



The Bar Tribunals and Adjudication Service

Sentencing Guidance 2014
For consultation

This consultation will close on Friday 6 September 2013

This consultation paper will be of interest to:

- Advice UK
- Advocacy Training Council
- Association of Asian Women Lawyers
- Association of Muslim Lawyers
- Bar Council
- Bar and Gay Lesbian Group (BLAGG)
- Bar Mutual Indemnity Fund
- Bar Pro bono unit
- Bar Professional Training Course (BPTC) providers
- Bar Standards Board
- BTAS Panel Members
- Citizens Advice Bureau
- Circuits
- Consumer Future
- Deaf Lawyers UK
- Discrimination Law Association
- Institute of Barristers' Clerks
- Institute of Legal Executives
- Institute of Paralegals
- Inquest and Howard League
- Law Care Barristers in England and Wales
- Law Society
- Legal Services Board
- Legal Services Consumer Panel
- Legal Ombudsman
- Office for judicial complaints
- Society of Asian Lawyers
- Society of Black Lawyers
- Sole Practitioner Group
- Solicitors Regulation Authority
- South East Circuit Minorities Committee
- The Gender Trust
- The Inns of Court
- The Specialist Bar Associations
- The UK Association of Jewish Lawyers and Jurists
- The UK Law Students Association
- Turkish British Lawyers Society
- Unlock
- Which?
- Witness Service & Victim Support

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Important information about this consultation

To:

This consultation is open to the general public including members of the legal profession and individuals who work or have an interest in the regulation of barristers.

Duration:

This consultation will run from Friday 12th July to Friday 6th September.

Enquiries:

If you have any questions about the consultation please contact:

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Bar Tribunals & Adjudication Service
The Tribunal Suite
9 Gray's Inn Square
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WC1R
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Email: consult@tbtas.org.uk

Open Day:

If you would like to discuss the consultation in person please visit at our office (above address) on **Tuesday 30th July between 8.30am -7pm**, when we will be holding an open day to enable members of the public and the profession to ask the Working Group and BTAS staff any questions relating to the Sentencing Guidance.

How to respond:

Views on the current draft of the Sentencing Guidance are welcome. Please submit your response by **Friday 6th September 2013** to:

Katie Walmsley
Bar Tribunals & Adjudication Service
The Tribunal Suite
9 Gray's Inn Square
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Telephone: 0203 432 7350
Email: consult@tbtas.org.uk (in word or pdf format)

In this consultation paper we have posed specific questions to inform the final draft of BTAS's Sentencing Guidance. These questions can be found within the body of the text and also consolidated at Annex 1. The Sentencing Guidance can be found at Annex 2. We would be grateful for your response specific to the questions set out as well as commenting more generally on the guidance. Where possible please link your comments to the specific questions or parts of the paper and Guidance rather than making general statements.

Response Paper:

Following the conclusion of the consultation, a response paper will be prepared and published on the BTAS Website: www.tbts.org.uk

Please note, all responses will be published on the BTAS website.

Please state within your response, if you do not wish to be named and if so please give reasons why. BTAS will only exclude the identity of the respondents if there is a compelling reason to do so.

Complaints:

Complaints about this process should be addressed to:

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Introduction

About the Bar Tribunals & Adjudication Service

1. The Bar Tribunals and Adjudication Service ('BTAS') is responsible for recruiting; appointing, administering and adjudicating Disciplinary Tribunals, including Tribunals which consider the most serious allegations of professional misconduct against barristers.
2. The Bar Standards Board (BSB) regulates barristers called to the Bar in England and Wales in the public interest. It investigates and prosecutes disciplinary offences and BTAS's involvement ensures the independence of the adjudicatory panels.

Background

3. The first, comprehensive version of the guidance came into effect 2 April 2009 following its creation by the Council of the Inns of Court. This was in response to one of the recommendations of the BSB's Strategic Review (2007)¹.
4. The function of the guidance is to assist those whose responsibility it is to impose the appropriate sanction under the disciplinary processes for breaches of the Code of Conduct of the Bar of England and Wales.
5. At the inception of the first version of the guidance it was agreed that it could be updated and revised at any time if the need arose. The first review of the guidance was set for 3 years after its publication. The review of the Sentencing Guidance was delayed by an urgent review into the disciplinary processes of the bar. The Review Group published their report ("the Browne Report") to COIC on 18 July 2012; the full report is available at: <http://www.graysinn.info/index.php/disciplinary-tribunals-review-coic>. Within the summary of recommendations reference was made to the continuing need for a review of the Sentencing Guidance. The summary of recommendations can be found at annex 15 of the report (web link above).
6. Knowing that the BSB was in the process of amending the Code of Conduct for implementation in January 2014, a decision was taken by the newly formed Bar Tribunals and Adjudication Service to carry out the review of the guidance in two stages:
 - a. **Stage 1:** Review and amend the first version of the guidance to correct any minor inaccuracies and out of date terminology, and to remove sections which no longer fall within the jurisdiction of the BSB's regulatory powers (specifically inadequate professional service complaints). The second version was published April 2013 and is published on BTAS' and the BSB's website.
 - b. **Stage 2:** Produce an entirely NEW Sentencing Guidance in line with the introduction of the new 'BSB Handbook' (which will include a revised Code of Conduct), due to be published in January 2014.

This consultation deals with stage 2 of the review.

¹ You can read the Strategic Review on the BSB's website, here: https://www.barstandardsboard.org.uk/media/1346882/_bsb_strategic_review_of_complaints_and_disciplinary_processes_report_by_robert_behrens_complaints_commissioner_july_2007.pdf

Aims & Objectives of the Sentencing Guidance

7. The key aims of the guidance are to promote consistency and transparency in the decision making process. The guidance will also inform the profession and the public about principles on which sanctions will be applied and identify the probable range of sentence for the misconduct under consideration.
8. BTAS aims to:
 - ensure consistency with underlying principles of sentencing; such as proportionality, public protection, deterrence and maintain high standards of behaviour and performance, together with any other relevant policies.
 - ensure consistency with BTAS Equality and Diversity Policy

Q1. Do you agree or disagree with the current aims and approach of BTAS's sentencing guidance?

9. The purposes of applying sanctions (as set out at 3.1-.3.2 of the Guidance) for breaches of the Code are:
 - a) To protect the public and consumers of legal services;
 - b) To maintain high standards of behaviour and performance at the Bar;
 - c) To promote public and professional confidence in the complaints and disciplinary process.
10. The primary purpose of imposing sanctions is to protect the public. This is of paramount importance and should be the fundamental guiding factor when considering what sanctions to impose. However, in fulfilling the other purposes it is also important to avoid recurrence of the behaviour by the individual as well as provide an example to other barristers in order to maintain public confidence in the profession. Decision makers must take all of these factors into account when determining the appropriate sanction to be imposed in an individual case. Decision makers should also bear in mind that sanctions are not intended to be punitive in nature but nevertheless may have that effect.

Q2. Do you agree or disagree with the purpose and principles of sentencing set out at paragraph 3.1 - 3.2 of the guidance?

Q3. Do you agree or disagree that the proposed guidance will:

- a. enable panels to make appropriate decisions?***
- b. ensure that the public interest is satisfied?***

If you disagree please explain why and briefly outline how you would remedy this.

The Working Group on Sentencing Guidance

11. The Working Group on Sentencing Guidance consists of key stakeholders and specialist advisors, who have been assisted in their work by the Management Team. The Management Team report to the COIC (Council of the Inns of Court) Change Programme Project Board, who will give their approval for the final product to be sent to COIC.
12. Four discrete pieces of research were undertaken upon recommendation of the first Working Group on Sentencing Guidance. The research papers proved a useful tool to the Group when the time came to make recommendations. These papers are available upon request.

Research Paper 1: Sentencing Data Report

13. This element of the research focused on sentencing data collected between April 2009 and April 2013. The aim of the Sentencing Data Report was to provide the Working Group with an overview of the number of charges and corresponding resulting sanctions given over the last 4 year period, specifically comparing the sanctions given for each offence with the current guidance.
14. The data analysed suggest that the majority of offences received sentences in line with current guidance. Panels only departed from the guidance where there were mitigating or aggravating factors present. There is no evidence of significant departure from the guidance. The fact that panellists only departed from the guidance where there were aggravating or mitigating factors present may be considered to indicate that the current guidance is neither overly prescriptive, nor too vague.

Research Paper 2: Summary of the Sentencing Survey

15. A survey was conducted consisting of 13 questions addressing the respondents use and experience of the current Sentencing Guidance. The survey was issued to 174 people, 55 responses were received (equating to a 32% response rate).
16. It was suggested that some part of the guidance contained duplication. Other areas that could be improved upon included:
 - Guidance on the use/application of aggravating and mitigating factors.
 - Dealing with multiple charges.
 - Guidance on dishonesty was thought to be unclear.
 - Amplification on administrative warnings and fines.
 - Guidance on reasons for departing from the guidance.
17. In summary, respondents were satisfied with the current guidance, and warned against making any future iteration too prescriptive. A number of suggestions (as outlined above) were provided indicating that some areas of the guidance could be clarified and expanded upon.

Research Paper 3: Summary of Code Changes

18. The guidance will require significant revision in line with the changes to the new 'BSB Handbook'. The Handbook will change fundamentally to an outcome focused system of regulation which centres on Core Duties. The Core Duties will replace the current sections of the Code of Conduct, under which offences are currently charged (e.g. 301 of the current Code). The guidance will need to incorporate these changes with comprehensive guidance on the Core Duty associated with each offence.
19. Other significant changes to the Code, which will have an impact on the guidance are as follows:
 - The maximum level of fine will increase to £50,000.
 - Three person panels will have the ability to suspend up to 12 months.
 - The approach taken to unregistered barristers.
 - The list of persons who may be subject to a Disciplinary Tribunal has been expanded.
 - A new requirement to report misconduct.

Please note: this section is for information only. BTAS does not wish to consult on changes to the Code of Conduct; this aspect has already been consulted upon by the BSB.

Research Paper 4: Sanctions Research

20. The sanctions research provided a comparative assessment of sentencing guidance applied by other regulators. This research suggests that the current guidance is very detailed and informative. The guidance could be improved through clear explanation and a less punitive approach.
21. The guidance could also be improved by the inclusion of some of the tools and approaches used by other regulators. For example, the health regulators take a less punitive approach towards sentencing ('Indicative Sanctions'). Other regulators focus heavily on case law. The guidance on the decision making process could be usefully outlined with the aid of flow charts and key stages and may also be improved by including a section on '*what makes a good determination?*'

Sentencing Guidance v Indicative Sanctions Guidance

22. Those involved in the original drafting of the Guidance decided on the term 'Sentencing Guidance', as this was deemed to be more accessible to the public. Many other regulators use the term 'indicative sanctions' and the Working Group recognise that this might more accurately reflect the purpose of the document.

Q4. Should the guidance be called 'sentencing guidance' or 'indicative sanctions guidance' or an alternative (please suggest)?

The decision making process

The Working Group agreed to include a step by step guide to the decision making process (as set out at 3.5 of the Guidance):

Step 1

Consider the following checklist of relevant factors:

- Individual facts of the case - breaches of the code will differ significantly. The panel is entitled to form a view based on the individual facts of each case.
- Assessing the seriousness of the breach - How serious is the breach? Where does the breach sit on the scale of seriousness?
- Culpability - how culpable is the defendant for the breach? Did the breach arise from planned or intentional actions?
- Actual harm or the risk of harm - what was the outcome of the breach? Did the breach involve actual harm or the risk of harm? Does the breach impact the general reputation of the bar? Is there harm to the public as a result of the breach?
- Aggravating & mitigating factors - see Annex 1 for a list of potential aggravating and mitigating factors, please note this list is not exhaustive.
- Personal circumstances of the individual barrister
- Previous disciplinary/professional record - is the barrister of previous good professional standing (see paragraphs)
- Reflect on any equality and diversity factors within the case and the panel's commitment to the Equality Act 2010 (see paragraph 1.6 above).

Step 2 – Look up the offence/breach within the Guidance (Part 2).

Step 3 – Decide whether to reduce, stay at or increase the sentence in the circumstances of the case.

Step 4 – Decide whether a concurrent or consecutive sentence would be appropriate.

Step 5 – Give your reasons

Q5. Have we included the types of factors you would expect to see in determining sanctions? If not please give reasons.

A barrister's financial means

23. In the recent case *Matthews v Solicitors Regulatory Authority* [2013] EWHC 1525 (Admin), the High Court held that a professional's financial means should be taken into account when tribunals consider costs and fines combined. The Working Group considered, and formed no conclusion on, whether the guidance should include reference to such considerations of financial means.

Q6. Should the panel take into account the barrister's financial means before making a determination (e.g. imposing a fine)? If so, should this information be collected before the hearing as standard?

Recommendations by the Working Group

Costs

24. The Group discussed whether panels should consider costs in relation to the totality of sentence, and the question was raised as to whether a panel could discount a sentence due to the amount of costs awarded against the defendant. From their discussion, the group concluded that the position must be that Tribunals should determine the sentence before any cost application is considered.

Q7. Do you agree that panels should not take into account applications in respect of costs when determining sentence? If not please give reasons?

Continuing Professional Development

25. The group discussed the seriousness of Continuing Professional Development (CPD) failures. The following arguments were advanced:
- There is a need to promote a CPD culture and to support a learning opportunity model as the starting point for understanding non-compliance. The risk is that others in the profession, as well as members of the public, begin to question the absolute commitment to maintaining standards.
 - Actual incompetence, including that arising from ignorance of up-to-date law and practice, is capable of being dealt with as misconduct.
 - Most reasonably diligent barristers stay up to date by means, including reading professional journals that do not fall within the CPD regime. In reality, CPD is usually a requirement additional to the normal business of staying abreast of the latest developments in our particular areas of practice.
 - Many barristers are puzzled by the severity of sanction in CPD failure cases. We appear to treat them with equivalent seriousness to, for example, breaches of the cab rank rule or acting while professionally embarrassed. This risks affecting the confidence of the profession.
 - The public has a right to expect barristers to comply with CPD requirements. If they do not, then no matter how competent they may be, the CPD failure suggests they are not prepared to comply with the requirements of their own professional body (and in so doing risk bringing the profession into disrepute or undermining its standing in the eyes of the public).

Q8. Taking into account the arguments set out above, do you agree with the current starting point for CPD failures (see Part II of the Guidance, section E.3)? If not please give reasons

Advice as to future conduct

26. The Group discussed the purpose of the sanction 'advice as to future conduct' and questioned whether it was an appropriate sanction for Disciplinary Tribunals given the serious nature of the cases. The Group suggested that the sanction ought to be handed down, only in the most exceptional cases e.g. where the defendant is particularly junior. Please note that the sanction 'advice as to future conduct' will remain a sanction available to Disciplinary Tribunals by virtue of the Disciplinary Tribunals Regulations.

Q9. Do you consider the distinction between a 'reprimand' and 'advice as to future conduct' to be clear'? If not, please give reasons.

Q10. Do you agree that 'advice as to future conduct' should be reserved for exceptional circumstances? Please briefly explain your answer.

Bar Mutual Indemnity Fund

27. The Group discussed the seriousness of a failure to pay Bar Mutual Indemnity fund (BMIF) and the potential risk to the public for such a failure. The Group suggested that there may be a need to include further detail on BMIF failure within the guidance.

Q11. Failure to pay Bar Mutual Indemnity fund (BMIF) is currently charged under breach of practising requirements: should there be separate guidance for this breach?

Equality and diversity

28. The Group discussed at length the impact of equality issues and the decision maker's commitment to equality and diversity. The group agreed the statements included within the Guidance at 1.4 -1.8. The Group concluded that the decision maker should reflect on this commitment when deciding sentence (this has factor has been included at 3.5 step 1).

Q12. Do have any comments about how far the guidance enables decision makers to appropriately address equalities issues or avoid discrimination?

General questions

Q13. Are there any factors you believe decision makers should take into account that have not been included in the draft guidance?

Q14. Do you have any other comments about the proposed structure and/or content of the guidance?

Supplementary note

29. Some of the descriptions of the common offences, listed under Part II of the Guidance, will be subject to amendment in the final version, pending Legal Services Board Approval of the draft BSB Handbook revisions.
30. Following the conclusion of this consultation and the final publication of the Guidance in January 2014, the guidance will be open to review January 2016. This is based on the time expected for breaches of the new Code of Conduct to reach and conclude at a Disciplinary Tribunal.

Annex 1 – List of questions

Q1. Do you agree or disagree with the current objectives and approach of BTAS's sentencing guidance?

Q2. Do you agree or disagree with the purpose and principles of sentencing set out at paragraph 2.6 of the guidance?

Q3. Do you agree or disagree that the proposed guidance will:

- a. enable panels to make appropriate decisions?**
- b. ensure that the public interest is satisfied?**

If you disagree please explain why and briefly outline how you would remedy this.

Q4. Should the guidance be called 'sentencing guidance' or 'indicative sanctions guidance' or an alternative (please suggest)?

Q5. Have we included the type of factors you would expect to see in determining sanctions? If not please give reasons.

Q6. Should the panel take into account the barrister's financial means when making a determination? If so, should this information be collected before the hearing as standard?

Q7. Do you agree that panels should not take into account applications in respect of costs when determining sentence? If not please give reasons?

Q9. Do you consider the distinction between a 'reprimand' and 'advice as to future conduct' to be clear? If not, please give reasons.

Q10. Should advice as to future conduct be reserved for exceptional circumstances? Please briefly explain your answer

Q11. Failure to pay Bar Mutual Indemnity fund (BMIF) is currently charged under breach of practising requirements, should there be separate guidance for this breach?

Q12 Do have any comments about how far the guidance enables decision makers to appropriately address equalities issues or avoid discrimination?

Q13. Are there any factors you believe decision makers should take into account that have not been included in the draft guidance?

Q14. Do you have any other comments about the proposed structure and/or content of the guidance?

Annex 2 – Sentencing Guidance



The Bar Tribunals and Adjudication Service

Sentencing Guidance:

Breaches of the Code of Conduct under new BSB Handbook

This document is intended to provide guidance and is not intended to inhibit decision makers from using their own discretion when considering an appropriate sanction in individual cases.

Version 3

Date of implementation: January 2014

Date of next review: January 2016

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Introduction from the President of the Council of the Inns of Court

Part I – General guidance

Section 1 - Introduction

- 1.1. This guidance has been developed by The Bar Tribunals and Adjudication Service ('BTAS') Working Group on Sentencing Guidance in collaboration with the Bar Standards Board ('BSB'), for use by the Professional Conduct Committee of the BSB and members of BTAS's Disciplinary Tribunals ('decision makers') when considering what sanctions should be imposed where a barrister has been found to be in breach of the Code of Conduct under the new BSB Handbook which replaces the 8th edition of the Code of Conduct (the Code).
- 1.2. The guidance is publicly available and allows defendant barristers, complainants and other interested parties to gauge, in advance, the potential sanction that might be imposed in a particular case. For more information on BTAS's Disciplinary Tribunals please visit the BTAS website (www.tbta.org.uk). For more information about the complaints process, please see the Complaints and Professional Conduct section on the BSB's website (www.barstandardsboard.org.uk).
- 1.3. The guidance provides decision makers with a basis for considering what sanctions are appropriate in any given case and is intended to promote proportionality, consistency and transparency in sentencing. **However, it must be stressed that it is not intended to interfere with decision makers' powers to impose whatever sanctions are appropriate in the circumstances of individual cases. Decision makers must exercise their own judgement when deciding on the sanctions to impose and must also ensure that any sentence is appropriate and fair, based on the individual facts of the case.** Written reasons should be given for all sanctions imposed including any aggravating or mitigating factors. **Care should be taken to include in the written reasons the basis for departing a significant extent from this guidance.**

Equality and diversity statement²

- 1.4. The Bar Tribunals and Adjudication Service is committed to eliminating discrimination and encouraging diversity. BTAS will monitor and publish equality and diversity data in line with any similar requirement placed upon the BSB by the Legal Services Board. Similarly, BTAS will monitor and publish equality and diversity data to describe our disciplinary panel members, clerks and ICC lay members. BTAS oppose all forms of unlawful and unfair discrimination.
- 1.5. BTAS is committed to playing its part in furthering the regulatory objective set out in the Legal Services Act 2007 to encourage an independent, strong, diverse and effective legal profession. It is also committed to meeting in full the Equality Duty (section 149 of the Equality Act 2010), as well as complying with the requirements of the Equality Act 2010 (Specific Duties) Regulations 2011.

² For further detail about BTAS's commitment to equality and diversity please see BTAS's Equality and Diversity Policy

- 1.6. BTAS will therefore have due regard to the need to take steps to meet the aims of Equality Duty, namely to:
- eliminate unlawful discrimination, harassment and victimisation and any other conduct prohibited by the Act;
 - advance equality of opportunity between people who share a protected characteristic and people who do not share it; and,
 - foster good relations between people who share a protected characteristic and people who do not share it.
- 1.7. The BSB is equally committed to the meaningful compliance with equalities legislation in every aspect of its work, to demonstrate best equalities and anti-discrimination practice.
- 1.8. Everyone who is acting for or on behalf of BTAS including panel members is expected to adhere to the spirit and letter of the Equality Act 2010. Panel members should bear this commitment in mind when considering sentencing.

Section 2 - Aims and objectives of the Bar's complaints and disciplinary system

2.1 The Bar Tribunals and Adjudication Service ('BTAS') is responsible for recruiting; appointing and administering disciplinary panels, including Disciplinary Tribunals which consider the most serious allegations of professional misconduct against barristers. The Bar Standards Board investigates and prosecutes disciplinary offences and BTAS's involvement ensures the independence of the adjudicatory panels.

2.2 BTAS is committed to the statement of purpose set out in the COIC disciplinary tribunals and hearings review group final report³to:

- provide a hearings service that is efficient, effective, timely, professional and transparent and one that uses up to date practises and approaches.
- facilitate high quality decision-making in the public interest; and,
- be independent, providing clear separation of the adjudicatory function from the BSB, as the prosecuting body for the Bar.

Background to the Bar's complaints and disciplinary system

2.3 The BSB came into existence on 1 January 2006 following a decision to separate the regulation of the Bar from the representative functions of the Bar Council. The Bar Council has delegated to the BSB all of its regulatory functions including investigation of complaints and the subsequent prosecution of barristers for breaches of the Code. However, the final decision as to whether a barrister has breached the Code is a matter for independent panels appointed by the Bar Tribunals and Adjudication Service (BTAS). In limited circumstances, the Professional Conduct Committee of the BSB can impose sanctions with the agreement of the barrister.

2.4 The operation of the Bar's complaints and disciplinary system is governed by the BSB's high level strategic objectives as well as the specific aims and objectives of the complaints and disciplinary system. Therefore, all decisions regarding the action to be taken in relation to individual complaints are taken by the BSB in the context of the objectives and aims set out below.

2.5 The BSB's strategic objectives applicable to the complaints and disciplinary system are:

- To establish systems to identify areas of risk to consumers; to take action to remedy poor performance by barristers; and where things go wrong, to provide an efficient and fair complaints and disciplinary system.
- To be recognised as a respected, independent regulator according to best regulatory principles with the confidence of the Legal Services Board, consumers, the Bar and other stakeholders.

³ In late 2011, COIC commissioned a Review Group, chaired by Desmond Browne QC, to examine its disciplinary procedures. The Review Group published their report ("the Browne Report") to COIC on 18 July 2012; the full report is available at: <http://www.graysinn.info/index.php/disciplinary-tribunals-review-coic>. The statement of purpose can be found at annex 15, paragraph 2 in the summary of recommendations.

2.6 In taking these higher level strategic objectives forward, the BSB is committed to ensuring that the Bar's complaints and disciplinary system operates according to the following aims:

- To act in the public interest;
- To protect the public and consumers of legal services;
- To promote access to, and the proper administration of, justice;
- To maintain high standards of behaviour and performance for the Bar;
- To provide appropriate and fair systems for the barrister who is subject to regulatory action;
- To ensure complaints are dealt with fairly, expeditiously and consistently; and
- To promote public and professional confidence in the complaints and disciplinary process.

2.7 Most decisions regarding the sanctions to impose in relation to breaches of the Code are taken by the independent panels appointed by BTAS who are not directly subject to the aims and objectives of the BSB. Nevertheless, BTAS fully supports the BSB's aims and objectives and, urges disciplinary panel members to adopt them when dealing with disciplinary cases.

Section 3 - Purpose and principles of sentencing

- 3.1 The purposes of applying sanctions for breaches of the Code are:
- a) To protect the public and consumers of legal services;
 - b) To maintain high standards of behaviour and performance at the Bar;
 - c) To promote public and professional confidence in the complaints and disciplinary process.
- 3.2 The primary purpose of imposing sanctions is to protect the public. This is of paramount importance and should be the fundamental guiding factor when considering what sanctions to impose. However, in fulfilling the other purposes it is also important to avoid recurrence of the behaviour by the individual as well as provide an example to other barristers in order to maintain public confidence in the profession. Decision makers must take all of these factors into account when determining the appropriate sanction to be imposed in an individual case. Decision makers should also bear in mind that sanctions are not intended to be punitive in nature but nevertheless may have that effect.

Deterrence and upholding standards

- 3.3 In some cases, the sanction imposed may be necessary to act as a deterrent to other members of the profession. Therefore, when considering a sentence, it may be necessary not only to deter the individual barrister from repeating the behaviour, but also to send a signal to the profession and the public that the particular behaviour will not be tolerated. A deterrent sentence would be most applicable where there is evidence that the behaviour in question seems to be prevalent in relation to numbers of barristers within the profession.

Proportionality

- 3.4 In deciding what sanctions (if any) to impose, the decision maker should ensure that the sanctions are proportionate, weighing the interests of the public with those of the practitioner. Proportionality is not a static concept and will vary according to the nature of the breach and the background of the individual barrister. For example, a first time breach of the Continuing Professional Development requirements would rarely, if ever, warrant a suspension or disbarment but a similar breach, having been committed many times without remorse or any attempt to remedy the situation, might warrant consideration of suspension or disbarment. Repeated breaches of relatively minor provisions of the Code may indicate a significant lack of organisation, integrity, or insight on the part of the barrister which could represent a risk to the public and undermine confidence in the profession. Sentences should be reflective of the seriousness and circumstances of the breach e.g. where the incentive for breaching the Code was for financial gain the sentence should reflect that. The sanction imposed should be no more onerous than the circumstances require, the lowest proportionate punishment should be imposed in any particular case.

Determining Sentence

3.5 When a panel has found a charge proven or when the defendant admits the misconduct charged, the panel must then consider sentence. The panel then hears submissions on sentence before retiring to determine the appropriate sanction for the breach. Below is a step by step guide to determining sentence:

Step 1

Consider the following checklist of relevant factors:

- Individual facts of the case - breaches of the code will differ significantly. The panel is entitled to form a view based on the individual facts of each case.
- Assessing the seriousness of the breach - How serious is the breach? Where does the breach sit on the scale of seriousness?
- Culpability - how culpable is the defendant for the breach? Did the breach arise from planned or intentional actions?
- Actual harm or the risk of harm - what was the outcome of the breach? Did the breach involve actual harm or the risk of harm? Does the breach impact the general reputation of the bar? Is there harm to the public as a result of the breach?
- Aggravating & mitigating factors - see Annex 1 for a list of potential aggravating and mitigating factors, please note this list is not exhaustive.
- Personal circumstances of the individual barrister.
- Previous disciplinary/professional record - is the barrister of previous good professional standing.
- Reflect on any equality and diversity factors within the case and the panel's commitment to the Equality Act 2010 (see paragraph 1.4 -1.8 above).

Step 2 – Look up the offence/breach within the Guidance (Part II).

Step 3 – Decide whether to reduce, stay at or increase the sentence in the circumstances of the case.

Step 4 – Decide whether a concurrent or consecutive sentence would be appropriate.

Step 5 – Give your reasons

Giving reasons

- 3.6 You must give reasons for sentence. Reasons need not be unduly extensive but must clearly inform the parties why you have reached the decision you have.
- 3.7 The following tips may prove useful when drafting reasons for sentence:
- Summarise submissions and any evidence offered on sentencing and the Panel's position on them.
 - Explain the Panel's decision and the reasons for that decision with reference to this guidance.
 - Include any aggravating or mitigating factors present within the case that were taken into account.
 - If conditions or suspension have been imposed on the barrister, explain the reason(s) for their duration.
 - Explain any significant departure from the Sentencing Guidance

What happens next⁴?

- 3.8 Once the panel have completed, signed and dated the finding and sentence sheet, a Chairman's report will be produced outlining the finding/sentence and reasons for that finding/sentence, including any costs or fines and the date by which they should be paid.
- 3.9 All findings of professional misconduct will be published on the BTAS⁵ website seven days of the Tribunals finding, regardless of whether the sentence has been pronounced or an appeal submitted. All findings of professional misconduct remain on the barrister's record indefinitely.
- 3.10 The defendant has 21 days in which to appeal a finding or sentence.
- 3.11 If the defendant has not appealed the finding/sentence or such an appeal by the defendant has been dismissed, the defendant's Inn of Court will pronounce the sentence and a final report will be issued.

⁴ For an in depth explanation of the procedure of Disciplinary Tribunals see BTAS's Information and Guidance pack

⁵ See BTAS's Publication Policy for further details.

Section 4 – Breaches of the Code of Conduct and professional misconduct

Introduction

- 4.1 The behaviour of barristers both in their professional lives and, to a limited extent their personal lives, is governed by the Code of Conduct which is set out in Part II of the *Handbook*. The BSB's Professional Conduct Committee ('PCC') is responsible for considering complaints about breaches of the Code. It has the power to refer complaints for disciplinary action, to determine some charges of professional misconduct with the barristers consent⁶, decide to take no further action or dismiss a case. The full powers of the PCC are set out in Part V of the *Handbook*.
- 4.2 The structure of the Code of Conduct has changed and it is now based on Core Duties supplemented by Conduct Rules which are accompanied by Guidance. Each section of the Code also lists at the beginning the Outcomes the Rules in that section are designed to achieve. The Core Duties and the Rules are mandatory whereas the Guidance is not. Failure to comply with the Guidance is not in itself a breach of the Code but the barrister will need to show how their obligations have been met if they depart from the Guidance. The Outcomes are also not mandatory but will be taken into account by the BSB when considering how to respond to alleged breaches.
- 4.3 Professional misconduct is now defined in the Handbook as "a breach of [the] Handbook by a BSB regulated person which the PCC does not consider appropriate for disposal by way of no further action or the imposition of administrative sanctions". Nearly all breaches of the Handbook (i.e. breaches of the Core Duties and the Conduct Rules) can now potentially be dealt with by the imposition of by way of administrative sanctions by the BSB and fines and will only be elevated to professional misconduct where the PCC does not consider such sanctions are appropriate. The only exception is where the complaint involves a conviction for dishonesty or deception. In such cases the Complaints Regulations require that the complaint must be referred to a Disciplinary Tribunal.

Powers to address breaches of the Code

- 4.4 Where the PCC has decided that administrative sanctions are not an appropriate means to address a complaint, it will only refer a matter to a Disciplinary Tribunal where it considers there is a realistic prospect of a finding of professional misconduct being made and it is in the public interest, having regard to the regulatory objectives, for a referral to be made.
- 4.5 When considering a referral to a Disciplinary Tribunal, the PCC also has the option, in appropriate cases, to direct instead that the complaint be subject to the Determination by Consent procedure (DBC). This procedure allows the PCC to determine charges of professional misconduct on the papers but only with the consent of the barrister. The PCC powers of sentencing under the DBC procedure are limited to reprimands, advice as to future conduct, orders to complete continuing

⁶ The Determination by Consent Procedure

professional development and fines; it cannot impose a suspension or disbar a barrister.

Section 5 - Available sanctions

This section of the Guidance sets out the various sanctions available for breaches of the Code. The available sanctions are based on the nature and seriousness of the breach of the Code and vary according to the type of breach. There is nothing to prevent a sentence including more than one sanction and in many cases a combination of sanctions will be appropriate (e.g. a fine, a suspension and advice as to future conduct). A general overview of how to approach each sanction is provided in Section 6. Section 7 includes other important information to consider.

Administrative warnings and fines (which are NOT available to Disciplinary Tribunals)

5.1 The PCC may impose an administrative sanction on a BSB regulated person where:

- the PCC is satisfied on the balance of probabilities that the breach has occurred; and
- the PCC considers that to impose an administrative sanction is proportionate and sufficient in the public interest.

5.2 The PCC may impose the following administrative sanctions:

- A warning to remedy the breach identified; and
- A fine of up to £1,000.

Professional misconduct

5.3 The sanctions available for professional misconduct are:

- Disbarment (only available to a five-person Disciplinary Tribunal);
- Suspension from practice (a three-person panel can only impose a suspension of up to twelve months for acts or omissions that took place after 1st January 2014. For acts or omissions that took place before 1st January 2014 a three person panel may suspend up to 3 months; there is no limit on the period of suspension a five-person panel can impose, although more than 3 years is thought to be tantamount to disbarment);
- Prohibition (temporary or permanent) from accepting public access instructions;
- Exclusion from providing representation funded by the Legal Aid Agency;
- A fine of up to £50,000⁷ (for acts or omissions that took place on or after 1st January 2014) A fine of up to £15,000 (for acts or omissions that took place

⁷ The increase in the maximum level of fine relates to the regulation of entities. BTAS will issue Sentencing Guidance relating to entities in due course,

on or after 31 March 2009) or up to £5,000 (for acts or omissions that took place prior to 31 March 2009);

- Additional CPD requirements, including in specific areas of law;
- Reprimand;
- Advice as to future conduct.

5.4. **Costs**

Disciplinary Tribunals have the power to award costs. A Costs Order is not a sanction and therefore not covered in this guidance. The sentencing decision should proceed, and is independent of, any consideration of an application in respect of costs.

Section 6 - General approach to individual charges and sanctions

6.1 This section gives guidance on the approach to take in relation to the application of individual sanctions. Decision makers should always take into account that a combination of sanctions may be appropriate in relation to a single breach of the Code. Also, it is important that the terms of any sanction are clear and therefore guidance is provided in Annex 2 as to the suggested wording to be used on findings and sentence sheets.

Dishonesty

6.2 Any dishonesty on the part of a member of the Bar, in whatever circumstances it may occur, is a matter of great seriousness. It damages the reputation of the profession as a whole, quite apart from its effect on the reputation of the individual barrister. Dishonesty is incompatible with the duties placed on barristers to safeguard the interests of their clients and their overriding duty to the law, justice and the courts. Public interest requires, and the general public expects, that members of the Bar are completely honest and are of the highest integrity. Therefore, in cases where it has been proved that a barrister has been dishonest, even where no criminal offence has been committed, disbarment will almost always have to be considered (see Part II section B - Dishonesty). For guidance on dealing with situations where the barrister has been, or may have been, dishonest during the course of proceedings, see paragraph 7.5.

Disbarment (Disciplinary Tribunal only)

6.3 The sanction of disbarment is only available to five-person Disciplinary Tribunals. Disbarment is the most serious sanction that can be imposed and should be reserved for cases where the need to protect the public or the need to maintain confidence in the profession is such that the barrister should be removed from the profession. It is not possible to provide a definitive list of the circumstances in which disbarment will be appropriate as it will depend on the facts of the case and the individual background of the barrister. However, as Sir Thomas Bingham M.R. stated in Bolton v The Law Society [1994] 2 All ER 486:

“To maintain [the] reputation and sustain public confidence in the profession, it is often necessary that those guilty of serious lapses are not only expelled but denied readmission the reputation of the profession is more important than the fortunes of any individual barrister.”

Therefore, disbarment may be appropriate where one or more of the following factors apply:

- a) a serious and/or persistent departure or departures from professional standards;
- b) serious harm has been caused to either the administration of justice, the reputation of the Bar or any person including the individual complainant and there is a continuing risk to the public or the reputation of the profession if the barrister is permitted to continue in practice;
- c) the barrister has committed a serious criminal offence involving dishonesty, violence or sexual offences;
- d) the barrister has acted dishonestly regardless of whether it was in connection with a criminal offence (see 6.2 below)
- e) the barrister has shown a persistent lack of insight into the seriousness of his/her actions or the consequences for his/her practice, the administration of justice or the reputation of the Bar.

6.4 In the case of *SRA v Sharma*⁸ Mr Justice Coulson outlined the following points in relation to the appropriate sanction for dishonesty:

- a) Save in exceptional circumstances, a finding of dishonesty will lead to the solicitor being struck off the roll, see *Bolton*⁹ and *Salisbury*¹⁰. That is the normal and necessary penalty in cases of dishonesty, see *Bultitude*¹¹.
- b) There will be a small residual category where striking off will be a disproportionate sentence in all the circumstances, see *Salisbury*.
- c) In deciding whether or not a particular case falls into that category, relevant factors will include the nature, scope and extent of the dishonesty itself; whether it was momentary or over a lengthy period of time, such as *Bultitude*; whether it was a benefit to the Solicitor, and whether it had an adverse effect on others.

Suspension from practice (Disciplinary Tribunal only)

6.5 This sanction is only available to Disciplinary Tribunals. Suspension from practice is a serious matter and should be reserved for cases where the barrister represents a risk to the public which requires that he/she be unable to practise for a period of time and/or the behaviour is so serious as to undermine public confidence in the profession and therefore a signal needs to be sent to the barrister, the profession and the public that the behaviour in question is unacceptable.

⁸ *Solicitors Regulation Authority v Sharma* [2010] EWHC 2022 (Admin)

⁹ *Bolton v the Law Society* [1994] 1 WLR 512

¹⁰ *The Law Society v Brendan John Salisbury* [2008] EWCA Civ 1285

¹¹ *Bultitude v the Law Society* [2004] EWCA civ 1853

6.6 Relevant factors to take into account are not limited to but include:

- a) actual harm or the risk of harm to the public;
- b) the seriousness of any breach of the Code;
- c) abuse of position or abuse of trust;
- d) the barrister has shown a lack of insight into and understanding of his/her actions and their consequences;
- e) the barrister has shown a lack of integrity that is not so serious as to warrant disbarment; and
- f) the behaviour is likely to be repeated or has been repeated since the initial incident.

6.7 **Period of suspension:** it is usual to impose a suspension for a specified period of time.

The Disciplinary Tribunal Regulations do not stipulate an upper limit to the period of suspension a five person panel can impose. However, very long periods of suspension are tantamount to disbarment and therefore where a suspension of more than three years is considered appropriate, the Disciplinary Tribunal should give serious consideration to disbarment unless the circumstances are exceptional. The Visitors to the Inns of Court stated in the case of Durand (1961) that *“three years ... must ... be the maximum sentence of suspension which in practice can properly be given”*. Any period of suspension will inevitably have a serious negative impact on the barrister’s level of knowledge and up to date experience. Therefore, the longer the period of suspension the more difficult it will be for the barrister to return to practice as an effective advocate. If exceptionally a period of suspension longer than three years is considered appropriate, it should be combined with conditions regarding retraining so as to ensure that before the barrister returns to practice appropriate refresher training has been undertaken.

6.8 **Suspension subject to conditions:** while a specific period of suspension is the norm it is also acceptable to make the period of suspension unless or until the occurrence of a specified event or completion of a specified activity. For example, a barrister could be suspended pending completion of practising requirements, a specified training course or other similar activity. In these circumstances, the suspension would cease when acceptable evidence is provided to the BSB of the relevant activity being completed. The Tribunal should ensure that the terms of any order of suspension from practice are clear particularly where conditions on the suspension are imposed. Barristers should be in no doubt about what actions they need to take to bring a suspension to an end and what evidence they need to present to allow the suspension to be lifted.

Prohibition from accepting public access instructions (Disciplinary Tribunal only)

6.9 This sanction is only available to Disciplinary Tribunals. It is generally applicable in cases where the barrister was acting under formal Public Access instructions; however, there may be circumstances where a barrister's treatment of a client, even when instructed by a solicitor, indicates that the barrister should not be allowed to accept Public Access instructions. It is a requirement that any barrister providing this type of access must have completed a Public Access training course and must also provide the client, in advance, with prescribed information about the terms and extent of the work that can be carried out. Clients who instruct barristers by this means are exposed to greater risk than those who use a solicitor and therefore panels need to look carefully at whether the barrister's behaviour represents a risk to the public which requires some level of restriction on his/her ability to continue accepting public access instructions.

6.10 In general, such a sanction would be appropriate where the barrister's behaviour directly relates to, or arises from, the circumstances of the public access instructions. For example, the barrister has either failed completely, or in part, to comply with the prescribed terms for Public Access or has in some way exploited the Public Access relationship to the detriment of the client. In particular, panels should take into account the manner in which the barrister has handled the issue of fees including both the way in which the fee level has been set and the arrangements for payment. A time-limited prohibition would be appropriate where the barrister's behaviour indicates a level of risk that could be addressed via a period of contemplation and a review of his/her practices which would mitigate the potential risk to clients (this may apply to situations where the barrister has failed during the proceedings to recognise the seriousness of the effect of his or her conduct). A permanent prohibition would be appropriate where there is evidence that the barrister has intentionally exploited the relationship, has persistently provided a poor service to clients, has charged unreasonable rates, or has taken on instructions with no chance of success.

Fines (Disciplinary Tribunal or Professional Conduct Committee)

6.11 The imposition of a fine is a sanction that can easily be combined with other sanctions and decision makers should always consider whether this would be appropriate. The maximum limit of a fine is £50,000¹² but fines at the upper end of the scale should be reserved for serious breaches of the Code where the barrister does not represent an on-going risk to the public but appears to have profited substantially from the breach. Fines, on the whole, are a "deterrent" sanction and their main purpose is to mark the severity of the breach and prevent its reoccurrence.

6.12 **The means of the barrister:** when considering whether to impose a fine, the financial means of the barrister should not be the determining factor. If a fine is considered appropriate in the light of the seriousness of the breach, then it should be imposed regardless of the barrister's means. Therefore, the decision maker should

¹² The increase in the maximum level of fine relates to the regulation of entities. BTAS will issue Sentencing Guidance relating to entities if and when appropriate.

first decide if a fine is the appropriate sanction, then consider the appropriate level of fine based on the breach, and finally look at adjusting the fine level in order to take into account a barrister's financial situation. A fine should not be increased merely because a barrister can afford it but it is reasonable to reduce the level of fine to take into account the barrister's financial circumstances or increase it where there is evidence that indicates that the barrister has profited from the breach.

- 6.13 **Time to pay and instalments:** When a decision maker orders that a fine should be paid, the sum will technically become due for payment immediately after the appeal period has expired or, in the case of Determination by Consent, when the finding is accepted by the barrister. It is, however, good practice for decision makers to specify when the fine is due in their decision (see paragraph A2.8 for wording of the sentence).
- 6.14 Decision makers should bear in mind that it is open to a barrister to negotiate a payment plan with the BSB following a Tribunal. In most cases, the issue of payment by instalments is better left to the BSB to negotiate with the barrister after the hearing as the BSB will be able to make more detailed enquiries regarding the barrister's financial situation and will have time to negotiate a mutually acceptable plan. Where decision makers consider that it is appropriate to order an instalment plan they should take into account the cost to the BSB of administering the plan. It is helpful to limit any instalment plan to a maximum period of eight months because small instalments over a lengthy period of time can be expensive to administer and involve costs to the profession far in excess of the original fine. Additionally, lengthy instalment plans can lead to substantial delay in it becoming apparent that action needs to be taken for non-compliance.

Additional CPD requirements (Disciplinary Tribunal or Professional Conduct Committee)

- 6.13 The purpose of ordering that a barrister complete additional Continuing Professional Development (CPD) hours is to ensure that barristers are sufficiently trained and knowledgeable in areas where the breach of the Code may demonstrate that they are lacking in the required expertise. It is a rehabilitative sanction and can often be appropriately combined with other sanctions. Decision makers should avoid making a general order to complete further hours but instead specify the area or subject matter in which additional training is required. Further, the order should stipulate a specific date by which the hours should be completed and the completion reported to the BSB. Additional CPD hours should not be imposed solely as a punishment but should serve a useful purpose that will help to prevent the breach of the Code being repeated in the future.
- 6.14 Where a barrister has failed to complete the required number of CPD hours for a particular year or years, then it is important that the decision maker orders that the outstanding hours be completed within a specified period. It may also be appropriate to order that failure to complete the outstanding hours within the specified period will result in an automatic suspension from practice for a specified period.

Reprimands (Disciplinary Tribunal or Professional Conduct Committee)

6.15 A reprimand is appropriate in cases where the breach of the Code is minor and there is no continuing risk to the public but the decision maker wishes to indicate formally that the behaviour is unacceptable and should not occur again. A reprimand is a “backwards looking” sanction and represents censure of previous behaviour. It is therefore appropriate where the behaviour is unlikely to be repeated in the future. The sanction should include an order as to how the reprimand should be made. In most cases, it will be made at the Tribunal and probably form part of the general sentencing decision. However, Tribunals may consider that it is appropriate to order that the reprimand be made in the form of a written document. Reprimands can be given by the decision maker at the hearing or in the report, or by ordering the barrister to attend on a nominated person to be reprimanded. Relevant positive factors that would indicate whether a reprimand is appropriate include, but are not limited to, the following:

- a) no evidence of loss to any person including the individual complainant;
- b) appreciation and understanding on behalf of the barrister of the failings;
- c) the behaviour was isolated and not intentional;
- d) genuine expressions of regret/remorse; and
- e) previous good history.

Advice as to future conduct (Disciplinary Tribunal or Professional Conduct Committee)

6.16 Advice as to future conduct will be appropriate in cases where the breach is minor and has not had any lasting consequences for the complainant but the decision maker considers it would be helpful if the barrister is given some guidance as to how to behave in the future. Advice is a “forward looking” sanction which should be used where it is thought that the barrister needs to change his/her behaviour. Advice as to future conduct would be particularly appropriate where a barrister appears to have a lack of appreciation or understanding of the nature of the breach and the reasons why disciplinary action was considered necessary. The advice can be given by the decision maker at the hearing or in the report, or by ordering the barrister to attend on a nominated person to be given advice. Such sanctions are particularly appropriate where the barrister is inexperienced in the profession and could benefit from guidance rather than censure.

No further action (Disciplinary Tribunal or Professional Conduct Committee)

6.17 The option to take no further action in cases where a breach of the Code has been proved is open to all decision makers. It is only appropriate where the barrister’s behaviour presents no risk to the public and there are no on-going or lasting effects in relation to the behaviour. Taking no further action would be appropriate in cases where the barrister has fully acknowledged the breach; the effects of bringing disciplinary action have already had a significant impact on the barrister’s reputation or practice and where no purpose would be served by ordering other sanctions.

Section 7 – Other important issues to consider

Character evidence

- 7.1 Barristers are entitled, as part of their mitigation, to put forward character references/witnesses to support their submissions. However, while such evidence can be relevant to the sanctions imposed, it should be treated with caution and panels should be wary of becoming distracted from the main issues by an abundance of character evidence. The fact that a barrister was previously of “good character” and has a good reputation, can only go so far in mitigating his/her behaviour and the more serious the breach of the Code, the less weight should be attached to character evidence. The emphasis should be on the nature of the breach of the Code and the circumstances in which the breach occurred.
- 7.2 If the character evidence indicates that the person providing it knows the barrister well and has a clear basis for assessing that the behaviour in question was a genuine anomaly/one-off then some weight should be given to it. However, if the character evidence indicates that the person supplying it can only have limited direct knowledge of the barrister, then it should be treated with caution and it may be that little or no weight can be given to it. The general approach should be that character evidence is treated with caution and should not unduly affect the sanctions imposed: a person of good character and impeccable reputation can still commit breaches of the Code that are serious and warrant the same sanctions as any other barrister. Authors of testimonials will be expected to have been informed of the charges. The better and longer the author has known the barrister, the more weight the testimonial is likely to carry.

Fitness to practise

- 7.3 In the Bar’s complaints and disciplinary system, the term “fitness to practise” is only used when considering whether a barrister is unfit to practise due to health reasons (including addiction). The Fitness to Practise Rules are contained at Section E Part V of the BSB Handbook. Fitness to Practise proceedings are not disciplinary in nature and are run entirely separately from any disciplinary proceedings. The primary purpose is to ensure the protection of the public by considering whether a barrister is medically fit to practise and if not, imposing any necessary restrictions.
- 7.4 Some disciplinary cases may give rise to concern about a barrister’s fitness to practise as a result of material submitted as part of the barrister’s defence and/or mitigation or as a result of their behaviour during the proceedings. This will often include information relating to, or indicating, an on-going or recurring addiction or mental health problem. If a decision maker has information before it that gives rise to concern about a barrister’s fitness to practise, it should:
- a) Proceed with making a decision on the case before it based on all the facts and evidence;

- b) State in the decision sheet (along with the decision on the case) that there is concern about the barrister's fitness to practise and give reasons for such concern (including reference to relevant documents); and
- c) Formally refer their concerns to the Professional Conduct Committee of the BSB, who will consider the evidence and, if necessary, invoke the relevant procedure under the Fitness to Practise Rules.

Dishonesty during the course of disciplinary proceedings

- 7.5 Where the barrister is not facing a specific charge alleging dishonest conduct, but the panel nonetheless decides that he/she has engaged in dishonest behaviour during the course of the disciplinary proceedings, the panel may refer the matter to the Professional Conduct Committee of the BSB to consider raising a fresh complaint. The panel must sentence the barrister only in relation to the charges currently before it; however, it should ensure that it details the circumstances and basis of any concerns of dishonest behaviour by the barrister as this will be relied upon in any future disciplinary proceedings.

Multiple charges

- 7.6 Panels should not impose one sentence for the most serious sanction because this can cause problems if the barrister decides to appeal. If a decision is taken on appeal to overturn the finding or sentence on the most serious charge but not any of the other charges, it can be difficult to establish what sanction should apply to those charges that remain or determine how seriously the original Tribunal viewed each of the remaining charges. To avoid this situation Panels should impose a separate sentence for each charge.

Concurrent and consecutive/cumulative sanctions save in respect of fines (which by definition are cumulative)

- 7.7 Where there are multiple proved charges that warrant a sanction on each charge, the decision maker will have to decide whether the sanction on each charge should run concurrently or consecutively: imposing a concurrent sentence means that the sanctions will run alongside each other, whereas imposing a consecutive sentence means that the sanctions will run after each other. Decision makers should be cautious about imposing consecutive sanctions unless they are sure that the totality of the consecutive sanctions is warranted based on the cumulative seriousness of the charges. See paragraph 6.7 when considering consecutive suspensions.

Deferred sentences

- 7.8 The Professional Conduct Committee and Disciplinary Tribunals have the power to defer sentences. This means that a sanction can be imposed but be subject to deferred implementation based on whether a further breach of the Code occurs within a stipulated period. The stipulated period should be between six months and two years. Further breaches of the Code within the stipulated period will leave the

barrister open to activation of the original deferred sentence as well as sanctions for the new breach.

- 7.9 A deferred sentence can only be imposed where the sanction is a fine or a suspension. Therefore, it is appropriate in circumstances where the behaviour is relatively serious (and therefore warrants a fine or suspension), the behaviour is unlikely to be repeated and there is no immediate need to protect the public, but the barrister needs to be encouraged to change the way in which he/she behaves. Lengthy periods of suspended sanctions should be reserved for cases where the barrister may need to have a control mechanism in place to temper his/her behaviour.

Suspension of practising certificate pending appeal

- 7.10 The Disciplinary Tribunal Regulations give Disciplinary Tribunals the power to order that the BSB suspend a barrister's practising certificate pending the outcome of an appeal where the sanction imposed is one of more than one year's suspension or disbarment. This power is different from imposing a sanction of suspension or disbarment in that suspension of a practising certificate only affects the barrister's ability to provide legal services as a barrister. Only the Inns of Court have the ability to suspend barristers formally or disbar them and in doing so also remove other privileges attached to call to the Bar including membership and use of the Inn's facilities.
- 7.11 The need for a provision that allows the BSB to suspend the right to have a practising certificate arises because sanctions imposed by Tribunals will not be implemented until after the outcome of any appeal is known. Clearly where a Tribunal considers that the barrister represents an immediate risk to the public which warrants a lengthy suspension or disbarment, it would be wrong to allow the barrister to continue practising merely because an appeal has been submitted. The Regulations stipulate that a Tribunal should order that the barrister's practising certificate be suspended pending appeal unless there is good reason not to do so.

Reporting the barrister's unsuitability as a pupil supervisor

- 7.12 In any case where a barrister is a pupil supervisor and the breach of the Code indicates that the barrister may no longer be suitable to continue in that role, the decision maker should order that a report be made to the barrister's Inn so that consideration can be given to removing the barrister from the list of pupil supervisors. Decision makers do not have the power to order that a barrister's status as a pupil supervisor be removed: this is a matter solely for the Inns of Court but it is important that a report is made to the relevant Inn where the circumstances warrant it.

Part II - Guidance on common breaches of the Code

1. The structure of the Code of Conduct regulating barristers has been transformed in its entirety. The new BSB *Handbook* is based on outcome focused regulation, the Code of Conduct contained within Part II of the *Handbook* includes the ten Core duties applicable to all barristers:

Core Duty 1: You must observe your duty to the court and the administration of justice.

Core Duty 2: You must act in the best interests of each client.

Core Duty 3: You must act with honesty and integrity.

Core Duty 4: You maintain your independence.

Core Duty 5: You must not behave in a way which is likely to diminish the trust and confidence which the public places in you or the profession.

Core Duty 6: You must keep the affairs of each client confidential.

Core Duty 7: You must provide a competent standard of work and service to each client.

Core Duty 8: You must not discriminate unlawfully against any person.

Core Duty 9: You must be open and co-operative with your regulators.

Core Duty 10: You must take reasonable steps to manage your practice, or carry out your role within your practice, competently and in such a way to achieve compliance with your legal and regulatory obligations.
2. These Core Duties underpin the Code of Conduct and the BSB's entire regulatory framework. The Core Duties are supplemented by rules in Part II of the *Handbook*, both the Core Duties and the rules are mandatory. The Code of Conduct also contains details of outcomes which compliance with the Core Duties and rules is designed to achieve. The outcomes may provide guidance when considering if a breach of the Core Duties and/or rules has occurred but they do not alone amount to a breach of the Code of Conduct. Charges for breaches of the Code of Conduct therefore may be brought under the Core Duties and/or the rules.
3. This section provides guidance in relation to the starting points for sanctions in respect of the most common breaches of the Code. For ease of reference the most common breaches have been set out in the same order as can be found in the Code of Conduct. Sections A to E provide information related to charges of professional misconduct.

4. The guidance is not intended to represent a tariff for the breaches and decision makers must decide each case on its own facts. The suggested sanctions do not necessarily represent the “going rate” and the guidance merely indicates where a decision maker might start before considering all the relevant factors.
5. It is important that consistency and proportionality in sentencing are maintained and therefore where a decision maker imposes a lesser or higher sanction than suggested by this guidance, it is important that full reasons are given as to why the sanction is considered appropriate. This will not only give the barrister and the complainant a clear indication of the reasons for a lenient or harsh sentence but will provide justification for the decision should the case go to appeal. It is particularly important for decision makers to give full written reasons for the sentencing should they impose a deferred sanction, as the decision to activate the sanction will be taken by a different body and that body will require detailed reasons in order to make a fair decision.
6. In assessing the appropriate sanction for a breach of the Code, decision makers must consider any aggravating or mitigating factors that may cause the sanction to be increased or decreased. Details of aggravating and mitigating factors applicable to all breaches are set out in Annex 1. In addition to this, the individual tables relating to common breaches provide examples of aggravating and mitigating factors applicable to each breach. The factors listed are examples and the lists are not intended to be exhaustive.
7. It must be made clear that the guidance in relation to the common breaches is not intended to detract from decision maker’s complete discretion to impose any sanction which is appropriate to an individual case: the final decision is a matter for decision makers alone.
8. In relation to fines and suspensions, rather than including specific amounts, the following table shows three bands for fines and suspensions which are referred to in the rest of Part II. The ranges represent the following:

Fines	Suspensions
Low level = up to £1,000	Short = up to 3 months
Medium level = over £1,000 and up to £3,000	Medium = over 3 months and up to 6 months
High level = over £3,000 and up to £50,000 ¹³	Long = over 6 months and up to three years

¹³ ibid

Section A - The barrister and the court

A.1 Misleading the Court

Description	
<p>Barristers are under a duty not to mislead the Court and doing so is usually considered to be a serious breach of the Code. This is a breach of Core Duty 1; this breach is likely to be charged under Part II of the Code, section C.1, Rule 1 (II. C1.R1): Every barrister owes a duty to the court to act with independence in the interests of justice. This duty overrides any inconsistent obligation that the barrister may have.</p> <p>As the circumstances surrounding this offence can vary widely, the appropriate sanction may range from giving advice to disbarment. One key element that could warrant more serious sanctions for this breach is whether or not the breach was committed intentionally.</p> <p>Listed below are common circumstances in which breaches might occur set out according to severity.</p>	
Common circumstances	Starting point
a. Recklessly misleading the Court	a. Reprimand and/or advice as to future conduct
b. Knowingly misleading the Court	b. A short suspension to disbarment
Aggravating factors	Mitigating factors
<ul style="list-style-type: none"> • Personal or professional advantage gained (financial or otherwise) • Negative impact on the complainant, client or other party • Actions of the barrister adversely affected the course of the proceedings. 	<ul style="list-style-type: none"> • Immediate apology • Remedial action taken at an early point
<p>NB - Acting on a client's instructions should not be considered as a mitigating factor as this runs contrary to a barrister's overriding duty to the Court.</p>	

A.2 Not abusing the role as an advocate

Description	
<p>Barristers have a duty to ensure they do not make submissions, or draft documents, that are not properly arguable or supported by evidence. In particular, allegations of fraud should be supported by evidence regardless of the client's instructions. This is a breach of Core Duty 1; these types of breaches are likely to be charged under Part II of the Code, section C.1, rule 4 (II. C1.R4): a barrister has a duty not to mislead the court or to permit the court to be misled. However, depending on the nature of the circumstances, it may also breach Core Duty 3 and may be charged under Part II, section C.2, rule 2 (II.C2.R2).</p> <p>As the circumstances surrounding these breaches can vary widely, the appropriate sanction may range from giving advice to disbarment. One key factor to take into account in determining the level of sanction is whether the breach was committed intentionally. Protection of the public is particularly relevant in relation to allegations of fraud, as such allegations are usually made against an individual and therefore may impact on the credibility and reputation of that person.</p> <p>Listed below are common circumstances in which breaches might occur set out according to severity.</p>	
Common circumstances	Starting point
a. Recklessly making unsupported submissions	a. Reprimand and/or advice as to future conduct
b. Recklessly making allegations of fraud	b. Medium level fine to short suspension
c. Making intentional unsupported submissions or allegations of fraud	c. Medium suspension to disbarment
Aggravating factors	Mitigating factors
<ul style="list-style-type: none"> • Personal or professional advantage gained (financial or otherwise) • Negative impact on the complainant, client or other party • Dishonest motive 	<ul style="list-style-type: none"> • Immediate apology • Remedial action taken at an early point
<p>NB - Acting on a client's instructions should not be considered as a mitigating factor, as this runs contrary to a barrister's overriding duty to the Court.</p>	

Section B – Behaving ethically

B.1 Conviction for drink driving and related offences

Description	
<p>In general a criminal conviction is a serious matter for barristers given their role in the administration of justice and the need to maintain public confidence in the profession. A criminal conviction for drink driving is a breach of Core Duty 5. For further guidance on conduct that is likely to be a breach of Core duty 3 and/or Core Duty 5 see Part II of the Code of Conduct, section C.2, Guidance paragraph 11 (II.C2.G11).</p> <p>It may also be accompanied by a separate charge for any other related convictions, such as dangerous driving.</p> <p>The sanction that is imposed should relate to the breach of the Code of Conduct for a barrister having been convicted of a criminal offence. It is not intended to be a second form of punishment, or “double jeopardy”, for the actual criminal offence.</p> <p>The starting point for a first time conviction for drink driving should normally be a reprimand and a low level fine. Where a conviction results in a custodial sentence, the general starting point should be disbarment unless there are clear mitigating factors that indicate that such a sanction is not warranted.</p> <p>Listed below are common circumstances in which breaches might occur set out according to severity.</p>	
Common circumstances	Starting point
a. A first time conviction for drink driving only	a. A reprimand and a low level fine
b. A conviction for drink driving that involves an element of dangerous driving	b. A medium level fine and/or a short suspension
c. A conviction for drink driving that is accompanied by further related convictions (e.g. leaving the scene, driving whilst disqualified)	c. A short to medium suspension
Aggravating factors	Mitigating factors
<ul style="list-style-type: none"> • Injury to persons • High alcohol level • Lack of cooperation with the police 	<ul style="list-style-type: none"> • Compelling emergency situation

B.2 Conviction for assault and violent acts

Description	
<p>A criminal conviction for violence is a breach of Core Duty 5. For further guidance on conduct that is likely to be a breach of Core duty 3 and/or Core Duty 5 see Part II of the Code of Conduct, section C.2, Guidance paragraph 11 (II.C2.G11).</p> <p>The guidance below is also applicable to charges relating to domestic violence, which should not be treated any less seriously than other forms of violence.</p> <p>The sanction that is imposed should relate to the breach of the Code of Conduct for a barrister having been convicted of a criminal offence. It is not intended to be a second form of punishment, or “double jeopardy”, for the actual criminal offence.</p> <p>The starting point for a conviction of minor assault should normally be a reprimand and a medium level fine, which may increase to a short suspension. Where a conviction results in a custodial sentence, the general starting point should be disbarment unless there are clear mitigating factors that indicate that such a sanction is not warranted.</p> <p>Listed below are common circumstances in which breaches might occur set out according to severity.</p>	
Common circumstances	Starting point
a. A conviction for low level assault	a. Reprimand and medium level fine to a short suspension
b. A conviction for an act of violence causing injury	b. A medium level suspension
c. A conviction for an act of serious violence	c. Disbarment (or in exceptional circumstances, a long suspension)
Aggravating factors	Mitigating factors
<ul style="list-style-type: none"> • Previous criminal convictions • Lack of cooperation with the police • Use of a weapon • Victim was particularly vulnerable • Intent to cause harm • Discriminatory motivation • Serious injury to the victim 	<ul style="list-style-type: none"> • Isolated incident in difficult and unusual circumstances • Element of self-protection or protection of others/property

B.3 Conviction for drug possession or supply

Description	
<p>A criminal conviction for drug possession or supply is a breach of Core Duty 5. For further guidance on conduct that is likely to be a breach of Core duty 3 and/or Core Duty 5 see Part II of the Code of Conduct, section C.2, Guidance paragraph 11 (II.C2.G11).</p> <p>The sanction that is imposed should represent the offence under the Code of Conduct for a barrister having been convicted of a criminal offence. It is not intended to be a second form of punishment, or “double jeopardy”, for the actual criminal offence.</p> <p>The starting point for a conviction of drug possession (normally tried in the Magistrates’ Court) should be a reprimand and a medium level fine. A period of suspension or disbarment would be appropriate where there is has been intentional supply for profit. Where a conviction results in a custodial sentence, the general starting point should be disbarment unless there are clear mitigating factors that indicate that such a sanction is not warranted.</p> <p>Listed below are common circumstances in which breaches might occur set out according to severity.</p>	
Common circumstances	Starting point
a. A conviction for drug possession (any class)	a. A reprimand and a medium level fine
b. A conviction for supply or intent to supply (any class)	b. Disbarment
Aggravating factors	Mitigating factors
<ul style="list-style-type: none"> • Previous criminal convictions • Lack of cooperation with the police • Medium/large scale operation 	<ul style="list-style-type: none"> • No intention to gain financially

B.4 - Dishonesty

Description	
<p>Dishonesty is a breach of Core Duty 5. For further guidance on conduct that is likely to be a breach of Core duty 3 and/or Core Duty 5 see Part II of the Code of Conduct, section C.2, Guidance paragraph 11 (II.C2.G11).</p> <p>Please see paragraphs 6.2 above regarding the general approach to be taken towards dishonesty within the profession.</p> <p>There are a number of different types of breaches of the Code that involve dishonesty and different charges that may be brought in relation to each.</p> <p>Dishonesty can amount to criminal dishonesty (even though no criminal charges may have been brought - see also criminal convictions) or personal or professional dishonesty that does not amount to a crime.</p> <p>Some examples of dishonest behaviour that form the basis for charges of professional misconduct include:</p> <ul style="list-style-type: none"> • Making a false declaration on Call • Inflating marks or experience on an application form • Falsification of documents • Certain types of criminal convictions, such as theft, perjury, or fraud • Deliberate misuse of client money • Dishonesty in connection with disciplinary proceedings (see paragraph 7.5) <p>Dishonesty is not compatible with practice in a profession which requires exceptional levels of integrity. The general starting point should be disbarment unless there are clear mitigating factors that indicate that such a sanction is not warranted. Therefore, no common circumstances are listed below but instead the emphasis should be on the potential mitigating factors that might reduce the sanction from disbarment.</p>	
Common circumstances	Starting Point
	a. Disbarment
Aggravating factors	Mitigating factors
	<ul style="list-style-type: none"> • Clear evidence that behaviour was out of character and the consequences were not intended (see 7.1 & 7.2 of this guidance) • Behaviour limited to personal life and no evidence of dishonesty in professional life (see 7.1 & 7.2 of this guidance)

B.4 Discrimination and harassment

Description	
<p>Discrimination and harassment is a breach of Core Duty 8 (a barrister must not discriminate unlawfully against any person) and is likely to be charged under Part II of the Code, section C.2, rule 5 (II.C2.R5); a barrister must not discriminate unlawfully against, victimise or harass any other person on the grounds of race, colour, ethnic or national origin, nationality, citizenship, sex, gender re-assignment, sexual orientation, marital or civil partnership status, age, pregnancy, maternity, religion or belief.</p> <p>This type of breach is not intended to cover the situation where a barrister has been convicted of a criminal offence for harassment in his/her personal capacity. This section relates to behaviour in the course of a barrister's professional work that amounts to any form of harassment or bullying.</p> <p>The starting point for a finding of either discrimination or harassment should be a medium level fine, although a suspension or disbarment would be appropriate in circumstances where the behaviour is of a serious nature and/or continues over an extended period of time.</p> <p>Listed below are common circumstances in which breaches might occur set out according to severity.</p>	
Common circumstances	Starting Point
a. An isolated incident which had a limited impact on the complainant	a. A medium level fine
b. The behaviour took place over an extended period of time and/or the barrister was in a position of power or acting in a supervisory role	b. A high level fine and a short suspension
c. Physical or particularly strong verbal actions towards a vulnerable individual or group	c. A medium suspension to disbarment
Aggravating factors	Mitigating factors
<ul style="list-style-type: none"> • A significant negative impact on the victim • Failure to accept responsibility for actions • The vulnerability of the victim in the circumstances 	<ul style="list-style-type: none"> • Immediate apology

Section C – The barrister and the client

C.1 Acting without a professional client

Description	
<p>A barrister may only supply legal services to a client if he/she is instructed by a professional client (normally a solicitor) or the barrister is acting under Licensed or Public Access. The rules prohibiting acting directly for a client are designed to protect the public and accepting instructions without a professional client can put the public at risk. Breaches are likely to be charged under Part III of the Code, Section B.3, rule 2 (III.B3.R2).</p> <p>The starting point should normally be a reprimand and/or a medium level fine. The main factors in determining the sanction will be the risk posed to the client, whether the breach involved a level of exploitation of the client and/or whether the behaviour was motivated by financial gain.</p> <p>Listed below are common circumstances in which breaches might occur set out according to severity.</p>	
Circumstances	Starting point
a. Acting without a professional client (not financially motivated)	a. Reprimand and/or advice as to future conduct
b. Acting without a professional client (financially motivated)	b. Medium level fine to a short suspension
c. Acting without a professional client over a prolonged period of time	c. Short to medium suspension
Aggravating factors	Mitigating factors
<ul style="list-style-type: none"> • Negative impact on the client • Particularly vulnerable client 	<ul style="list-style-type: none"> • Limited level of legal services provided • Remedial action taken at an early point

C.2 Breach of cab-rank rule

Description	
<p>A self-employed barrister acting via instructions from a professional client must not withhold services on the basis of the nature of the case, the client's opinions or beliefs or on the basis of the source of the financial support. These requirements are known collectively as the "cab-rank rule". Breaches of these obligations are likely to be charged under Part II of the Code, section C.3, rule 15 (II.C3.R15).</p> <p>The starting point should normally be a reprimand and/or a medium level fine.</p> <p>Listed below are common circumstances in which breaches might occur set out according to severity.</p>	
Circumstances	Starting point
a. Breach of cab-rank rule (financial motive)	a. Reprimand and medium level fine
b. Breach of cab-rank rule (discriminatory motive)	b. Reprimand and short suspension
Aggravating factors	Mitigating factors
<ul style="list-style-type: none"> • Actions of the barrister adversely affected the course of the proceedings 	<ul style="list-style-type: none"> • Immediate apology

C.3 Accepting instructions when professionally embarrassed

Description	
<p>There are a range of circumstances in which a barrister may be professionally embarrassed. These include (but are not limited to) accepting instructions when the barrister is likely to be a witness or his/her connection to the case will make it difficult to maintain independence, when there is a potential conflict of interest and when there is a significant risk of confidential information being communicated. Breaches are likely to be charged under Part II of the Code, section C.3, rule 7 (II.C3.R7).</p> <p>The sanctions should normally be a reprimand and/or a medium to high level fine. More serious sanctions should be imposed where the breach has had a significant impact on the client or the progress of the proceedings.</p> <p>Listed below are common circumstances in which breaches might occur set out according to severity.</p>	
Circumstances	Starting point
a. Accepting instructions when professionally embarrassed (inadvertently)	a. Reprimand and/or advice as to future conduct
b. Accepting instructions when professionally embarrassed (intentionally)	b. Reprimand, medium to high level fine
Aggravating factors	Mitigating factors
<ul style="list-style-type: none"> • Actions of the barrister adversely affected the course of the proceedings • Financial motivation 	<ul style="list-style-type: none"> • Immediate apology • Remedial action taken at an early point

C.4 Late withdrawal

Description	
<p>A late withdrawal from a case is likely to be charged under Part II of the Code, section C.3, rule 13 (II.C3.R13). .</p> <p>The starting point should normally be a reprimand and/or a medium to high level fine.</p> <p>Listed below are common circumstances in which breaches might occur set out according to severity.</p>	
Circumstances	Starting point
a. Late withdrawal (not financially motivated)	a. Reprimand and/or advice as to future conduct
b. Late withdrawal (financially motivated)	b. Reprimand, medium to high level fine
Aggravating factors	Mitigating factors
<ul style="list-style-type: none"> • Actions of the barrister adversely affected the course of the proceedings • Lateness/complexity of case prevents client from finding suitable alternative representation 	<ul style="list-style-type: none"> • Immediate apology • Positive steps taken to find/assist an alternative barrister.

C.5 Breach of Court Direction or failure to comply with a Court Order

Description	
<p>Breach of a Court direction or order usually occurs in the course of a barrister representing a client. However it is possible that such a breach may occur in the course of a case that a barrister is involved with on a personal level. Charges are likely to be brought under Core Duty 5.</p> <p>Given a barrister's responsibilities to the Court and for upholding the integrity of the profession, such behaviour should be considered more seriously than if committed by a lay person. Disrespect for the authority of a Court should be considered as a serious matter.</p> <p>In most cases the starting point should be a reprimand and/or a fine. The level of fine will be dependent on the circumstances of the breach and the barrister's attitude. In cases where the breach might amount to a criminal offence (usually this occurs in relation to personal matters where a barrister, for example, breaches a restraining order), a medium level fine or a suspension would be appropriate. Suspensions should be reserved for cases where the impact on the complainant is significant.</p> <p>Listed below are common circumstances in which breaches might occur set out according to severity.</p>	
Common circumstances	Starting Point
a. Inadvertent breach of a direction/order that did not have implications for the future course of the proceedings	a. Reprimand
b. Inadvertent breach of a direction/order that resulted in a change to the course/outcome of the proceedings	b. Reprimand and low level fine
c. Deliberate breach of an order/direction in order to gain advantage	c. Medium fine and/or medium suspension
Aggravating factors	Mitigating factors
<ul style="list-style-type: none"> • Deliberate disobedience based on gaining advantage for the barrister or his/her client • Continued breach in face of warnings from the Court • Evidence of previous failures to obey Court Orders/Directions • Significant impact on the complainant or case 	<ul style="list-style-type: none"> • Unintentional • Confusion as to the nature of the order • Immediate apology • Remedial action taken at an early point

C.5 Failure to comply with a Court judgment

Description	
<p>Usually a failure to comply with a Court judgment will occur as result of an event in the barrister's personal life although it is possible that it will result from representing a client. Charges are likely to be brought under Core Duty 5.</p> <p>.</p> <p>It is a serious matter for a barrister to fail to comply with a Court judgment because it shows a level of contempt for the legal process which is not compatible with the standards expected of professionals with a responsibility to the Court. Therefore, a barrister's non-compliance with a Court judgment should be considered to be more serious than that of "lay person". However, the nature of the judgment will be relevant as will be the point at which the non-compliance has reached.</p> <p>The starting point should be a fine with the level increasing according to the circumstances. A deliberate breach of a judgment resulting in significant implications for the complainant/proceedings may warrant a short suspension.</p> <p>Listed below are common circumstances in which breaches might occur set out according to severity.</p>	
Common circumstances	Starting Point
a. Breach of judgement related solely to personal financial obligations	a. Low level fine as well as reprimand and/or advice as to future conduct
b. Deliberate disregard for the authority of the court combined with a significant impact on the complainant/case	b. Medium level fine and/or medium suspension
Aggravating factors	Mitigating factors
<ul style="list-style-type: none"> • Deliberate attempt to evade financial obligations 	<ul style="list-style-type: none"> • Late compliance with the judgment • Genuine attempts to meet the judgment

C.6 - Overcharging

Description	
<p>Overcharging is likely to be charged under Core Duty 5 (behaving in a way that is likely to diminish the trust and confidence which the public places in you or the profession). It is a serious breach in that it will inevitably involve a victim whether that it is the public purse, a company or an individual.</p> <p>Normally a starting point of medium level fine would be appropriate but the level of fine will be highly fact specific and should reflect the extent and circumstances of the overcharging. Where the overcharging consists of knowingly charging for work/hours not completed, decision makers should carefully consider whether the behaviour includes an element of dishonesty and may warrant disbarment (see paragraph 6.2 on dishonesty).</p> <p>Listed below are common circumstances in which breaches might occur set out according to severity.</p>	
Common circumstances	Starting Point
a. Overcharging of a privately paying or commercial client	a. Medium level fine,
b. Overcharging of a client who is publicly funded	b. High level fine or short suspension,
c. Knowingly charging for work/hours not completed.	c. Medium suspension to disbarment
Aggravating factors	Mitigating factors
<ul style="list-style-type: none"> • Significant amount of overcharging • Particularly vulnerable client • Pattern of repeated behaviour • Public Access client 	<ul style="list-style-type: none"> • Overcharged fee repaid voluntarily • Genuine mistake

C.7 Discourtesy

Description	
<p>Discourtesy, in most cases, will be directed towards a Judge or Magistrate but can also involve conduct towards a lay client or other individual involved in the proceedings. Discourtesy is likely to be charged under Core Duty 7 (not providing a competent standard and service to each client). When considering discourtesy it will be important to consider the circumstances of the act and whether or not it was an isolated incident as opposed to repeated acts of discourtesy in the face of repeated warnings from the Judge or Magistrate.</p> <p>In most cases the starting point should be a reprimand accompanied by a low level fine.</p> <p>Listed below are common circumstances in which breaches might occur set out according to severity.</p>	
Common circumstances	Starting Point
a. An isolated incident within proceedings	a. Reprimand, possibly accompanied by a low level fine
b. Repeated pattern of discourtesy against a background of repeated warnings or interventions from the Judge/Magistrate	b. Reprimand accompanied by a medium level fine
c. A high level of the discourtesy that had a significant impact on the victim	c. Reprimand accompanied by a medium to high level fine
Aggravating factors	Mitigating factors
<ul style="list-style-type: none"> • Lack of remorse • Failure to acknowledge impact of behaviour • Adverse impact on the course of the proceedings • Bullying behaviour 	<ul style="list-style-type: none"> • An isolated incident in difficult or unusual circumstances • Immediate apology

C.8 Using status to influence

Description	
<p>The circumstances in which a barrister may attempt to use his/her status to influence usually arise in relation to the barrister's personal life. A typical breach under this heading might arise where a barrister sends correspondence on a personal matter on chambers' letterhead holding him or herself out as a barrister in an attempt to influence or pressurise someone to accede to a course of action. Using status to influence is likely to breach Core Duty 3 (acting without honesty and integrity) and Core Duty 5 (behaving in a way that is likely to diminish the trust and confidence which the public places in you or in the profession).</p> <p>In most cases the starting point should be a low level fine. However, if the pressure is severe and amounts to "bullying", then a higher level fine would be appropriate.</p> <p>Listed below are common circumstances in which breaches might occur set out according to severity.</p>	
Common Circumstances	Starting Point
a. A single incident of using status to influence when he or she ought to have realised that it was inappropriate	a. A low level fine
b. Repeated incidents where the barrister is attempting to exploit his/her status as a means of exerting pressure or there is a financial motivation involved	b. A medium level fine
Aggravating factors	Mitigating factors
<ul style="list-style-type: none"> • Victim is particularly vulnerable • Behaviour over an extended period of time • Motivation is financial gain 	<ul style="list-style-type: none"> • An isolated incident • Immediate apology

C.9 - Incompetence

Description	
<p>Incompetence is likely to breach Core Duty 5 (behaving in a way that is likely to diminish the trust and confidence which the public places in you or in the profession) and Core Duty 7 (providing a competent standard of work and service to each client). Incompetence may be charged under Part II of the Code, section C.3, rule 7.8 (II.C3.R7.8). .</p> <p>The level of incompetence and seniority of the particular barrister concerned will be important factors in deciding what sanction is appropriate. It will also be important to consider whether the incompetence has had a direct impact on the client's case.</p> <p>In most cases the starting point should be a reprimand and/or advice as to future conduct however this may be accompanied by a fine for more serious cases. Listed below are common circumstances in which breaches might occur set out according to severity.</p>	
Common circumstances	Starting Point
a. An isolated act on the part of an inexperienced barrister which did not adversely affect the client's case	a. Advice as to future conduct and/or reprimand and low level fine
b. Significant or repeated acts of incompetence which had an adverse effect on the proceedings	b. A medium level fine to a short suspension
Aggravating factors	Mitigating factors
<ul style="list-style-type: none"> • Failure to take responsibility for actions 	<ul style="list-style-type: none"> • Immediate apology • Remedial action taken at an early point

C.10 - Delay

Description	
<p>Delay may be charged under Part II of the Code, section C.3, rule 7.1(II.C3.R7.1)..</p> <p>The length of the particular delay will be relevant and persistent instances of ignoring related communications from the client. The workload of the barrister is not a relevant factor to take into account as barristers are required by the Code to refuse instructions if they do not have adequate time or opportunity to prepare that which is required.</p> <p>It will also be important to consider whether or not the delay had a direct impact on the client's case.</p> <p>In most cases the starting point should be a low level fine.</p> <p>Listed below are common circumstances in which breaches might occur set out according to severity.</p>	
Common circumstances	Starting Point
a. A delay with limited impact on the proceedings	a. A low level fine
b. A significant delay in the face of repeated communications seeking a response	b. A medium level fine
Aggravating factors	Mitigating factors
<ul style="list-style-type: none"> • Lack of remorse • Previous convictions for similar breaches • Adverse effect on the course of the proceedings • Distress or worry caused to client 	<ul style="list-style-type: none"> • Immediate apology • Remedial action taken at an early point

Section D – Barristers and their regulator

D.1 - Failure to report a criminal charge or conviction promptly

Description	
<p>Barristers are required to report nearly all criminal convictions and also the fact that charges have been preferred in relation to a range of criminal offences. Failure to report a criminal charge or conviction is charged under Part II of the Code, section C.4, rule 2 (II.C4.R2).</p> <p>Failure to report a criminal conviction will usually be accompanied by a disciplinary charge relating to the specific conviction. Although there may be multiple charges, a separate sanction should be imposed for each.</p> <p>The starting point for failure to report a criminal charge or conviction promptly should be a low level fine. Given the nature of the offence, the range of appropriate sanctions is limited and it is unlikely that more than a medium level fine will be appropriate. However, the sanctions for the criminal conviction itself are likely to be more severe (see A.1 - A.3).</p> <p>Listed below are common circumstances in which breaches might occur set out according to severity.</p>	
Common circumstances	Starting point
a. Failure to report promptly being charged with a relevant criminal offence	a. A low level fine
b. Failure to report promptly a relevant criminal conviction	b. A low to medium level fine
Aggravating factors	Mitigating factors
<ul style="list-style-type: none"> • Substantial delay in reporting the conviction • Attempts to conceal conviction and/or relevant facts or details relating to the conviction 	<ul style="list-style-type: none"> • Genuine and understandable ignorance of the duty to report

D.2 - Failure to respond

Description	
<p>Barristers are required, under Part II of the Code, section C.4, rule 1 (II.C4.R1), to promptly provide all such information to the Bar Standard's Board as it may, for its regulatory functions, from time to time require and to notify it of any material changes to that information.</p> <p>Failure to respond is most often accompanied by other charges for breaches of the Code. However, in some circumstances, a late response from the barrister results in the main issues of complaint being dismissed but a charge for failing to respond is still brought because of the inconvenience/delay caused either to the BSB or the complainant and/or because of the barrister's attitude towards the authority of the BSB.</p> <p>In most cases the starting point should be a low level fine increasing according to the circumstances, the barrister's attitude and the level of delay/inconvenience caused. A short suspension might be appropriate where the behaviour has been repeated in relation to a number of separate complaints.</p> <p>Listed below are common circumstances in which breaches might occur set out according to severity.</p>	
Common circumstances	Starting Point
a. Delays in responding but with some level of engagement with the BSB	a. Low level fine
b. Failure to respond at any point to BSB enquiries	b. Low level fine (upper end)
c. Deliberate decision not to engage with the BSB showing a disregard for the authority of the regulator	c. Medium level fine
Aggravating factors	Mitigating factors
<ul style="list-style-type: none"> • Lack of explanation for the failure to respond • Distress and inconvenience to the complainant • Substantial delay in being able to deal with the complaint • Persistent failures to respond 	

D.3. Failure to comply with an Order of a BTAS Tribunal or the Professional Conduct Committee

Description	
<p>The BSB does not have powers of enforcement. Where a barrister fails to comply with an Order of a previous Tribunal or disciplinary panel (including financial penalties) the only option available is to take further enforcement action and if necessary bring further proceedings for professional misconduct in front of Tribunal. Under Part II of the Code, section C.4, rule 1.2 (II.C4.R1.2) barristers must comply in due time with any decision or sentence imposed by the Bar Standards Board, a Disciplinary Tribunal, the Visitors, an interim panel, a review panel, an appeal panel or a medical panel.</p> <p>The appropriate sanction will depend on the nature of the original sentence, whether compliance of whole or part of the order remains outstanding and the reasons why the breach occurred. It is therefore difficult to set an overall starting point. A financial penalty may not be appropriate where previous financial orders remain outstanding. In most cases, where order(s) remain outstanding, and no serious attempts have been made to comply, a conditional short suspension could be appropriate (i.e. the suspension does not become operative unless the barrister fails to comply with conditions set by the Tribunal).</p> <p>Where compliance has been achieved by the date of the Tribunal, the starting point should be a low level fine combined with a reprimand/advice as to future conduct.</p> <p>Listed below are common circumstances in which breaches might occur set out according to severity.</p>	
Common circumstances	Starting Point
a. Failure to comply in due time or with only part of an order	a. Low level fine and reprimand/ advice as to future conduct
b. Failure to comply with any part of the orders of the Tribunal/panel	b. Conditional short suspension
c. Deliberate decision not to engage with the BSB showing a disregard for the authority of the regulator	c. Medium suspension
Aggravating factors	Mitigating factors
<ul style="list-style-type: none"> • Similar previous findings • No attempt to comply with the order 	<ul style="list-style-type: none"> • Genuine attempts to comply • Late compliance

Section E – Barristers and their practice

E.1 - Poor administration of practice/chambers

Description	
<p>All self-employed barristers have an obligation to ensure that their practices are efficiently and properly administered and they can be held personally responsible for any failures to do so. All members of chambers are now under an obligation to take reasonable steps to ensure that their chambers are administered competently and efficiently. What steps it is reasonable for barrister to take depends on all the circumstances including the arrangements in place for the management of chambers and the role the barrister play in those arrangements. Poor administration of practice/chambers is likely to be charged under multiple rules in Part II of the Code, section C.5 (II.C5) dependant on the circumstances of the individual case.</p> <p>In most cases advice as to future conduct will normally be appropriate. Fines in the low to medium range would be appropriate where there is financial gain or the problems are systemic within a practice/chambers. Fines for Heads of Chambers would not normally be appropriate given the collective nature of chambers but could be appropriate for sole practitioners.</p> <p>Listed below are common circumstances in which breaches might occur set out according to severity.</p>	
Common circumstances	Starting Point
a. Failure to return papers/keep proper records of cases/fees	a. Advice as to future conduct
b. Systemic failures to manage a wide-range of areas of practice/chambers in order to save money or increase income	b. Reprimand and a low to medium fine (dependent on potential financial gain)
Aggravating factors	Mitigating factors
<ul style="list-style-type: none"> • Financial gain • Persistent or wide ranging failures in administration • Adverse impact on other members of chambers 	<ul style="list-style-type: none"> • One off/limited duration due to break down in technical support or staff mistakes • Problems in staffing outside the control of an individual barrister • Remedial action taken at an early point

E.2 Holding out

Description	
<p>“Holding out” is the short hand term to describe a barrister who is not entitled to practise presenting him/herself to others in a way that would lead people to believe that he/she is entitled to practise and offer legal services as a barrister. The breach is will be charged under Part III of the Code, section B.1 (III.B1) no practice without authorisation.</p> <p>Holding out can occur in a variety of circumstances. The type of cases that are likely to lead to charges of professional misconduct are those where the barrister has deliberately stated that he is entitled to practise and has provided legal services for financial gain when he/she is not entitled to do so.</p> <p>The starting point should be a reprimand or advice as to future conduct with fines being more appropriate where the behaviour is deliberate/financially motivated.</p> <p>Listed below are common circumstances in which breaches might occur set out according to severity.</p>	
Common circumstances	Starting Point
a. Using misleading description of status on a business card/letter head	a. Reprimand/advice as to future conduct
b. Inappropriate use of title as a marketing device	b. Reprimand/advice as to future conduct and low level fine
c. Providing legal services for financial gain in circumstances where the client is misled into believing the barrister is entitled to practise.	c. Medium level fine to suspension dependent on the extent of the financial gain (disbarment could be considered where there is a clear risk to the public and the barrister may be likely to persist in the behaviour)
Aggravating factors	Mitigating factors
<ul style="list-style-type: none"> • Failure to pay administrative fine on time or at all • Providing legal services in return for payment • Persistent pattern of behaviour • Motivation is financial gain • Using status of barrister to threaten or exploit • Failure to take remedial action when asked to do so by the BSB 	<ul style="list-style-type: none"> • No direct impact on members of the public • Breach was inadvertent and unintentional

E.3 - Breach of practising requirements

Description	
<p>The requirements a barrister must meet to practise as a self-employed barrister are set out in Part III of the Code, Scope of Practise and Authorisation Rules. The requirements include completion of Continuing Professional Development (CPD), payment of practising fees and obtaining insurance cover.</p> <p>It is likely that charges of professional misconduct in relation to breach of the practising requirements will only come before a Tribunal in the case of persistent or recalcitrant defaulters who will have received repeated warnings as to the potential consequences of their continued default and may also have previously been subject to administrative sanctions.</p> <p>It is also likely that a charge sheet in relation to practising requirement breaches will also include a charge in relation to a failure to pay an administrative fine and/or a failure to respond to the BSB.</p> <p>Often panels will be faced with a charge sheet which includes up to three charges for: failing to pay the administrative fine, failing to meet the relevant requirement and failure to respond.</p> <p>Panels should treat any of the above failures seriously given that the barrister will have had a number of previous opportunities to rectify his/her non-compliance and considerable resources will have been expended in trying to make the barrister meet his/her obligations. Each breach should be sentenced separately.</p> <p>The starting point for each charge should be a low level fine towards the top end. Therefore in cases where three charges are included on the charge sheet, the total fine could amount to £3,000. The starting point for persistent offenders should be a short conditional suspension - the condition being the barrister should meet the practising requirement by a specified date. Immediate suspensions should be considered where the barrister has previously been subject to a conditional suspension of a similar offence.</p> <p>Listed below are common circumstances in which breaches might occur set out according to severity.</p>	
Common circumstances	Starting Point
a. Failing to meet practising requirements in due time (compliance achieved late)	a. Low level fine with starting point of £600
b. Failing to meet practising requirements (compliance still outstanding)	b. Low to medium level fine with starting point of £900 and an order to comply with outstanding requirements by a specified date
c. Failure to pay an administrative fine	c. Low to medium level fine with starting point of £900

d. Repeated failures to meet practising requirements (but no previous disciplinary history of this)	e. Short suspension (usually conditional)
d. Previous disciplinary history of failing to meet practising requirements (including previous suspension)	f. Medium to long suspension conditional on requirements being met
Aggravating factors	Mitigating factors
<ul style="list-style-type: none"> • Previous disciplinary findings for failing to meet practising requirements • Failure to attend a Disciplinary Tribunal without explanation 	<ul style="list-style-type: none"> • Attempts to comply and/or previous responses to BSB enquiries • Attempts to prevent recurrence • Financial hardship causing inability to pay

E.4 Breach of pupillage advertising/funding requirements

Description	
<p>All pupillages must be advertised in order to allow for open selection and equality of opportunity. It is also a requirement that pupillages are funded at a minimum prescribed level or more. This breach is likely to be charged under Part II of the Code, section C.5, rule 17.4 (II.C5.R17.4).</p> <p>Breaches of the advertising requirements may be unintentional and stem from lack of knowledge of the requirements. However, failures to provide funding are more serious as they are likely to be motivated by financial gain and in most cases will involve some level of exploitation of the pupil. Deliberate evasion/circumvention of both requirements should be taken seriously.</p> <p>Where the breach is unintentional, a reprimand or advice as to future conduct would be appropriate. Intentional breaches of the funding requirements should attract a relatively heavy fine, particularly where the arrangements involved a level of exploitation of the pupil.</p> <p>Listed below are common circumstances in which breaches might occur set out according to severity.</p>	
Common circumstances	Starting Point
a. Failure to advertise but no pupillages were offered in contravention of the rules	a. Reprimand/advice as to future conduct
b. Deliberate failure to advertise where pupils have been taken on in contravention of the rules	b. Reprimand and low level fine
c. Deliberate failure to provide funding motivated by financial gain	c. Medium to high level fine dependent on the level of potential or actual financial gain
d. Intentional failure to comply with recruitment requirements as well as failure to provide funding requirements	d. Short suspension
Aggravating factors	Mitigating factors
<ul style="list-style-type: none"> • Financial gain • Exploitation of a pupil • Breach resulted in the pupillage not being registered • Persistent breaches involving numbers of pupils <p>Lack of response to warnings from Pupillage and Training Committee of the BSB</p>	<ul style="list-style-type: none"> • Unintentional • One off where previous pupillages had been properly handled • Remedial action taken at an early point

Annex 1 – Aggravating and mitigating factors

Before the panel determine the appropriate level of sentence for the breach of the Code, the panel will need to have due regard to any evidence of factors that aggravate or mitigate the seriousness of the breach. Aggravating and/or mitigating factors can include the level of culpability of the defendant and/or the level of harm caused to the profession and/or the public.

Aggravating factors

The following factors, if present, may determine whether a higher sanction for a breach should be imposed. The factors listed are only examples and are not exhaustive:

- Premeditation
- Motive of financial gain
- Corruption/gross deception
- Coercion
- Involvement of others
- Persistent conduct or conduct over a lengthy period of time
- Undermining of the profession in the eyes of the public
- Attempts to hide the misconduct or wrongly lay blame elsewhere
- Effect on the complainant or particular vulnerability of the complainant
- Actions accompanied by discriminatory behaviour or motivation (does not require intent)
- Breach of trust
- Position of responsibility within the profession
- Previous disciplinary findings for similar breaches
- Previous disciplinary findings for any types of breaches, particularly where the breaches show an unwillingness to comply with the Code
- Lack of remorse for having committed the offences
- Failure to respond promptly to communications from the BSB, or inappropriate behaviour that frustrates the administration of the complaint
- Failure to attend a Tribunal without explanation
- Indication of an element of dishonesty (see paragraph 6.2 on a finding of dishonesty and paragraph 7.5 on dishonesty during proceedings)
- Lack of insight

Mitigating factors

The following factors, if present, may determine whether a lower sanction for a breach should be imposed. The factors listed are only examples and are not exhaustive:

- Guilty plea
- Genuine remorse (as expressed in e.g. a willingness to apologise to the complainant and/or compromise over matters such as fees)
- Limited experience within the profession
- The breach was unintentional
- Single incident (not applicable if behaviour involves discrimination)

- Heat of the moment (not applicable if behaviour involves discrimination)
- Co-operation with the investigation
- Voluntary steps have been taken to remedy or rectify the breach
- Evidence of attempts to prevent reoccurrence
- Previous good character (not applicable if behaviour involves discrimination)
- Evidence of financial hardship (only applicable when it has had a direct impact on the commission of the offence)
- Advice was sought and obtained from the Bar Council's professional ethics helpline
- Particular personal circumstances that provide a reasonable explanation for the behaviour. In particular, bereavement, relationship breakdown and divorce (matters such as pressure of work and bankruptcy should be treated with caution as these factors may indicate a greater risk to the public in the barrister's on-going practice)
- Good references (only of limited applicability and very much dependent on the nature of the offence and the role and identity of the referee)

Annex 2 – Wording of sentences and Findings and Sentence sheet

Wording of sentences

A2.1 Prescriptive requirements for the wording of sanctions are no longer included in the Disciplinary Tribunal Regulations but it is still important that panels include on the findings and sentence sheet clear details of the sanction(s) imposed. Therefore set out below is guidance on the wording that should be used when imposing each of the individual sanctions, including any sanction imposed under the Determination by Consent procedure. It is based on the previous wording of the Disciplinary Tribunal Regulations and may appear very formal but it provides a sound basis for ensuring that any sanctions imposed are not subject to confusion. It is mandatory to use one of the statements contained in paragraph A2.2 below where a defendant is absent from a Tribunal hearing.

Absence of the barrister charged

A2.2 Where the barrister charged has not been present throughout the proceedings, the sentence must include one of the following two statements:

- (i) If the relevant procedure under Regulation 14(1) has been complied with, that the finding and sentence were made in the absence of the barrister in accordance with Regulation 14(1).
- (ii) If the procedure under Regulation 14(2) has been complied with, that the finding and the sentence were made in the absence of the barrister and that he has the right to apply to the Directions Judge for an order that there should be a new hearing before a fresh Disciplinary Tribunal.

Disbarment

A2.3 "That [X] be disbarred and expelled from the Honourable Society of [X] [and *any other Inn of which he is a member*]"

Removal from the Register of European Lawyers

A2.4 "That [X] be removed from the register of European lawyers maintained by the Bar Council."

Suspension from practice

A2.5 "That [X] be suspended for [X] weeks/months/year."

"That [X] be suspended until he has complied with [state the practising requirement with which the barrister should comply]."

"That [X] be suspended from accepting or carrying out any [state the area of practice that the suspension shall apply to] for [X] weeks/months/years."

"That [X] be suspended from accepting or carrying out any [state the area of practice that the suspension shall apply to] until he has complied with [state the practising requirement with which the barrister should comply]."

Suspension from the Register of European Lawyers

A2.6 "That [X] be suspended from the register of European lawyers maintained by the Bar Council for [X period]."

"That [X] be suspended from the register of European lawyers maintained by the Bar Council until he has complied with [state the practising requirement with which the barrister should comply]."

"That [X] be suspended from the register of European lawyers maintained by the Bar Council with regards to accepting or carrying out any [state the area of practice that the suspension shall apply to] for [X] weeks/months/years."

"That [X] be suspended from the register of European lawyers maintained by the Bar Council with regards to accepting or carrying out any [state the area of practice that the suspension shall apply to] until he has complied with [state the practising requirement with which the barrister should comply]."

Prohibition on accepting or carrying out public access instructions

A2.7 "That [X] be prohibited from accepting or carrying out any public access instructions."

"That [X] be prohibited from accepting or carrying out any public access instructions for [X] weeks/months/years."

"That [X] be prohibited from accepting or carrying out any public access instructions until he has complied with [state the practising requirement with which the barrister should comply]."

Payment of fine

A2.8 "That [X] pay a fine of £[] to the Bar Standards Board, within [X] weeks/months of the expiry of any appeal period."

"That [X] pay a fine of £[] to the Bar Standards Board, to be paid in monthly installments of £[] to commence within [X] weeks/months of the expiry of any appeal period."

Continuing Professional Development

A2.11 "That [X] shall by [date] complete a minimum of [X] hours of continuing professional development (in addition to the mandatory requirements set out in the Continuing Professional Development Regulations at Annex C to the Code of Conduct) [in the

subject of ...] and provide satisfactory proof of compliance with this Order to the Bar Standards Board."

Reprimand

A2.13 "That [X] has been reprimanded by the Tribunal."

"That [X] is ordered to attend on [X- the nominated person] to be reprimanded."

Advice as to future conduct

A2.15 "That [X] has been advised by the Tribunal as to his future conduct in regard to....."

"That [X] is hereby ordered to attend on [X – the nominated person] to be given advice as to his future conduct in regard to.....".

Order for reduction of Legal Aid fees

A2.16 "That the fees otherwise payable to [X] by the Legal Aid Agency in connection with the legal services provided by him are reduced in the following sum £[] according to the attached list. *(a list of the reductions should be provided)* "

Order for cancellation of Legal Aid fees

A2.17 "That the fees otherwise payable to [X] by the Legal Aid Agency in connection with services provided by him should be cancelled in accordance with the attached list. *(a list of the cancelled services should be provided)* "

Exclusion from Legal Aid work

A2.18 "That [X] be excluded from providing representation funded by the Legal Aid Agency (as explained in Section 42(4)(b) of the Administration of Justice Act 1985 as substituted by Section 33 of the Legal Aid Act 1988 and amended by Schedule 4 to the Access to Justice Act 1999) until [X date] or for a period of [X time]beginning on [X date].

ANNEX 3 - Glossary