularly those below 10 years call with experience of professional regulation.

#### **4. SCOPE OF WORK REQUIRED**

- 4.1. In summary, the scope of the representation services the BSB will require of TRP appointed organisations is:
  - a. Advice on the preparation of Disciplinary Tribunal cases. This includes the initial advice on charges and evidence at the beginning of the disciplinary process, advising on and appearing in interlocutory matters or applications as well as representation at any substantive hearings including appeals arising and hearings before other Panels as needed; and
  - b. Advice and representation for other types of cases as needed.

#### **5. FEES**

- 5.1. As a public interest regulator, funded in the main by the practising fees of paid by individual members of the Bar, the BSB must ensure good stewardship of its finances. The BSB has therefore set a fee structure for remuneration of those who provide us with representation services in line with that of other public bodies and some professional regulators. The fee

structure is attached at Annex 1 and is based on a model of a fee for the initial advice upon referral and brief and refresher fees to cover hearings. Where cases fall outside the norm of that described above, individual fees may be agreed but will be in line with the fees set out in Annex 1.

## **6. CRITERIA FOR ASSESSING APPLICATIONS**

6.1. The criteria against which applications will be assessed are set out below.

6.2. The successful applicant should be able to demonstrate:

- i. a clear understanding of the legal regulatory environment;
- ii. a strong track record in providing representation services to professional regulators;
- iii. that it can provide a range of suitably experienced counsel at different levels of seniority from lower junior level through to QC level;
- iv. previous experience of providing legal advice and representation in relation to large and legally/ factually complex cases;
- v. experience in public law and how it impacts on professional disciplinary processes;
- vi. The ability to manage the volume of BSB's requests for representation as well as returns and urgent matters;
- vii. That appropriate and effective safeguards are in place to deal with conflicts of interest;
- viii. compliance with obligations as a Data Controller under the General Data Protection Regulations (GDPR);
- ix. a commitment to equality and access to justice; and
- x. the ability to ensure that those carrying out work for the BSB, will attend induction and other regular training provided by the BSB to ensure they remain up to date with our practice and procedure.

6.3. Applications should also set out the following:

- the qualifications and experience of each of the barristers who it is proposed will undertake work for the BSB; and
- information on the diversity make-up of chambers or authorised organisation; and
- the systems in place for promoting and ensuring fair allocation of work.

## **7. APPLICATION GUIDELINES**

7.1. The guidelines for submitting an application are set out below. You are free to set out your written application in any order that works for you, but the application should conform with the following requirements. It

should specifically address the criteria set in section 6 above and be sent electronically to (in the current circumstances there is no requirement that any application be sent in hard copy but hard copy applications will be accepted):

Paul Pretty  
Head of Investigations and Enforcement,  
Bar Standards Board  
[PPretty@BarStandardsBoard.org.uk](mailto:PPretty@BarStandardsBoard.org.uk)  
289-293 High Holborn, WC1V 7HZ

### **Previous Applicants**

- 7.2. The BSB recognises that there may be organisations who were unsuccessful in last recruitment who may wish to apply again. We would be happy to consider reapplications and it will be acceptable to submit an updated version of your previous application. Please note that any reapplications should address the additional criterion in relation to fair allocation of work.

## **8. TIMETABLE FOR APPLICATIONS**

- 8.1. **Application period opens:** Monday 12 April 2021.
- 8.2. **Deadline for submission of applications:** Friday 7 May 2021 at 5.00pm.
- 8.3. **Selection of applicants for interview:** each of the written applications will be considered and those that best meet the criteria will be shortlisted for interview. Organisations will be notified if they have been shortlisted by 2 June 2021.
- 8.4. **Date of interviews:** interviews will take place in the week commencing 14 June 2021 and applicants should ensure they have suitable representatives available to attend on that day. We intend interviews to take around an hour.
- 8.5. **Commencement date for provision of services:** the BSB will require the successful applicants to be able to provide the relevant services from 1 August 2021.
- 8.6. **Duration of provision of services:** once appointed, the BSB anticipates using the successful organisations to provide us with



services for an initial period of three years, with the option to extend this by mutual agreement for a further two years to five years.

- 8.7. **Induction training:** it is essential that relevant counsel from the successful organisations are trained on the BSB processes and procedures prior to the commencement of the provision of services. The successful applicants will therefore be expected to facilitate training and ensure maximum attendance on a date between 12 and 16 July 2021.

## Annex 1



REGULATING BARRISTERS

### Tribunal Representation Panel fees schedule

1. The BSB will remunerate members of the Tribunal Representation Panel on the basis of a banded system of brief and refresher fees.
2. The bandings, which reflect the seniority of the counsel instructed, are as follows:

Band A – 2-5 years' post-qualifying experience (PQE) <sup>6</sup>	Initial instruction fee of £300, brief fee of £1,000 and refresher fee of £500 per day after the first day of the final hearing
Band B – 5-10 PQE	Initial instruction fee of £475, brief fee of £1,750 and refresher fees of £750 per day after the first day of the final hearing
Band C – 10 PQE+	Initial instruction fee of £600, brief fee of £2,000 and refresher fees of £1,000 per day after the first day of the final hearing

3. The “Initial Instruction Fee” for each band is paid per case and covers the initial review of the papers and advice on the case. This takes place when a case is first referred to a Disciplinary Tribunal, requiring advice on charges, evidence and other relevant issues.
4. The “brief fee” is paid per case and includes all preparatory work and attendance at the first day of the hearing. While the BSB has set a minimum level of experience of two years PQE, there may be occasional cases where it would be appropriate to accept a lower level of experience. In such cases, we will look at agreeing alternate rates.
5. Where counsel is required to attend an oral preliminary hearing, this will be paid at the same rate as a “refresher” day.

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<sup>6</sup> PQE is taken from the date of completion of pupillage.

6. Occasionally, the BSB will require advice outside of the normal disciplinary process (for example in relation to investigations). This will be paid at the hourly rate of £70, £110 and £140 for each respective band.
  
7. Chambers outside London who apply to be considered should be aware that we will not pay travel expenses for counsel to attend disciplinary hearings in London. Successful chambers will be expected to absorb this cost. However, we will pay any other travel expenses, such as attendance at appeals in other parts of the country.

**12 April 2021**