



# The Bar Tribunals & Adjudication Service

The Council of the Inns of Court

## Fitness to Practise Hearings

### *Guidance for Disciplinary Pool Members & Clerks (Revised November 2019)*

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#### The Bar Tribunals & Adjudication Service

9 Gray's Inn Square,  
London  
WC1R 5JD  
T: 020 3432 7350  
E: [info@tbts.org.uk](mailto:info@tbts.org.uk)

The Council of the Inns of Court. Limited by Guarantee  
Company Number: 8804708  
Charity Number: 1155640  
Registered Office:  
9 Gray's Inn Square, London WC1R 5JD

## Introduction

1. The purpose of this guidance is to provide an overview of the procedures for determining whether an Individual's<sup>1</sup> fitness to practise is impaired by reason of his or her health, and to provide guidance on the application of the Fitness to Practise Regulations which are included in Part 5: Section E of the Bar Standards Board (BSB) Handbook 2014 ( Fourth Edition updated September 2019). The guidance has been prepared in liaison with the Council of the Inns of Court (COIC) and is issued jointly by the BSB and COIC.
2. This guidance is primarily for members of the BSB's IDMB Independent Decision Making Body [IDMB], Legal and Enforcement Department, and the COIC Fitness to Practise Panels and Appeal Panels ("Panels") administered by Bar Tribunal and Adjudication Service (BTAS). However, it will also be of assistance to the Individual and his or her representatives, complainants and members of the public.
3. This guidance is not exhaustive and will be reviewed in the light of experience and any relevant case law.

## Public Protection and Proportionality

4. Fitness to Practise and Appeal Panels are responsible for determining whether or not an Individual is unfit to practise, and, if so, what restrictions should be imposed on his or her right to practise. The Fitness to Practise Regulations should be read in conjunction with the BSB Handbook of the Bar of England and Wales, in particular the Complaints Regulations and the Disciplinary Tribunal Regulations.
5. In every case, a Panel must consider all the available evidence and must act to protect the public. Protection of the public, which is key, will require consideration of whether the Individual puts clients, or any other member of the public, at physical risk, or whether his or her judgment is impaired to such an extent that he or she is unable to adequately protect the client's interests.
6. Action may also be required in the public interest or in the interests of the Individual, where he or she puts himself or herself at risk, either professionally or personally, for example as a result of a lack of insight into his or her condition or capabilities.
7. Panels must at all times have regard to the requirements of natural justice and the principles of proportionality, and must deal with cases before them fairly, justly and efficiently. This involves:
  - (a) dealing with a case in ways which are proportionate to the complexity of the issues and the resources of the parties;

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<sup>1</sup> Please note: "Individual", for the purpose of these Regulations, means any *BSB authorised individual*, as defined under Part 6 of the *Handbook*.

- (b) seeking flexibility in proceedings wherever possible;
- (c) ensuring that all parties have been given an opportunity to participate fully in the proceedings;
- (d) using the Panel members' knowledge and experience effectively; and,
- (e) avoiding delay, as far as possible.

## The Equality Duty and Duty to Make Reasonable Adjustments

8. Panels need to be aware of their obligations under equality legislation. The following characteristics are protected under the Equality Act 2010:
  - Age
  - Disability
  - Gender re-assignment
  - Pregnancy and maternity
  - Race
  - Religion or belief
  - Sex
  - Sexual orientation
  - Marriage and civil partnership
9. Issues relating to the protected characteristics of age, disability and pregnancy and maternity are more likely than other protected characteristics to arise in fitness to practise proceedings (for the purposes of the Equality Act, the protected period for pregnancy and maternity is the period of pregnancy and six months after the baby is born).
10. A person is disabled if they have a physical or mental impairment, and that impairment has a substantial and long-term adverse effect on his or her ability to carry out normal day-to-day activities (Equality Act 2010, section 6).
11. Panels must, in the exercise of their functions as defined under section 149 of the Equality Act 2010:

- (a) have due regard to eliminate unlawful discrimination, harassment and victimisation and other conduct prohibited by the Act;
  - (b) seek to advance equality of opportunity between people who share a protected characteristic and those who do not; and,
  - (c) foster good relations between people who share a protected characteristic and those who do not.
12. Panels also have an obligation under the Equality Act 2010 to make reasonable adjustments for disabled persons. The duty to make reasonable adjustments is anticipatory and is defined under the Equality Act s.20 as the duty to take reasonable steps to avoid substantial disadvantage to disabled people in relation to:
- Provisions, criteria or practices;
  - Physical features e.g. premises where tribunals are held;
  - Provision of auxiliary aids e.g. induction loops.
13. Where an Individual coming before a Panel has a disability, the Panel must consider whether the Individual is fit to practise, on the assumption that reasonable adjustments will be made. This is because Individuals' chambers and courts (except in relation to the exercise of their judicial function) have a duty to make reasonable adjustments to meet the requirements of disabled Individuals.
14. It should be borne in mind that even where reasonable adjustments have been made, an impairment may affect the ability of an Individual to undertake certain aspects of a role. However, the focus must be on his/her fitness to practise. For example, if an Individual 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.

## Initial Consideration and Referral of Cases to a Fitness to Practise Panel

15. A case does not need to be referred to a Fitness to Practise Panel merely because an Individual is unwell, even if the illness is serious. However, an Individual's fitness to practise is brought into question if it appears that he/she has an incapacity due to a medical condition (including an addiction to drugs or alcohol), and as a result, the Individual's fitness to practise is impaired to such an extent that restrictions on practise are necessary (refer to Paragraph 39 below for further discussion of the meaning of "unfit to practise"). For example, an Individual who has an incapacity but does not appear to be following appropriate medical advice about

modifying his or her practice as necessary in order to minimise risk to the public may be “unfit to practise”.

16. Information raising a question regarding an Individual’s fitness to practise may be received from a variety of sources, for example, from a judge, other barristers, through another complaint, as a result of a self-referral from the Individual or from the findings of the Disciplinary Tribunal. The fitness to practise issues may also come to the IDMB’s attention where it is considering a complaint of professional conduct.
17. The IDMB must refer a case to a Fitness to Practise Panel if it considers that an Individual may be unfit to practise. The IDMB may also refer a matter to a Fitness to Practise Panel where another Disciplinary Panel or Tribunal considering the matter considers an Individual may be unfit to practise, or where an Individual requests that the matter be referred (*rE306*).
18. The complaint or information must raise genuine concerns as to the Individual’s fitness to practise for the IDMB to refer it to the Fitness to Practise Panel. It must not be frivolous, vexatious, or without merit.
19. No decision to refer shall be taken unless the Individual has had a reasonable opportunity to comment upon the matter (*see rE307*). In practice, unless the Individual has already had an opportunity to comment on the information, upon receipt of any written information or complaint, the Chair of the IDMB shall notify the Individual of that information and invite him or her to submit written representations to the IDMB, normally within 14 days. This period will vary depending on the nature of the case, the level of risk to the public, or the need to make reasonable adjustment (which may involve allowing the Individual more time to respond). Any such representations made by the Individual will be taken into consideration by the IDMB when deciding whether to refer the matter to a Fitness to Practise Panel. The IDMB has a duty to act quickly to protect members of the public and the wider public interest and it is important for cases presenting the most risk to be referred to a Preliminary Hearing in short order after information suggesting that interim restrictions on an Individual’s practice are required. It will therefore not always be possible to gather all the evidence that might potentially be available before referring the matter to a Preliminary Hearing, particularly in the most serious cases.
20. In addition, in reaching a decision regarding referral, the IDMB should have regard to:
  - (a) the standard of proof which will apply before the Panel when considering facts in dispute (i.e. the civil standard of proof);
  - (b) the weight of the evidence (and any finding of fact); and,
  - (c) the Bar Standard Board’s duty to act in the public interest, which includes the protection of the public and maintaining public confidence in the profession.

21. If in doubt, the IDMB should lean in favour of allowing the case to proceed to a Fitness to Practise Panel and should be slower to halt a case concerning an Individual who continues to practise than one who does not.

## Preliminary Hearing of a Fitness to Practise Panel

22. Once a matter is referred to a Fitness to Practise Panel, a preliminary hearing will be held.
23. At the preliminary hearing the Fitness to Practise Panel will consider:
- (a) whether to give directions for a full hearing of the Panel (see Paragraphs 24 to 29 below);
  - (b) whether the Individual should be suspended or prohibited from accepting or carrying out any public access instructions pending the conclusion of the matter; and,
  - (c) any undertakings as to the Individual's conduct or behaviour pending the conclusion of the full hearing.

### Directions for the Full Hearing

24. At a preliminary hearing the Fitness to Practise Panel may direct that the Individual undergo an examination by a Medical Examiner nominated by the Panel (*rE310.1*). On nominating the Examiner, the Panel will take into account the available information about the Individual's condition and have regard to any reasonable objections to the nominated Medical Examiner raised by the Individual.
25. The examination will involve an assessment of the Individual's physical and/or mental condition by a Medical Examiner who is a registered medical practitioner appointed by the Panel. The Medical Examiner will then prepare a report which shall be disclosed to the Panel and the Individual in accordance with *rE311.2*.
26. The Individual may also be asked to authorise disclosure of his or her relevant medical records to such Medical Examiner for the purpose of the examination and producing the report. Such disclosure will only be required to the extent that is reasonably necessary to enable the Medical Examiner to perform the examination to the appropriate standard and to report to the Fitness to Practise Panel on any relevant matters.
27. While the Fitness to Practise Panel cannot compel an Individual to submit to an examination or agree to disclosure of his or her medical records, it shall be entitled to take any refusal to supply relevant medical records into consideration when deciding if the Individual is unfit to practise.

28. The Fitness to Practise Panel may also direct the IDMB to carry out such other investigations as the Panel considers appropriate to the matters for consideration at the full hearing. The nature of any further investigations required will depend on the circumstances of the case but may include obtaining documentary evidence and taking statements from witnesses.

### **Interim Restrictions**

29. When considering whether to direct an interim suspension or disqualification, the Panel should bear in mind that its primary duty is to protect members of the public and the wider public interest, and not to assume responsibility for, or give priority to, the treatment or rehabilitation of the Individual.
30. If the Panel is satisfied that:
- (a) in all the circumstances, there may be impairment of an Individual's fitness to practise which poses a real risk to members of the public (as discussed at Paragraph 5), or is otherwise in the public interest or the interests of the Individual; and,
  - (b) after balancing this against the impact on the Individual, the Panel considers that an interim order is a proportionate response;
- the appropriate order should be made.
31. In reaching a decision whether to direct an interim order, the Panel should consider the following issues:
- (a) The seriousness of the risk to members of the public if the Individual continues to practise pending conclusion of the full hearing. In assessing this risk, the Panel should consider the seriousness of the allegations, and the weight of the information, including information about the likelihood of a further incident(s) occurring during the relevant period. For this purpose, the Panel should pay no regard to the complexity of the legal work generally undertaken by the Individual;
  - (b) Whether public confidence in the profession is likely to be seriously damaged if the Individual continues to practise during the relevant period;
  - (c) Whether it is in the Individual's interests to practise unrestricted. For example, the Individual may clearly lack insight as to the impact of his or her health condition or ability to practise;
  - (d) Whether the public can be sufficiently protected by accepting any undertakings as to their practise, and the Individual's willingness to make such undertakings (discussed below).
32. The period of any interim suspension or disqualification must be specified. Except in exceptional circumstances, the period shall not exceed 3 months (*rE314*). In considering the period for which an interim suspension or disqualification should be imposed, the Panel

should bear in mind the time that is likely to be needed before the matter is resolved (for example, the time needed to complete any investigation into allegations regarding the Individual's fitness to practise, including obtaining assessments of the Individual's health and for the case to be listed for a full hearing of the Fitness to Practise Panel).

33. For a period of interim suspension or disqualification to exceed 3 months, there must be "exceptional circumstances". To be "exceptional", the circumstances must be out of the ordinary course, unusual, special, or uncommon. To be exceptional a circumstance need not be unique or unprecedented or even very rare, but it cannot be one that is regularly, routinely, or normally encountered (Lord Bingham CJ in *R v Kelly (Edward)* [2000] QB 198 at page 208). The Panel will need to decide what is exceptional on a case by case basis. When the Panel decides to direct an interim restriction, it must give reasons for that decision, including reasons for the period of time for which it is directed, particularly where the period exceeds 3 months. The reasons do not need to be long or detailed but must be clear and explain how the decisions were reached, including identifying the reasons for which the order is considered necessary.

### Reviewing Interim Restrictions

34. The Panel, Chair of the IDMB, the IDMB (or PCD, acting under authority from the IDMB), or the Individual may direct that a review of the interim restriction is held, before the period expires (*rE316.1*).
35. The Individual may also request a review in the event of a significant change in circumstances or other good reason (see Paragraph 70 below in relation to the meaning of "significant change in circumstances"). A review shall be by way of rehearing of the case by the Fitness to Practise Panel in accordance with *rE325*.
36. When reviewing an interim order or undertakings, the Panel must fully consider all the circumstances relating to the case, including any new information and may exercise any of the powers of the Fitness to Practise Panel under *rE326* confirm, extend, vary or replace the previous direction. In doing so, the Panel should apply the same test and take account of the same factors as set out in Paragraph 31 above.

### Full Hearing of the Fitness to Practise Panel

37. At the end of the investigation period, once any relevant medical reports have been received, the Chair of the Panel will prepare a summary of the case. Once this has been prepared, the Individual shall be notified of the arrangements for a full hearing of the Fitness to Practise Panel (*rE318*).
38. At the conclusion of a full hearing of the Fitness to Practise Panel it shall determine whether the Individual is unfit to practise, and if so, what restrictions to impose.



## Determining Whether the Individual is Unfit to Practise

39. Under Definition 199 of Part 6 of the BSB Handbook, an Individual is 'unfit to practise' where he or she:
  - (a) is incapacitated due to his or her physical or mental condition (including any addiction); and as a result,
  - (b) the Individual's fitness to practise is impaired; and,
  - (c) 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.
40. "Incapacity" means that the Individual is unable to function or incapable of functioning as normal. The incapacity must have a material effect on his or her ability to function on a day-to-day basis. The incapacity must impair the Individual's fitness to practise, in that, his or her ability to practise must be damaged or harmed by reason of his or her incapacity. Finally, it must be necessary to restrict the Individual's ability to practise either in the public interest or in the Individual's own interests.
41. The Panel must first determine whether any facts in dispute are proved and shall apply the civil standard of proof. This is the balance of probabilities; in other words, the Panel must be satisfied that it is more likely than not that an event occurred. It is then for the Panel to decide, exercising its judgment, whether, on the basis of the facts proved, the Individual is unfit to practise.
42. The following evidence may be taken into account when considering if an Individual is unfit to practise:
  - (a) any evidence of actual self-harm or a risk of self-harm;
  - (b) any evidence of actual harm, or a risk of harm to clients, colleagues or to the public;
  - (c) the Individual's current physical or mental condition;
  - (d) whether the Individual's condition is episodic, recurrent, or in remission, if it is likely to recur, and whether it is capable of causing impairment if it recurs;
  - (e) whether the Individual's condition has been sustained over a long period;
  - (f) whether there has been a failure by the Individual to seek relevant help, treatment or support for the condition;
  - (g) whether there has been a failure by the Individual to comply with reasonable undertakings which were intended to assist him or her to work effectively within the constraints of his or her condition;

- (h) whether there has been a failure by the Individual to comply with a drug regime, treatment regime or medical supervision relating to the condition;
  - (i) whether there has been a failure by the Individual to comply with instructions from a health professional about relevant testing, investigations and medical assessment relating to the condition;
  - (j) whether circumstances have prevented the Individual from seeking treatment, or the receipt of treatment is not relevant or available;
  - (k) the Individual's insight in relation to the condition and the impact on his or her ability to practise;
  - (l) any previous findings that the Individual was unfit to practise or otherwise impaired by reason of his or her health by any other regulatory body. However, in such cases the Panel should bear in mind that the findings may have been made at a time when equality legislation such as the Equality Act 2010 or Disability Discrimination Act 2010 did not exist; or,
  - (m) any refusal to comply with reasonable requests in relation to a medical examination or the disclosure of relevant medical records.
43. If the Individual's fitness to practise is not impaired by any incapacity, or if restricting practise is not necessary for the protection of the public or in the Individual's own interests, the Panel must conclude that an Individual is *not* unfit to practise, and no action needs to be taken.
44. The Panel must give reasons for its determination as to whether the Individual is unfit to practise. Where facts are disputed, the Panel must also give reasons as to why an Individual's evidence was not preferred. Such reasons need not be detailed and need only refer to, for example, the Individual's demeanour, attitude or approach to specific questions (*Southall v General Medical Council* [2009] EWHC 1155). However, the demeanour of an Individual may be directly related to a disability or impairment and Panels should ensure they take this into account when assessing the evidence.

## Restrictions

45. If the Fitness to Practise Panel is satisfied that the Individual is unfit to practise, the Panel will then consider what directions to make in relation to the Individual's practice. The directions available to the Panel are set out at *rE320*.
46. In deciding what restriction to impose, the Panel should weigh the interests of the public against the interests of the Individual, and should have regard to any mitigating factors, which may include, but are not limited to:

- (a) evidence of the Individual's insight and understanding of his or her condition, and his or her attempts to address it, which may include seeking and undergoing relevant treatment for his or her condition (where relevant and available), and expressions of regret and apology;
  - (b) evidence of the Individual's overall adherence to important principles of good practice. Mitigation could relate to the circumstances leading up to the incidents as well as the character and previous medical history of the Individual; and/or,
  - (c) matters of personal and professional mitigation, such as testimonials, or evidence of personal hardship and work-related stress. However, features such as these should be considered and balanced carefully against the central aim of restrictions, that being the protection of the public and the maintenance of standards and public confidence in the profession.
47. When assessing whether an Individual has insight, the Panel will need to take into account whether he or she has demonstrated insight consistently throughout the hearing, eg the Individual has not given any untruthful evidence to the Panel or falsified documents. But the Panel should be aware that there may be differences in the way that insight is expressed, for example, whether or how an apology or expression of regret is framed and delivered and the process of communication, and that this may be affected by the Individual's circumstances, for example, his or her ill health.
48. The Panel should also have regard to any aggravating factors, such as any previous findings and restrictions imposed by a Fitness to Practise Panel at a full hearing or by any other regulator. The Panel must not, however, give undue weight to any decision to impose an interim suspension or disqualification pending full hearing, as the Panel, when considering whether to direct an interim restriction at a preliminary hearing applies a lower test. That decision will also have been reached without making a finding on the facts or on the Individual's fitness to practise.
49. Whatever restriction is directed, the Panel must explain its reasons for doing so. This will help show that all relevant issues have been addressed and why a particular course of action has been taken. The explanation should include:
- (a) the factual basis of the decision;
  - (b) the legal power or authority being relied upon; and,
  - (c) conclusions on the main submissions made by the parties or representatives.
50. Reasons must be given in sufficient detail so that interested parties may understand why a determination has been made and should include reference to the mitigating and aggravating factors that influenced its decision. The determination should include an explanation as to why a particular period of restriction was considered necessary, and, in the interest of proportionality, must also demonstrate that the less serious conditions and

restrictions were considered, and the reasons as to why the Panel did not consider they were appropriate.

### Conditions on Practise

51. The Fitness to Practise Panel may make the Individual's right to continue to practise (or right to resume practise after any period of suspension or disqualification) subject to such conditions as it thinks fit. The purpose of conditions is to enable the Individual to deal with his or her health issues while continuing to practise in a way that protects the public.
52. Before imposing conditions, the Panel should satisfy itself that:
  - (a) the Individual's medical condition can be appropriately managed through conditions;
  - (b) the Individual has genuine insight into his or her health problem(s);
  - (c) the Individual will abide by conditions relating to his or her medical condition(s), treatment and supervision, and that circumstances do not prevent the Individual from doing so;
  - (d) the public will be protected and will not be put at risk either directly or indirectly; and,
  - (e) it is possible to formulate appropriate and practical conditions to impose on registration.
53. Where conditions are imposed, they should be:
  - (a) clear, so that an Individual knows what is expected of him or her, and a Panel at any future review hearing is able to ascertain the original concerns and the exact proposals for their correction;
  - (b) relevant;
  - (c) addressed to the Individual (not to third parties);
  - (d) necessary in order to protect the public or in the interests of the Individual;
  - (e) proportionate to the impairment;
  - (f) formulated so that the conditions are not in effect a suspension; and,
  - (g) written in such a way that compliance can be easily verified, for example by providing for reports prepared by treating medical practitioners to be provided to the IDMB or a Panel considering the matter on review (see below).
54. It is open to a Panel to impose conditions as it sees fit in the circumstances of any particular case, whilst taking account of the general principles outlined above. However, appropriate

conditions may include conditions relating to relevant medical treatment, as well as conditions relating to an Individual's day-to-day practise. For example, appropriate conditions may include:

- (a) A requirement to place him or herself under the care of a medical practitioner/health care practitioner specialising in the Individual's condition, attend upon them as required and follow their advice as to treatment of his or her condition;
  - (b) Allowing the IDMB to exchange information with the medical practitioner/health care practitioner responsible for the Individual's care about his or her health and any relevant treatment he or she is receiving, such information to be disclosed to the Fitness to Practise Panel when reviewing the case;
  - (c) A requirement to attend upon one or more Medical Examiners for regular examination, whose reports will be made available to the Chair of the IDMB and/or any Fitness to Practise Panel when reviewing the case;
  - (d) A requirement to place him or herself under the care of a professional supervisor as nominated by the Panel, to attend upon them as required and to follow their advice and recommendations as to day-to-day practise;
  - (e) Allowing the IDMB to exchange information with the Individual's Supervisor on his or her progress under supervision and compliance with these conditions, such information being disclosed to the Fitness to Practise Panel when reviewing the case; and,
  - (f) Where an Individual is unfit to practise by reason of a substance addiction, appropriate conditions may include limiting consumption of that substance in accordance with relevant medical advice obtained.
55. Where an Individual is subject to undertakings or conditions following a hearing, these will be monitored and reviewed by the IDMB. If evidence suggests that these have been breached or that the Individual's fitness to practise has otherwise deteriorated, then the Individual will generally be referred for a review hearing under *rE324* in order that appropriate action may be taken. Where the breach raises a question of professional misconduct, the matter will be referred to the IDMB to consider a referral to the Disciplinary Tribunal.

### **Suspension**

*(applicable to 'BSB authorised individuals' only)*

56. If a Fitness to Practise Panel determines that a period of suspension is necessary for public protection, it may direct a suspension, either for a period of up to six months or indefinitely.
57. Suspension will be appropriate where the Panel is satisfied that no conditions can be formulated to protect the public or the barrister's interests.

58. The Fitness to Practise Panel does not have the power to disbar a barrister only by reason that he or she is unfit to practise. However, it can impose an indefinite period of suspension (rE320.1).
59. Indefinite suspension should only be directed where the Fitness to Practise Panel considers that this is the only means of protecting the public and the wider public interest, which includes maintaining public trust and confidence in the profession.
60. Indefinite suspension may be appropriate where:
- (a) the authorised individual demonstrates a persistent lack of insight into the seriousness of his or her condition and its impact on his or her fitness to practise;
  - (b) as a result of the authorised individual's incapacity, he or she has displayed a reckless and continuing disregard for the protection of the public;
  - (c) the authorised individual is incapacitated to the extent that his or her behaviour is fundamentally incompatible with the behaviour reasonably expected of a barrister.
61. The Panel is required in the interests of proportionality to balance the need to take action to protect the public, with the interests of the member, including any personal misfortune that a period of suspension would result in for the authorised individual or his or her family. However, the Panel must remember that its primary function is to protect the public.
62. A Panel must provide reasons for the period of suspension chosen, including the factors that led them to conclude that the particular period of suspension was appropriate.

## Undertakings

63. In lieu of making a direction to impose a period of restriction or to make his or her practise subject to conditions, a Panel may accept undertakings from an Individual. Those undertakings may relate to any conditions on practise, or any period of suspension or disqualification, and must be such as a Panel would have imposed.
64. Undertakings will only be appropriate where a Panel is satisfied that an Individual will comply with them, for example, because the Individual has shown genuine insight into his or her condition. The Panel may wish to see evidence that the Individual has taken responsibility for his or her own actions and/or otherwise taken steps to mitigate his or her actions.
65. Panellists should ensure that any undertakings are appropriate, proportionate, are sufficient to protect clients and the public, and are an effective way of addressing the concerns about the Individual. The guidance above in relation to conditions similarly applies where undertakings impose conditions on the right to practise.
66. Where a Panel accepts undertakings, the IDMB will monitor the Individual's progress and consider any new information received in relation to him or her, including any representations from the Individual to suggest that the undertakings are no longer appropriate.

67. Where there has been a breach of an undertaking, or where further concerns about the Individual's fitness to practise arise (including new information indicating a deterioration in the Individual's health), the matter may be referred for a review hearing at the discretion of the Chair of the IDMB. Where the breach raises a question of professional misconduct, the matter will be referred to the IDMB to consider a referral to the Disciplinary Tribunal.

### Referral to Another Committee

68. The Fitness to Practise Panel has a discretion to refer a case back to the IDMB to consider whether the case should be referred for a hearing before a Disciplinary Tribunal (*rE336*). This may be appropriate where a case raises an issue of professional misconduct, and where the public interest in the matter being determined in public, and when the range of powers available, requires the matter to be ventilated before the Disciplinary Tribunal (having in mind, in particular, the power available to the Disciplinary Tribunal to disbar a barrister).

### Review Hearings

69. Where restrictions are directed by the Fitness to Practise Panel under *rE313* or *rE320.1* or undertaken under *rE321*, they shall be reviewed at the discretion of the Chair of the IDMB, either on his own motion or at the request of the PCD, acting under authority from the IDMB, or the Individual in the event of a significant change in circumstances, or other good reason (*rE324*).
70. There may be a "significant change in circumstances or other good reason" where, for example, new and relevant evidence has come to light which could not reasonably have been known before the restrictions were imposed, or where circumstances have changed. Any change in circumstances must be significant having in mind the issues in the case, that is, be capable of leading the Panel on review to revoke or vary the order. Whether there is a significant change in circumstances or other good reason warranting a review hearing will be a question of judgment for the Chair of the IDMB, who shall decide whether to convene a Fitness to Practise Panel to review the case.
71. On review, the Fitness to Practise Panel must determine whether the Individual remains unfit to practise, and if so, whether the restriction imposed should be extended or varied.
72. It is important that no Individual should be allowed to resume unrestricted practise following a period of conditional registration or restriction unless the Panel considers that he or she is fit to resume practise and that the public will not be placed at risk by resumption of practise or by the imposition of conditions on practice.
73. The Panel will take into account any evidence produced in relation to the Individual's conduct or behaviour following the imposition of a restriction, including any evidence arising from any conditions made under *rE320.2* as well as evidence from any medical examinations undertaken in accordance with *rE311*.

74. Where a review hearing cannot be concluded before the expiry of the period of conditional registration or restrictions, the Panel may extend that period for a further short period to allow for re-listing of the review hearing as soon as practicable, with the objective of preserving the status quo pending the outcome of the review hearing (*rE327*).
75. If a Panel finds that the Individual failed to comply with any term of suspension or disqualification or any conditions imposed [or undertaken], it may refer the matter to the IDMB to consider whether a charge of professional misconduct should be brought before a Disciplinary Tribunal.

## Appealing the Fitness to Practise Panel's Decision

76. The Individual has a right to appeal against any decision made under the Regulations (except a previous decision made by an Appeal Panel), including a decision to refer a case to the Fitness to Practise Panel. Any appeals are heard by way of rehearing before an Appeal Panel, and the burden will be on the appellant to establish that the original decision was wrong in fact or in law.
77. Upon determination of any hearing of the Appeal Panel, the Panel may decide to:
- (a) allow the appeal;
  - (b) confirm the decision that is the subject of the appeal;
  - (c) exercise any of the powers of a Fitness to Practise Panel.
78. The guidance above in relation to procedure and decision-making similarly applies to hearings before an Appeal Panel.

## The Role of the Medical Examiner, as Compared to the Role of the Panel's Medical Member

79. A Medical Examiner is a registered medical practitioner, nominated by the Panel to conduct a medical examination of the Individual. The Medical Examiner is responsible for reporting his or her findings to the Panel and may be required to give evidence of those findings before the Panel and/or provide expert advice or opinion on the case. The Individual or his or her representative shall be entitled to cross-examine the Medical Examiner. In contrast, the role of the Medical Member on the Panel is to provide general experience and context as part of the panel's overall ability to determine the issues in relation to the barrister's fitness to practise. It is not their role to provide expert or medical evidence in relation to proceedings.

## Attendance at Hearings

80. The attendance of the Individual at any hearing of the Fitness to Practise Panel and Appeal Panel is required (*rE335.2*).



81. However, if the Individual does not attend, the Panel may proceed in his or her absence if it is satisfied that:
- (a) it is appropriate to do so; and,
  - (b) all reasonable efforts have been made to serve the Individual with notice of the hearing, by post to the Individual's address or, where agreed, by email; and,
  - (c) no acceptable explanation for the Individual's absence has been provided. Examples of what is acceptable may include ill health supported by relevant medical evidence, child/dependent care arrangements falling through unexpectedly, death/bereavement or serious accident involving family members.
82. If the Panel is not satisfied the above conditions have been met, it shall adjourn.
83. In considering whether proceeding in the absence of the Individual is appropriate, the Panel should take into account the following factors, where applicable:
- (a) the nature and circumstances of the Individual's behaviour in absenting himself or herself from the hearing, and in particular whether the behaviour was voluntary and deliberate and so plainly waived the right to be present;
  - (b) whether an adjournment might result in the Individual attending voluntarily;
  - (c) the likely length of such an adjournment;
  - (d) whether the Individual, though absent, is, or wishes to be represented or has, by his or her conduct, indicated that he/she does not wish to be represented;
  - (e) whether the Individual's representative was able to receive instructions from him or her and the extent to which they could present his or her defence;
  - (f) the extent of the disadvantage to the Individual in not being able to present his or her account of events, having regard to the nature of the evidence against him or her;
  - (g) the risk of the hearing reaching an improper conclusion about the absence of the Individual;
  - (h) the general public interest and the particular interest of any witnesses that a hearing should be held within a reasonable time; and,
  - (i) the effect of the delay on the memories of witnesses.

## Listing and Vacating Hearing Dates

84. Fitness to Practise Panels and Appeal Panels are convened by the President of the Council of the Inns of Court. The President maintains a COIC panellist pool, which includes members

eligible to sit on a Panel and consider fitness to practise issues; the pool includes practising barristers and lay members. In order to be eligible to sit on a Fitness to Practise Panel, a barrister must be at least 7 years Call, and to be a Chair, must be Queen's Counsel. To be eligible to sit on an Appeal Panel, a barrister member must be Queen's Counsel who is entitled to sit as a Recorder or Deputy High Court Judge or have been Queen's Counsel for at least 7 years. In accordance with Schedule 1, Paragraph 3 of the Regulations, the President will have in place separate arrangements for the appointment of Medical Members, as these members do not form part of the COIC panellist pool.

85. Before a hearing is listed, the Individual will be notified of the proposed time and date, and one alternative. The Individual will have an opportunity to accept one of the dates proposed, or to make representations proposing two further alternative dates.
86. Where the notice of hearing has been served, a hearing scheduled before a Fitness to Practise or Appeal Panel may be postponed by the Chair of the Panel under *rE342*. Where a hearing before a Fitness to Practise or Appeal Panel has commenced, the Panel may, at any time, adjourn a hearing in accordance with *rE343*.
87. In deciding whether to postpone or adjourn a hearing, the decision-maker must take into account all material circumstances, including:
  - (a) the public interest in the expeditious disposal of the case;
  - (b) the potential inconvenience caused to a party or any witnesses to be called by that party;
  - (c) the conduct of the party seeking the postponement or adjournment; and,
  - (d) the effect of any delay on the fairness of proceedings.
88. Where the Individual applies for a postponement or adjournment on grounds of ill health:
  - (a) the Individual must adduce appropriate medical certification in support of that application; and,
  - (b) the decision-maker may, if not satisfied by the medical certification produced, require the person to submit to be examined by a registered medical practitioner approved by the President.

## Administrative Matters

89. Where a Panel is convened, it will be assisted by an administrator who will be responsible for providing administrative support to the Panel, but who will carry out this role independently of the Bar Standards Board. A representative of the Independent Decision Making Body of the Bar Standards Board will be responsible for matters relevant to the preparation of the papers for presentation before a Panel hearing, including obtaining any reports or undertaking such other investigations as directed by Panel.

90. Panel hearings shall be recorded electronically, and the records shall be retained in accordance with BTAS' Data Retention Policy or, if any charges of professional misconduct are brought against the Individual arising from the case, until those proceedings have been finally disposed of or any appeal in relation to those proceedings has been exhausted.