



# The Bar Tribunals & Adjudication Service

The Council of the Inns of Court

## Disciplinary Tribunals

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

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## The Regulatory Framework

1. The Bar Standards Board (BSB) launched its new Handbook in January 2014, and it is now in its fourth edition, as updated in September 2019. The Handbook incorporates the Code of Conduct, Scope of Practice Authorisation and Licensing Rules, Qualification Rules, and the Enforcement Regulations.
2. The BSB's Handbook is available on their website: <https://www.barstandardsboard.org.uk/regulatory-requirements/bsb-handbook/the-handbook-publication/>. However, Pool Members and Clerks should be mindful that the Handbook is subject to frequent, albeit minor, updates, and for this reason BTAS recommends reference to an electronic (rather than printed) copy to ensure it remains up to date. Where an older version or edition is to be used in a Hearing, BTAS will advise of this and provide copies.
3. **The Code of Conduct**, Part 2 of the Handbook, requires those regulated by the BSB to comply with the Core Duties. These duties underpin the regulatory framework, define the core elements of professional conduct and set the mandatory standards that all regulated persons are required to meet:
  - CD1** You must observe your duty to the court in the administration of justice.
  - CD2** You must act in the best interests of each client.
  - CD3** You must act with honesty, and with integrity.
  - CD4** You must maintain your independence.
  - CD5** You must not behave in a way which is likely to diminish the trust and confidence which the public places in you or in the profession.
  - CD6** You must keep the affairs of each client confidential.
  - CD7** You must provide a competent standard of work and service to each client.
  - CD8** You must not discriminate unlawfully against any person.
  - CD9** You must be open and co-operative with your regulators.
  - CD10** You must take reasonable steps to manage your practice, or carry out your role within your practice, competently and in such a way as to achieve compliance with your legal and regulatory obligations.
4. The core duties are supported by a number of mandatory rules. In addition, the Code sets out the outcomes which compliance with the core duties and rules are intended to achieve. Enforcement action will be considered by the BSB where a regulated person is deemed to fail to meet these requirements.
5. The Code is divided into three sections. The Core Duties, the Conduct Rules, and the Rules applying to particular groups of regulated persons, for example barristers undertaking public access work, registered European lawyers, and unregistered barristers.

## Overview of the Bar's Complaints Processes

6. The BSB Handbook sets out the professional obligations to which barristers are subject. One of the BSB's aims is to ensure that all those who are regulated by the BSB live up to its standards as set out in the Handbook and as a result it is necessary to have fair and rigorous complaints and disciplinary processes in place to protect the public when barristers fail to live up to the standards. The BSB will only take enforcement action when they are satisfied that a barrister, or

person they regulate, has broken the rules and their conduct is a risk to their regulatory objectives.

The BSB's regulatory objectives are laid down in the Legal Services Act, and shared with all legal services regulators. They are:

- protecting and promoting the public interest;
- supporting the constitutional principle of the rule of law;
- improving access to justice;
- protecting and promoting the interests of consumers;
- promoting competition in the provision of services;
- encouraging an independent, strong, diverse and effective legal profession;
- increasing public understanding of citizens' legal rights and duties; and
- promoting and maintaining adherence to the professional principles.

The professional principles are:

- that authorised persons should act with independence and integrity;
- that authorised persons should maintain proper standards of work;
- that authorised persons should act in the best interests of their clients;
- that persons who exercise before any court a right of audience, or conduct litigation in relation to proceedings in any court, by virtue of being authorised persons should comply with their duty to the court to act with independence in the interests of justice; and
- that the affairs of clients should be kept confidential.

7. In addition, the BSB has an *Enforcement Strategy*, which provides a framework in which the BSB must take its enforcement decisions. Enforcement action, as set out in the strategy, is intended to meet the objectives of:

- protecting and promoting the public interest and the interests of consumers;
- promoting adherence to our regulatory arrangements as set out in our Handbook;
- supporting the constitutional principle of the rule of law;
- promoting and maintaining adherence to the professional principles;
- providing a credible deterrence to non-compliance with our regulatory arrangements; and
- preventing further breaches

8. The Rules and Regulations covering the complaints and disciplinary processes are set out in part 5, Enforcement Regulations of the BSB Handbook, and which provide the outline structure for processing complaints, investigating them and taking decisions on them. In short, the Enforcement Regulations means the application of sanctions to address non-compliance with the provisions within the Handbook.

9. The BSB's Legal and Enforcement Department (LED) is responsible for investigating complaints and taking action against barristers who may have breached the Code of Conduct. The need to take enforcement action may be identified by the LED from a range of information sources including, but not limited to, the following:

- reports made to the BSB from external sources such as clients, members of the public, lawyers or judges, law enforcement agencies or other regulators;

- information that comes to the BSB's attention via other external sources, including the Legal Ombudsman;
  - information that comes to the BSB from BSB regulated persons as a result of their duty to report certain matters as required by the Code of Conduct;
  - information from the BSB's Supervision Department concerning breaches, particularly by chambers or entities; and,
  - information from other departments within the BSB.
10. Once a complaint is received, it will be subject to a preliminary assessment in order to establish whether the complaint discloses a "potential" breach of the Code or the Handbook. If the complaint reveals a potential breach it is assessed against a set of criteria. Those assessed as reaching the necessary threshold of risk are forwarded for investigation. Those that do not reach the threshold may either be referred to supervision or disposed by dismissal or referral to chambers.
11. If a complaint warrants formal investigation, it will be assigned to a Case Officer to investigate and obtain relevant information from the complainant, the barrister complained of, and anyone else who may have knowledge about the matter which is the subject of the complaint. At any stage in the process, advice can be sought on the investigation from a member of the BSB's Independent Decision Making Body (IDMB) or an Equality & Diversity Advisor.
12. The enforcement tools available to the BSB include:
- Issuing formal advice;
  - imposing a non-disciplinary administrative sanction in the form of a warning or a fine;
  - referring a case to disciplinary action by the Determination by Consent Procedure with powers to impose sanctions up to the maximum of a fine;
  - referring a case to disciplinary action by a BTAS Disciplinary Tribunal with powers ranging from a reprimand to disbarment; and
  - imposition of a disqualification order preventing a person working for a BSB regulated person.
13. As of 1 April 2019, the standard of proof for allegations of professional misconduct has changed from the criminal standard to the civil standard (para rE164).
- Any conduct occurring on or after 1 April 2019 will be considered applying the civil standard of proof.
  - The criminal standard of proof will continue to apply to any conduct that occurred before that date.
  - It is also possible that some Tribunals, considering conduct that took place over the changeover date, will have to apply different standards when considering different charges in the same case.
14. The nature of the breach of the Code of Conduct only becomes directly relevant at the post-investigation stage of the process when the BSB takes a decision as to what type of enforcement action, if any, is appropriate. However, it is important to note that the imposition of an administrative sanction is not a disciplinary disposal and details of the decision and the sanction imposed will not be made publically available: this includes communication to the Queen's Counsel Appointment Body and the Judicial Appointments Commission. On the other



hand, while no further action decisions are also not formally classed as disciplinary disposals and are not made publically available, they are disclosed by the BSB in relation to applications for silk or judicial appointments.

15. At the conclusion of the investigation a review of the risk level is carried out and the Case Officer makes recommendation(s) as to whether the complaint should be dismissed or receive an administrative sanction, or be referred to the IDMB for disciplinary action by a Tribunal or by determination by consent. The decision as to whether an administrative sanction is an appropriate disposal in an individual case will be taken as part of the post-investigation assessment stage either by staff or the IDMB. Where it is considered that an administrative sanction is appropriate, a decision will need to be taken either by the staff or the Committee as to what type and level of sanction should be imposed. These sanctions cannot be enforced at a Disciplinary Tribunal.
16. The Handbook defines administrative sanctions (at Part 6, 'Definitions') as "an administrative warning, fixed penalty fine or other administrative fine up to the prescribed maximum, or any combination of the above in accordance with the [Complaints Regulations]". The types of administrative sanction are:
  - Formal Warnings;
  - Fines, of which the maximum level that can be imposed is £1,000 where the fine is to be imposed on barrister, or £1,500 where the fine is to be imposed on a BSB-regulated entity.
  - Multiple breaches – where a complaint involves more than one breach, all of which are suitable for disposal by administrative sanctions, separate sanctions for each breach should not be imposed but a global sanction imposed covering all the breaches based on the most serious breach. This is in line with the approach taken at the preliminary and post-investigation stages where a complaint is risk assessed as a whole rather than individually by its constituent aspects.
17. Barristers who are subject to the imposition of administrative sanctions have a right to appeal the decision to an independent panel, appointed by the Bar Tribunal and Adjudication Service (BTAS).
18. Where a complaint is referred to the IDMB, the options available for the disposal of the complaint are:
  - Dismiss the complaint, provided that the majority of the lay members present consent to the dismissal;
  - Dismiss the complaint but advise the barrister as to his/her future conduct in writing, or direct the barrister to attend on the IDMB Chair or a Vice Chair for such advice;
  - Decide that no further action should be taken on the complaint;
  - Direct that a formal written warning or financial penalty be imposed;
  - Where there is a realistic prospect of a finding of professional misconduct, refer the complaint to the Determination by Consent procedure or a Disciplinary Tribunal for disciplinary action, as long as the regulatory objectives would be best served by doing so; or,
  - Decide that further information is required before making a decision.

## The Disciplinary Process:

19. Where sufficient evidence of professional misconduct exists, the IDMB has the power to refer cases to a Disciplinary Tribunal panel or to the 'Determination by Consent' procedure to determine the outcome of the disciplinary case.
20. **Determination by Consent:** In certain circumstances the IDMB has the power to determine the outcome of a disciplinary case with the barrister's consent. This is known as "Determination by Consent" (DBC). For a case to be suitable for the DBC procedure, there should be no substantial dispute of facts and the breaches of the Code and/or Handbook should not warrant a period of suspension from practice or disbarment. The barrister must consent to the process and if, at any stage, the barrister fails to respond, or a dispute of facts arises, the process will stop and the case will be referred to a Disciplinary Tribunal.
21. Under the DBC procedure, the IDMB can:
  - order the barrister to pay a fine;
  - impose conditions on the barrister's licence or authorisation reprimand the barrister or order to attend on a nominated person to be reprimanded;
  - advise the barrister as to their future conduct or an order to attend on a nominated person to give the barrister advice as to their future conduct;
  - order to complete continuing professional development [CPD] of such nature and duration as the IDMB shall direct and to provide satisfactory proof of compliance with this order to the IDMB.

Any findings by the IDMB have the same status as any other disciplinary finding, such as those made by a Disciplinary Tribunal. Further information on the DBC procedure can be found on the BSB's website: [https://www.barstandardsboard.org.uk/complaints-and-professional-conduct/disciplinary-tribunals-and-findings/determination-by-consent-\(dbc\)/](https://www.barstandardsboard.org.uk/complaints-and-professional-conduct/disciplinary-tribunals-and-findings/determination-by-consent-(dbc)/).

## Disciplinary Tribunals

22. Procedures for dealing with complaints referred to Disciplinary Tribunals are laid down in Part 5 of the BSB Handbook; Enforcement Regulations: the Disciplinary Tribunal Regulations (DTRs). In all instances the content of the DTRs has precedence over the guidance provided below, for which reason reference is made wherever possible to the relevant Regulation<sup>1</sup>.
23. **Nature of Disciplinary Tribunals:** BTAS Disciplinary Tribunals are domestic, non-statutory tribunals. As such, the proceedings are intended to be relatively informal. The strict rules of civil and criminal evidence are not applied, although they are always used as a basis for deciding how to treat any evidential issues that arise. Additionally, as public authorities under the Human Rights Act 1998, BTAS Disciplinary Tribunals must be compliant with the European Convention of Human Rights.

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<sup>1</sup> These are given in the format used in the DTRs, which have the format of a numerical paragraph number prefixed by the letter 'r' to denote it is a rule or regulation (as opposed to guidance) and the letter 'E' to locate the paragraph in the Enforcement Regulations, e.g. rE101.

24. **Composition of the panels:** Disciplinary Tribunal panels are composed of either three or five members. Three person panels normally consist of a Queens Counsel (“QC”) as Chair, a lay member and a barrister member of at least 7 years standing. The President of COIC can appoint a judge to chair a three person panel if the respondent is a QC or there is any other good reason to do so. Five person panels consist of a judge as Chair, two barrister members (both of whom should be of at least 7 years standing) and two lay members (rE139-rE150).
25. The key difference between three and five member tribunal panels is the sanctioning powers available to each. A three person Tribunal panel cannot suspend a barrister for more than twelve months or disbar. However, if a three person panel feels that its sanctioning powers are insufficient, it can refer a case to a five person panel for sanctioning (rE211).
26. **The Enforcement Regulations:** BTAS Pool members and clerks should ensure they are familiar with the Disciplinary Tribunal Regulations at Part B of the Enforcement Regulations. The following brief summary is provide for convenient reference and should not be used as a substitute for reading the Regulations themselves:
- **Composition of disciplinary tribunals:** rE139 – rE150 outline details of the correct composition of both 3 and 5 member tribunals. Members of the BTAS Disciplinary Pool should ensure they are fully aware of these, as it is incumbent upon them to report to BTAS should their eligibility to sit on disciplinary proceedings become questionable.
  - **Documents to be served on the respondent:** rE103 – rE105 provides details of the documents that the BSB is obligated to supply to the respondent barrister within 28 days of the charges being served. Panel members should strive to ensure that this has been properly complied with, given the detriment that could otherwise be caused to the respondent. Panel members should also be aware of rE249 – rE250, which notes the circumstances in which documents are validly served.
  - **Provision of documents to the Disciplinary Tribunal:** rE151-rE153 sets out requirements relating to documents that panel members should receive prior to hearings. Clearly this should be of concern, as it is of considerable importance that panel members are properly prepared to hear a case.
  - **Absence of respondent:** rE183-rE184 allows a tribunal to proceed in the respondent’s absence if the relevant procedure has been complied with.
  - **Amendment and addition of charge(s) and/or application(s):** rE161 relates to circumstances in which charges can be amended. Generally, this can occur where the respondent will not suffer substantial prejudice by virtue of the amendment. However, the tribunal may grant, if it considers it necessary, the respondent an adjournment to properly consider the revised charges.
  - **Adjournment:** rE162 – rE163 imbues a panel with a more general power to grant an adjournment if it believes it is necessary. Applications for adjournments should always be seriously considered as such decision can be appealed or judicially reviewed where they have been wrongfully refused.

- **The sanction:** rE203 – rE219 deals with sanction. Panel members should be particularly aware of the need to record in writing the fact that a decision is not unanimous. Further, when the Chairman of the tribunal announces sanction, s/he should state whether the decision is unanimous or by majority. It should be noted that a 3-person tribunal cannot impose a sanction of disbarment, nor can it suspend a barrister’s practising certificate for a period longer than 12 months, or suspend a barrister for longer than 12 months. If the panel feels a sanction of grater severity is appropriate, then rE211 requires that it must refer the case to a 5-person panel for sanctioning.
27. **Report of finding and sanction:** Every Tribunal is required to formally report its finding(s) on each charge and application, the reasons for that finding and, where applicable, the sanction and the reasons for any sanction. It is required to do this in two ways, which (perhaps not as helpfully as might be hoped) are referred to in the DTRs using very similar terminology:
- i. At the end of the hearing, the Disciplinary Tribunal must record in writing its finding[s] on each charge or application, and its reasons. That record must be signed by the Chair and by all members of the Disciplinary Tribunals [rE199]. Although the reasons need not necessarily be lengthy they should show how, and why, and what particular evidence influenced the panel in making its finding(s). Copies of these sheets are sent to the respondent barrister after the conclusion of the hearing (who may refer to them when determining whether or not to appeal) and are used by BTAS to confirm the brief outcome of the hearing which must be promptly published on the BTAS website (rE243A.1).
  - ii. In addition, the Chair of the Panel must prepare the *Report of Finding and Sanction*’ (rE235). This is equivalent to the Tribunal’s judgment, and will usually be orally delivered at the conclusion of the hearing, after which BTAS will arrange for the digital recording of this to be transcribed and transposed onto the appropriate written template. Where judgment is for any reason reserved at the hearing, the text in the report must be agreed between all panel members (with the Clerk’s assistance as necessary) before it can be disseminated. Where the Chair deems it appropriate, this report may also refer to matters which, in the light of evidence given to the Tribunal, appear to require investigation or comment. Whether delivered orally or in writing, BTAS must publish this report ‘within a reasonable time’ after the Tribunal’s proceedings end (rE243A.1.a).
  - iii. In cases where the charges have been dismissed, details of the Tribunal’s findings are not put in the public domain and, and only an ‘anonymised summary’ of the report is published on the BTAS website *unless*, in either instance, the respondent so requests (rE243A.1.c).
28. **Burden of proof:** The burden placed upon a particular party to prove the truth of an issue in dispute. Generally, this falls on the party asserting that truth. In BTAS Disciplinary Tribunal hearings, the burden will lie with the prosecution (i.e. the BSB) to prove the charges against the respondent barrister (rE200).
29. **Standard of proof:** In order to discharge the burden of proof, a case must be proved to a particular standard. In BTAS Disciplinary Tribunal hearings, the Disciplinary Tribunal must apply the civil standard of proof which is “on the balance of probabilities”. (rE164).
30. **Case Law:** As well as the Code and the wider BSB Handbook, a voluminous body of case law forms part of the BTAS Tribunals regulatory framework. The English legal system is a “common

law” one. In extremely simplified terms, this means that legal principles are extracted from cases (usually decided by judges or panel members sitting in higher courts or tribunals) and applied, as “precedent”, to analogous facts in the present case under consideration. Where the law is perceived to be incorrect as applied to particular facts, a judge (always from a higher court) will enunciate a new principle, which will, from thereon in, be applied by the lower courts in future cases involving similar facts.

31. Such cases can relate to the interpretation of the Code, the Handbook or any other subject in issue during a Tribunal. Frequently parties will also draw on case law developed by other, comparable adjudicatory bodies such as the Solicitors Disciplinary Tribunal and the Medical Practitioners Tribunals Service. Distinctions made between cases can frequently be complex and technical, as parties attempt to tease out small differences between them.
32. Given the nuances of the English common law system, the law should not be regarded as fixed and unchanging, but as fluid and dynamic. If panel members are to apply proper principles, therefore, it is imperative that they keep a pace with the latest legal developments in the field of professional regulation.

## Overview of the Stages of the Disciplinary Tribunal Process.

33. The Disciplinary Tribunal process has four stages:

Stage 1 - serving the charges and the bundle of supporting documents;  
Stage 2 - agreeing and complying with the timetable for the case (“directions phase”);  
Stage 3 – setting the hearing date and Convening the Tribunal;  
Stage 4 - the Disciplinary Tribunal.

34. **Stage 1 - Service of the Charges (rE102 – rE105)**

- After the IDMB refers a case to a Disciplinary Tribunal, the file is passed to the Bar Standards Board’s (the “BSB”) Hearings Team and assigned to a Case Officer. A prosecutor from the BSB’s prosecution panel is instructed and the file is sent to him or her. The prosecutor reviews the file and provides advice on the charges, evidence, the bundle, and directions. The Case Officer then prepares the bundle to be served on the respondent barrister.
- According to the Regulations, the charges must be served on the respondent barrister, together with a copy of the Disciplinary Tribunal Regulations (Section B, Enforcement Regulations) and any directions sought no later than 10 weeks (or 5 weeks if the IDMB has directed that the prosecution of the charges be expedited) after the date on which the complaint was referred to a Disciplinary Tribunal. The BSB will normally serve the supporting bundle of documents on the respondent barrister at the same time as the charges; however, the bundle may be served later if documents are still being obtained. At the same time as serving the charges, the BSB will also serve on the respondent barrister proposed directions. The directions normally cover what documents are admitted into evidence, when a defence statement and defence documents should be served on the BSB, and the timetable for the substantive hearing.

### 35. Stage 2 – Directions (rE106 – rE126)

- The proposed directions (which may be ‘standard’ or ‘non-standard’) will be sent to a respondent barrister as soon as practicable after the issue of the charge(s) and/or applications on the respondent. The respondent barrister has 21 days from the date of service of the proposed directions to agree the directions or submit any proposed amendments.
- If standard directions are proposed, and the respondent barrister does not reply, then the respondent is deemed to have accepted the directions.
- If non-standard directions have been suggested by the prosecutor (i.e. the BSB), or the BSB has sought to amend the standard directions, then if the respondent barrister does not reply, the President is invited (rE109) to appoint a Directions Judge to endorse the proposed amendments to the standard directions or the proposed non-standard directions.
- Where both parties agree standard directions within the relevant period, those directions will apply to the case (rE110).
- Where both parties agree non-standard directions within the relevant period, these directions will apply to the case *unless* they were to have the effect of preventing BTAS from carrying out any of its operational functions (rE111), in which case a Directions Judge is required to endorse them before they have effect.
- In cases where a Directions Judge is required to endorse the directions, he or she will determine if an oral hearing is necessary (rE116 – rE118)
- After the oral directions hearing, or, if one is not required, after the review of the papers by the Direction Judge, BTAS must ensure that copies of the directions order are served on the Bar Standards Board and on the respondent[s] [rE124]. The directions order is final and there is no appeal against it (rE125).
- Oral directions hearings are presided over by a Directions Judge acting under the Disciplinary Tribunal Regulations.
- In addition to directions, at any time before the hearing either party can make *applications* (to stay proceedings; for the hearing to be held in private; to strike out the charge(s) etc (rE127). These can be dealt with by a Directions Judge, the Chair of the Tribunal and the Tribunal itself (after it has been convened).

### 36. Stage 3 – Setting the Hearing Date and Convening the Tribunal (rE130-rE153)

- Dates for hearings are arranged by BTAS first ascertaining the dates of availability of all the relevant parties including witnesses (a deadline for providing available dates is usually included in the directions). Where the respondent barrister is represented and/or there are a number of witnesses, it can sometimes be difficult to find a suitable date and delays can occur. Once a suitable date has been identified, BTAS will proceed to convene a panel for that date.

- After the President has nominated the Chair, panel members and a clerk, a Convening Order is sent to all parties identifying the time and location of the hearing together with the charges and any directions made. The Disciplinary Tribunal Regulations provide that the respondent may at the point of receipt of the Convening Order give notice to the President objecting to one or more of the proposed members of the panel, giving notice as soon as is reasonably practicable and specifying the grounds of objection (RE133 – rE135)
- The BSB's bundle of documents will be sent to panel members as soon as possible after the Convening Order is issued and at the latest 14 days before the hearing. The respondent barrister is normally expected (as part of the directions) to submit copies of any defence bundle to the BSB at the very latest 14 days before the hearing. If defence papers have been received, they will be forwarded to panel members with the BSB bundle. If a respondent barrister fails to comply with this direction and sends their papers in late, the BSB or BTAS will forward them to panel members as soon as possible after receipt. In some cases, the papers will arrive too late to allow this and panel members will receive the papers on the day of the hearing.

### 37. Stage 4 – The Disciplinary Tribunal hearing

- The order of proceedings at a hearing is set out in rE188 – rE198, and generally follows a standard criminal trial process. The charge(s) are put, pleas entered, the case against the respondent is presented by the BSB, followed by the respondent's defence, witnesses may be called after which the Tribunal decides a verdict and then – if appropriate - the sanction.
- The Tribunal applies the civil standard of proof (on the balance of probabilities) (rE164).
- **Witnesses (rE171 – rE181):** Witnesses are not always required to give evidence at a Tribunal hearing and most cases are considered on the papers alone. However, the respondent barrister may wish to give evidence under oath. If this is the case, the clerk will have the respondent barrister sworn in to give evidence.
- If either party to the case (the BSB or the respondent barrister) wishes to call witnesses to give evidence, the witnesses will wait outside the Tribunal Room in the Witness Waiting Room, until such time as they are needed. Most Tribunals take place in public and therefore witnesses are able to remain in the Tribunal room, as observers, after the conclusion of their evidence.
- The time estimate for the length of the hearing is usually set at the directions stage. Generally, they are fairly accurate. As with any case however, the Tribunal may run short or overrun. Panels may sit into the evening when it is considered necessary to recover time or conclude a case but Chairs should always bear in the mind that long hearings can be tiring for all concerned.
- If it is not possible to conclude the hearing within the allocated time, the hearing can go "part-heard" which means it will be adjourned until another date when all the parties and the panel members are available. It is good practice to try to agree, at the hearing, the amount of extra time that will be needed and set the date(s) as this will avoid further

delays. Panel members should, therefore, have their diaries with them at hearings (rE162 – rE163).

- **Conduct of the Hearing:** Robes are not worn at the hearing and all parties remain seated throughout (although a respondent barrister may be asked to stand to be sworn in / plead to the charges / receive the finding / sanction of the tribunal). At the outset of the hearing, there may be some preliminary matters for the panel to consider. This could include an application that the Tribunal takes place in private (this being an order that a directions judge will rarely grant since it is for the Tribunal itself to make the final decision on a request of this nature). There is a presumption that hearings take place in public and it is exceptional for them to take place in private. If a Tribunal is ordered to take place in private, the panel has no power to prevent subsequent disclosure of the results where there is a finding against the respondent barrister, although it can direct that the findings are not posted on the BTAS or BSB's website.
- The panel may also have to consider an application to adjourn. Panels should think carefully about adjournments, particularly if there has already been delay in progressing the case (rE154-rE155).
- The hearing will begin by the clerk reading out the charges. The respondent barrister will then enter a plea which will consist of him or her admitting or denying the alleged offence. Even if the respondent barrister is not present, it is good practice for the charges to be read out in order that they are included in the recording of the hearing.
- After the charges have been put, the BSB's prosecutor will open the case for the BSB. The prosecution witnesses (if any) are then called. Often, particularly where the prosecutor has produced an opening note, the panel will make it clear that it is familiar with the facts of the case and ask that the prosecutor proceed to the witness evidence. At the end of the prosecution case, the defence team may make a submission of "no case to answer"<sup>2</sup> and the BSB will respond accordingly.
- After the BSB has presented its case, the respondent barrister will present his or her case, which may include defence witnesses. If the respondent barrister wishes to present evidence which is not in the papers, he or she should only do this under oath, after which the BSB is provided with an opportunity to cross-examine.
- The panel should feel free to request closing speeches if they consider that this would be useful.
- **Findings:** After hearing all the evidence, the panel will retire to consider the finding(s). This process can be very swift or can take several hours. When the panel has reached its findings on the charges, the panel will return and should give full oral reasons for its decisions.
- **Sanctioning:** After any of the charges against the respondent barrister have been admitted or proved, the hearing will proceed to the sanctioning phase.

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<sup>2</sup> i.e.: when the prosecution at the end of their submissions to the panel presents no evidence in support of the charges and the case is accordingly dismissed.



- Full details of the sanctioning powers available to Disciplinary Tribunals are set out in the Annexes of the DTRs (Section B3, Annexes 1 – 5).
- BTAS publishes comprehensive Sanctions Guidance in relation to breaches of the BSB Handbook by members of the Bar of England and Wales, which is available on the BTAS website. This includes both guidance on the application of individual sanctions and guidance on appropriate starting points in relation to common breaches.
- The Sanctions Guidance provides decision makers with a basis for considering what sanction is appropriate in any given case and is intended to promote proportionality, consistency and transparency in sanctioning. However, it must be stressed that it is not intended to interfere with decision makers' powers to impose whatever sanction is appropriate in the circumstances of individual cases. Decision makers must exercise their own discretion when deciding the appropriate sanction to impose in each particular case and must also ensure that any sanction is proportionate and fair. 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 to a significant extent from the guidance. This ensures transparency in the decision making process.
- Although the BSB will not make any recommendations as to the appropriate sanction, the BSB will inform the panel of any previous disciplinary findings against the respondent barrister and provide copies of the relevant documentation.
- **Suspension pending Appeal:** Where a Tribunal has imposed a sanction of:
  - suspension of more than a year: or,
  - disbarment;

the Civil Procedure Rules does not provide for a sanction being held in abeyance until the period to lodge an appeal has past. The sanction will therefore come in to immediate effect unless the Tribunal orders a stay of sanction pending appeal. The Tribunal must consider whether to order that the respondent barrister's practising certificate be suspended by the BSB, after hearing representations from the respondent barrister and the BSB as to whether this would be inappropriate (rE225 - 229). Without conditions being placed upon the barrister's practising certificate, a respondent barrister would be free to continue practising if the sanction is stayed until such time as the sanction was pronounced or the outcome of an appeal was known. Conditions may include limiting the scope of the respondent's practice or imposing requirements that the respondent be prohibited from accepting or carrying out any public access functions, and or any other matters as the Tribunal consider appropriate for the purpose of public protection (rE224-rE233).

- In cases of disbarment, this will be carried into effect by the relevant Inn of Court via the formal pronouncement of the sanction of the Tribunal (rE239).
- rE240 states that in any case which the respondent has given notice of appeal to the High Court against the finding an/or sanction of the Disciplinary Tribunal on the charges of professional misconduct, no action referred to in rE239 may be taken until the appeal has been heard by the High Court or otherwise disposed of without a hearing

- **Costs:** A Disciplinary Tribunal has the power to make an Order for costs against or in favour of the respondent barrister as it thinks fit (rE244-rE248).
- Respondent barristers may apply for costs and this will usually be done orally. The BSB will generally resist all applications for costs because of the general principle articulated in *Baxendale-Walker v Law Society* [2007] EWCA Civ 233, that regulators should not be deterred from performing their functions by the threat of large costs claims.
- Where an Order for costs against the respondent barrister are made, the Tribunal should be mindful that the barrister may be unable to pay.
- **Publication of findings:** All findings of professional misconduct are a matter of public record and are published on the BTAS website within 14 days of the Tribunal's findings, regardless of whether the sanction has been pronounced or an Appeal submitted (rE243). Findings remain on the website for a minimum of two years. Findings with a sanction of a period of suspension from practice of 12 months or less will remain published for 10 years, and findings with a sanction of disbarment or suspension of 12 months or over will remain on the website indefinitely. BTAS also publishes the Tribunal's detailed report after the end of the proceedings.
- All findings of professional misconduct currently remain on a barrister's record held by the BSB indefinitely, as the concept of "spent convictions" does not exist. This means that even if a finding has been removed from the website, members of the public can still contact the BSB for details about the findings. More detailed are provide in the BTAS Publication Policy, available on the BTAS website.

## Guidance for Pool Members Serving on Disciplinary Tribunal Hearings

38. **Guidance on preparation:** As soon as possible after the Convening Order has been issued the Bar Standards Board (the “BSB”) will send BTAS the bundle(s) of documents for the hearing for onward transit to the panel members. They should arrive at the latest about 10 days before the hearing (in exceptional circumstances additional papers or the bundle itself may arrive later than this if documents are still being obtained). Should a panel member not have received the bundle(s) by one week before the hearing date, he/she should contact the BTAS Administrator who will then contact the BSB to expedite the delivery of the bundle(s). Panel members must avoid contacting the BSB direct as this could create a perception of bias.
39. It is important that panel members check immediately whether the barrister or any witnesses are known to them and consider whether this creates a conflict that will require them to stand down. If there is a conflict, then the panel member should contact BTAS immediately so that an alternative member can be found. Where a panel member knows one of the parties to the proceedings but considers the level of acquaintance does not create a conflict, he/she should still contact BTAS so that the position can be made known to the parties and any objections addressed before the hearing. Failure to do this might result in the issue being raised at the hearing and the case having to be adjourned.
40. Some cases can be relatively straightforward whilst others may be complex. The amount of material in the bundle(s) can vary widely. Each panel member will have his/her own methods for studying and analysing the information provided in the bundle(s). However, it is advisable to read through the bundle(s) as soon as possible after receipt or at least a few days before the hearing. Set out below is a checklist of the matters to be considered when looking at the bundle(s) for the first time.
- **Check the contents list.** The bundle(s) contain a contents list at the beginning. It is recommended that this list is checked against the contents of the bundle(s) to ensure that all the documents are included.
  - **Study the charge sheet.** The charge sheet is the first item after the contents list and should be studied carefully. It may assist to cross reference this document with the BSB Handbook. The wording of this document is critical and is often the subject of discussion between members of the panel before the hearing begins. If there are any queries about the charge sheet, a request for clarification can be made at the start of the hearing. Again, panel members must avoid direct contact with the BSB over such issues.
  - **Study the contents of the bundle(s).** Panel members should read through the bundle carefully and satisfy themselves that they have a good overall understanding of the nature of the charge(s), the evidence and the defence arguments (if any). Individual panel members will each have their own way of doing this.
  - If the case is very complicated, it may be helpful to make a list of all the allegations against the respondent and match these against the defence statements to establish if any gaps exist.
  - **Make notes and identify areas requiring clarification.** Panel members should make whatever notes they consider will assist with their understanding of the case and preparation for the hearing. It is good practice to list any queries, areas of concern or issues that need clarification. These can be discussed with other members of the panel

immediately prior to the hearing. Lay members may often have questions relating to legal processes or concepts that are referred to in the bundle(s). For example, these could include anything from legal terms or court procedure to the nature of a barrister's practice or the way chambers are organised.

- ***Prepare questions for the hearing.*** It is useful for panel members to make a list of questions they consider should be addressed to the BSB and the respondent barrister at the hearing.
- ***Prepare a chronology of events.*** It is recommended that panel members make a chronological list as they study the documentation: this helps to focus the mind on the sequence of events. In addition to main events, the list may contain the dates of critical letters and documents. Creating a chronology can aid understanding and may highlight inconsistencies.

41. **Pre-hearing discussion:** Panel members will normally be asked to attend at least 30 minutes prior to the start of the hearing for preliminary discussions prior to the start of the hearing. However, the Chair may become aware, before the hearing, of issues that will require more detailed preliminary discussion and, as such, require an earlier start time. If this is the case, the Chair will inform BTAS as soon as possible of this requirement, in order to allow BTAS to give the other panel members sufficient notice of the earlier start time.

- The clerk should make sure the panel members have all the papers, including any papers that may have been submitted after receipt of the hearing's bundle(s).
- The clerk will also advise of the late arrival of any party or of the non-attendance of the respondent barrister. The BSB should inform BTAS whether the barrister is represented or is intending to conduct his or her own defence, in order that tribunal panel members can be informed of arrangements before the start of the hearing.
- Usually, the room reserved for the panel is on the opposite side of the corridor. The clerk / panel members must check that doors are closed and that any panel discussions cannot be heard in the room where the parties will be waiting.
- During the pre-hearing discussions, panel members can raise any questions they may have arising from the bundle(s) as it may be that the concern can be allayed at this stage. It is often useful to discuss any anomalies (e.g. with dates) in the material or any information which members of the panel may feel is missing. It may be possible to resolve some queries at this time or ensure questions can be asked at the beginning of the hearing. Panel members should also review and discuss any new material provided by either of the parties since the issue of the bundle(s).
- At this point, panel members should feel free to raise any questions that they may have or seek explanation or clarification on aspects of the law or of legal practice and process that are relevant to the case.
- The panel members should discuss with the Chair how he or she prefers to handle the proceedings. Different Chairs have varying preferences as to the way they like panels to conduct themselves and questions to be asked during the hearing, for example. Some Chairs do not mind panel members interjecting at any appropriate time during the hearing with questions whilst others may wish to wait until the end of the hearing.

42. **Procedure during the Hearing:** Disciplinary Tribunal hearings are conducted in much the same way as in a court of law (albeit more informally) and the civil standard of proof is applied when adjudicating upon charges of breach of the Codes of Conduct and/or Handbook.
- When the BSB and the defence team have assembled in the Tribunal room the clerk will advise the panel, who will then proceed to the Tribunal room. Each position will be marked with the relevant person's name.
  - The Chair may deal with any preliminary matters before the proceedings are formally opened by the clerk reading the charge(s) and the respondent barrister entering pleas. The BSB will then proceed with their case, which may or may not include calling witnesses. The defence will then follow, which similarly may or may not include calling witnesses.
  - Adequate supplies of note paper will be available at each panel member's position. Panel members are advised to take notes during the proceedings, as not all the information is contained in the bundle(s) and not all the material presented to the Tribunal will be consistent with the bundle(s). Care should, however, be taken to not take notes in such detail that key information is missed.
  - Panel members should listen carefully to the proceedings. They should watch and listen to how questions are framed and answered, looking at whoever is speaking as much as possible as this may contribute useful information in evaluating the evidence and in later deliberations.
  - Whilst panel members are generally able to ask questions at any time during the proceedings, cross-examinations and statements should not normally be interrupted except to put brief questions on factual issues. Alternatively, panel members can hold any questions until the end of the relevant stage of the proceedings (following the Chair's direction at the pre-hearing discussion). After each introductory statement and witness cross-examination, the Chair should ask the panel members if they have any questions. Panel members should not feel inhibited from asking questions or seeking clarification from any of the parties during the hearing and should not be reticent or embarrassed to check anything which they do not understand. It is important that all issues are clear and understood.
  - Panel members should not ask leading questions or questions that would indicate any views about the parties or the evidence.
  - Panel members should avoid using Latin and obscure legal terminology without explaining it so that proceedings are comprehensible to all those present, including (potentially) the complainant and members of the public.
  - If a panel member is particularly concerned about anything during the proceedings, then he/she must confer with the Chair or fellow panel members. If it is necessary to conduct a conversation among panel members at any time, the Chair can decide whether to conduct such a discussion quietly during the hearing or to retire.
  - The proceedings can sometimes become quite intense and it is easy to lose track of how much time has elapsed. Levels of concentration can drop.

- **Preliminary applications such as adjournments:** A variety of preliminary applications can be made. There may, for example, be an application by the respondent for the case to be heard in private (Tribunal hearings are normally held in public) or an application for an adjournment. The panel will normally be advised prior to the hearing that such an application has been made (or is likely to be made) and will have the opportunity to discuss it before the hearing begins. The Disciplinary Tribunal Regulations should be referred to for clarification.
  - Any requests for an adjournment should be very carefully considered and not taken lightly. As many cases take a long period from the receipt of a complaint to the hearing stage, it is particularly important that the reason for the adjournment should be rigorously investigated. However, careful consideration of any such application needs to take place so as not to present grounds for appeal due to an unreasonable or unjustified refusal to grant an adjournment request. If the adjournment is based on the health of the respondent barrister or that of witnesses, the panel should ask for medical evidence. If it is not available on the day, a direction should be given that it is supplied within a specified period of time. Issues such as the non-availability of the barrister's representative should be treated with caution as all parties will have previously indicated that they were available to attend.
43. **Retiring to consider findings and sanction:** Following the presentation of the BSB's case and the respondent barrister's case, the panel will retire to consider its verdict. There is no time limit set for this. Different Chairs may handle this process in slightly different ways but it should be conducted as an open discussion where all panel members are equals. Set out below are some broad guidelines for panel members which should help during the deliberation process.
- Panel members should raise any points on which they are unsure, no matter how insignificant they may seem and regardless of the degree to which a member is uncertain. It happens, at times, that raising such a matter can lead to a material and defining discussion. Also, panel members should raise any concerns they may have about any part of the process from the original complaint to the panel deliberations.
  - Each member should advise the other panel members of their views as to whether they consider the charge(s) proved and the reasons why they hold that view. They should be prepared to discuss any aspect of their reasoning. If any member is unsure, they should let this be known. This is not an unusual occurrence and is perfectly acceptable.
  - Each member should listen carefully and respectfully to the views of the other members and be prepared to question and debate with them. No member should allow themselves to be dominated or pressured into making a particular decision by the Chair or any other member of the panel. Each panel member should be open to the views and arguments of other panel members and be prepared to be persuaded by the logic of an argument.
  - At this stage, the deliberations and findings should not in any way be influenced by what the potential sanction may be if the charge is proved. The findings should be based on the material in the bundle(s) and on the arguments and evidence put forward during the hearing. Sanction and mitigation will be considered at a later stage in the process.
  - Chairs should be aware of the importance of lay members and ensure that the barrister members of the panel do not unduly dominate or influence the panel. For this reason, a

Chair may ask the lay members to give their verdict and reasons before the barrister members are consulted.

- Once the panel has agreed upon a finding, the Chair will lead the drafting of the Tribunal's 'judgment' (subsequently published on the BTAS website as the 'Report of Finding and Sanction') and prepare the 'finding(s) sheets' on each charge or application, and its reasons (the latter record must be signed by all members of the Tribunal before the panel returns to give its verdict). All members of the Tribunal are expected to contribute to the preparation of these documents. It is of the utmost importance that these documents are well reasoned, carefully written and do not contain inconsistencies. Giving inadequate reasons for a finding may be a valid ground for appeal and, in any event, will not provide the necessary transparency of process. Should the panel members not arrive at a unanimous agreement as to the finding on any charge, the finding to be recorded on that charge shall be that of the majority. If the panel members are equally divided as to the finding on any charge, then, the burden of proof being on the BSB, the finding recorded on that charge will be that which is the most favourable to the respondent barrister.
  - The findings should be written in plain English and without the use of legal terminology. The complainant, who may be present, should be able to understand the findings. This is particularly important if the panel finds the charge(s) are not proved. Where appropriate, the reasons should make clear that the credibility of the complainant is not being impugned.
  - Following the completion of the written reasons, the panel will return to the Tribunal hearing room where the Chair will orally deliver the findings with reasons.
  - Once the findings have been delivered, the panel will hear submissions on sanction. The BSB will draw to the panel's attention the relevant parts of the Sanctions Guidance and will also inform the panel of any previous disciplinary findings. The respondent may put forward mitigation. For more detailed guidance on sanctioning, see the BTAS Sanctions Guidance.
  - The panel's deliberations on sanction should follow the same guidelines as described above for the deliberation on the verdict. Written reasons should be given for the sanction imposed and any aggravating or mitigating circumstances should be recorded in the judgment. Panels are free to depart from the BTAS Sanctions Guidance, but if doing so should provide comprehensive reasons. The Sanctions Guidance is publicly available and the respondent barrister and complainant will want to know why the panel decided to impose a sanction that differs from the Guidance. Further, a sanction may be challenged on appeal and the appeal judge will also need to understand the panel's reasons.
44. **The role of lay members and importance of their participation:** Lay members are individuals who, by virtue of their independence, help to provide assurance to the public and the profession that barristers are regulated in a manner that is open, transparent and fair. Lay membership also has the advantage of enabling the panel to gain from the knowledge and skills of experts in different fields.
- Lay members have a role equal to that of the legal professionals in all deliberations and decisions of the panel. It is vital that lay members understand this and act accordingly.

- It is important that lay members do not feel concerned about revealing their lack of legal knowledge either in the pre-hearing discussion, during the hearing itself, or in the deliberations and recording of findings and sanction. They are not expected to have knowledge of the law or of legal processes because they have been appointed to provide independent, non-legal assessments and viewpoints. A point that might seem obvious from an outside perspective could be the very thing that the legal professionals may have overlooked. Lay members have a role to challenge the thought processes and views of the legal professionals on the panels and those acting for the Bar Standards Board and the respondent. They also have a role to challenge the customs and practices of the legal profession. It may sometimes be the case that custom and practice within the legal profession may be considered by other professions or business areas to be questionable for a variety of sound reasons. Lay members, by virtue of their varied backgrounds and experiences, provide a different perspective and thought process to individual cases.

45. **The Role of the Chair:** The Chair is responsible for leading and managing proceedings so that hearings are operated in a fair, consistent, transparent and efficient manner. The Chair shall encourage a culture which fosters the highest standards of integrity and probity, so as to facilitate high quality decision-making in the public interest.

- At the outset of a hearing, the Chair should ensure that, all those in attendance understand the role of those present and the process to be followed at each stage of the hearing.
- The Chair should ensure that all members of the Tribunal, whether legal or lay, have an equal voice and are able to contribute constructively to both the hearing and the decision making process.
- The Chair will be able to guide the panel members through the legal framework. However, decisions on how the law should be applied remain collective ones for the full panel to make.
- The Chair should seek to ensure that witnesses are comfortable and that appropriate special arrangements have been or are made for vulnerable witnesses, in accordance with the Disciplinary Tribunal Regulations and BTAS Vulnerable Witness Policy (available on the BTAS website).
- The Chair is responsible for the general conduct of the hearing, for example, when the panel should put questions to the BSB, the respondent or witnesses. The Chair should ensure that the panel members do not interfere excessively or in an unduly aggressive manner so as to give rise to an allegation of bias and should, in particular, ensure that where there is a vulnerable witness, overly-aggressive cross examination is avoided.
- When retiring to consider finding and sanction, the Chair is responsible for leading panel discussions. Each panel member should be afforded a proper opportunity to contribute and the Chair should ensure that at each stage of the process a clear decision or consensus is reached.
- The Chair should ensure that the decision making is approached in a structured manner and that the panel's reasoning is fully explored. The Chair should have in mind at all times that providing adequately reasoned decisions is an essential part of a 'fair' hearing process, and that the Tribunal's 'Report of Finding and Sanction' will be subsequently



published on the BTAS website. A checklist has been developed by BTAS to assist with this process, although this is a guide and it is recognised this will not be suitable or necessary in all cases. This 'judgment checklist' is attached below as Annex 1.

- In terms of the practical aspects of management of a hearing, the Chair shall work with the Clerk to the Disciplinary Tribunal on matters of time management and practical arrangements, allowing the Clerk to keep the parties, witnesses, press or other relevant persons appropriately informed.

## Guidance for Clerks Serving on Disciplinary Tribunal Hearings

46. The primary role of clerks is to ensure that the needs of the Panel are met during the hearing. A large part of the role is to ensure that the administrative aspects of Disciplinary Tribunal proceedings are attended to.
47. Appointment: Clerks are appointed to Disciplinary Tribunals by the President of the COIC, by way of a Convening Order. Pre-hearing Administrative issues are dealt with by the BTAS Administrator as the clerk does not have any involvement outside scheduled hearings.
48. Clerks do not act in a legal advisory role but they are expected to address any queries raised by the panel about procedural issues. Issues will arise from time to time during the hearing or during the Panel's deliberations, it is vital that clerks understand the Disciplinary Tribunal Regulations (Enforcement Requirements, Part 5) and proactively identify any areas where the Regulations are not being followed or clarification is needed.
49. The clerk's responsibility is to the Panel and not to the parties to the proceedings. Clerks have a responsibility to raise matters of procedural concern, even in circumstances where nobody else involved in the proceedings has recognised the issue.
50. Clerks must avoid making direct contact with the BSB regarding any issues so as to avoid the perception of bias and should channel any request for information or clarification through the BTAS Administrator.
51. **Directions hearings** are held only when the parties cannot agree directions on paper. Oral directions hearings are presided over by a judge. It should be remembered that the directions judge is not acting formally in his/her official judicial capacity, but is acting as a directions judge under the Disciplinary Tribunal Regulations.
  - Oral directions hearings are most often used to hear applications for the striking out of charges. In most cases, both parties will have submitted to the directions judge a copy of their proposed directions and a copy of their submissions in support of those proposed directions and/or their application to strike out. Clerks should have a copy of all relevant documents from the BTAS case file.
  - In the event that a directions hearing is necessary, a clerk is required to attend and prepare a note of any directions given by the judge.
  - It is important that clerks listen carefully to the directions ordered. It is for the clerk to accurately record the directions which will later be used for the order. The clerk should check with both parties and/or the judge before leaving the hearing if anything is not clear.
  - The clerk's note of the directions given by the judge should preferably be provided within the 24 hours following the hearing date.
52. **In advance of the Hearing:**
  - Clerks are sent a copy of the Convening Order for the hearing at least 14 days before the hearing, together with the Charge Sheet and directions. However, if any correspondence

or telephone calls are received by a clerk after his/her appointment, from the parties or the Panel, they should be referred to the BTAS Administrator immediately for handling.

- The BTAS Administrator is responsible for setting up the hearing room. Each position is marked with the relevant person's name in order to assist the identification of those in the room who are participating in the proceedings. Copies of the Disciplinary Tribunal Regulations are placed on the Tribunal panel table and copies of the Sanctions Guidance are placed in the retiring room. All documents are available on the BTAS website and free wifi is provided throughout the Tribunal Suite to assist access. While the Tribunal Administrator will make these arrangements, the clerk is responsible for checking everything necessary is in place and, where items are missing, making arrangements for them to be provided.
- The clerk will be given the BTAS Administrator's case file of papers prior to commencement of the hearing so that the clerk is in a position to answer questions, if any arise, about service of the Convening Order. The BTAS Administrator sends the Convening Order to the respondent barrister by "recorded delivery" as well as normal first class post. It has to be served on the respondent barrister at least 14 days before the hearing.

**53. On the day of the Hearing:**

- Prior to the start of the hearing, the clerk should check that all the members of the Panel are present, as well as the parties to the case.
- The clerk will need to check with both the BSB and the barrister what witnesses they intend to call and whether they are present.
- If any issues arise regarding the attendance of the parties, or their witnesses, the clerk will need to liaise with the parties already present to obtain their views on how the hearing should proceed. The clerk should then inform the Chair of the situation and ask him/her to decide what action should be taken.
- If witnesses are to be called, the clerk should ensure that a copy of the BSB bundle (supplied by the BSB) is available for reference purposes if needed (N.B. to be accessed by witnesses in these circumstances only).
- The clerk should check prior to the start of the hearing whether either party intends to make any preliminary applications such as amendments to the original Charge Sheet. If this is the case, the panel should be alerted.
- In most cases there will be no problems with attendance and the clerk should inform the Chair when all the parties are present and ready to proceed. Thereafter, it will be a matter for the Chair to give instructions on when the hearing should commence and if any issues need to be addressed before the hearing starts. The clerk will be responsible for liaising with the parties regarding any issues the Chair wants clarified before the Panel enters the room.
- Once the Panel is ready to enter the room, the clerk should lead the Panel into the room, saying as the Panel enters "All rise please". The Panel and the clerk will then take their seats.

#### 54. **The Hearing**

- **Recording:** The clerk is required to ensure the BTAS Administrator is alerted to operate the digital recording equipment at the appropriate times when the tribunal are sitting (this if for the purpose of providing transcripts if required), unless a shorthand-writer is being used instead.
- **Charges:** Once the Panel Members are in position, and any preliminary matters have been dealt with, the Chair will direct the clerk to read the charges to the respondent barrister. The clerk should ask the barrister to stand and after each charge is read, ask the respondent barrister whether he/she “admits” or “denies” the charge. Clerks should not use the terms “guilty” or “not guilty” as Disciplinary Tribunals are not criminal proceedings and such terminology is inappropriate. Once the charges have been read and the pleas entered, the respondent barrister should be asked to sit down.
- **Witnesses:** The clerk is responsible for escorting witnesses to and from the Tribunal Room as necessary. Witnesses should be asked if they wish to be sworn or to affirm, after which the clerk will administer the appropriate oath or affirmation while the witness is standing. The witness will then be asked to sit. There are a variety of oath cards and religious books available at the hearing and it is good practice for the clerk to check with the witness, before entering the Tribunal Room, which, if any, oath or affirmation is required.
- **Note-Taking:** The clerk is not expected to keep a verbatim note of the proceedings but it is important that he/she keeps notes of the decisions made by the Tribunal and the pleas entered by the barrister, as well as details of any documents handed to the panel during the hearing. This is to allow the clerk to be able to assist the Panel with the preparation of the Report of Finding and Sanction (if required), and to provide a ‘safety net’ in event of any technical problems with the recording equipment.
- **Exhibits and documents presented:** If additional documents or exhibits are handed to the Panel during the course of the hearing (beyond the bundle provided to the clerk), the additional documents should be numbered in consecutive order, dated, initialled by the clerk and a note made of the details. At the conclusion of the hearing, copies of all additional documents, including exhibits, should be placed in the BTAS case file.

#### 55. **Retirement of the Tribunal panel:**

- The Panel may retire during the hearing to deliberate on the following:
  - Preliminary applications, such as applications to add charges or amendments to existing charges;
  - Interim applications, such as applications of no case to answer after the prosecution case has concluded;
  - Whether the charges are proved beyond reasonable doubt; and
  - The sanction to be imposed on the barrister where charges are proven by the BSB.
- The panel retires without the clerk.
- When the Panel retires, the clerk should ask how long the Panel thinks they will need for their deliberations and, depending on the timescale, whether the parties may be released

during that period of deliberation. The clerk should keep parties informed throughout the Panel's deliberations as to the Panel's likely time of return.

56. **Respondent barrister:** The clerk is responsible for assisting the respondent barrister through the proceedings. In most cases the respondent barrister, and/or his/her representatives, will be familiar with Tribunal protocol but this should not be assumed. It is good practice to confirm with the barrister prior to the hearings whether he/she understands the hearing process. If not, the clerk should give a brief overview of proceedings. Clerks must not give legal advice or make any comment, other than procedural, on any applications that might be made.
57. **Record of Findings and Sanction:** The clerk must ensure that the Chair and members of the Tribunal complete and sign the Record of Tribunal Determination(s) and Outcome(s) (provided by BTAS), including any fines and costs ordered and the timeframe in which they should be paid. Once completed, the clerk should place the documents in the case file and return it to the BTAS Administrator. The clerk should also note the timings of the oral judgment given.
58. **At the end of the Hearing**
- After the hearing has concluded, or at the end of the hearing day, the clerk should collect the Panel's documentation and return it to the BTAS Administrator. If the hearing is for more the one day, the clerk should ask the BTAS Administrator about the secure holding arrangements for documentation.
  - In cases where the Tribunal reserved judgment, the clerk may retain the case file papers to allow them to assist with the preparation of the Tribunal's Report of Finding and Sanction. Once this report is finalised any papers should be returned to the BTAS Administrator for retention or secure disposal.
  - Where the respondent barrister has been ordered to attend on a nominated person to be reprimanded or be given advice as to their future conduct, the clerk should clearly mark the relevant paperwork for the attention of the BTAS Administrator. This will avoid the BTAS Administrator disposing of relevant paperwork.

## Appeals following Disciplinary Tribunals

59. **Background:** All respondent barristers have a right to appeal the findings and/or sanction of a Disciplinary Tribunal. The BSB also has a right to appeal the findings and/or sanctions of a Disciplinary Tribunal.
60. Appeals are made to the High Court (Administrative Court) and are conducted in accordance with the Civil Procedure Rules Part 52 (Appeals) and Practice Directions 52A and 52D. Paragraph 27.1A of Practice Direction 52D provides for the appeal route to be the Administrative Court.
61. **The process:** The Civil Procedure Rule 52.16 provides that unless the Tribunal orders otherwise an appeal does not stay the decision of the Tribunal.
62. The first stage in the appeal process is for the barrister to file the appellant's notice in the Administrative Court and to pay the appropriate fee. This must be done within 21 days of the Tribunal decision. The appellant's notice must be lodged at the Administrative Court Office and a copy of the issued (stamped) notice then served on the BSB and BTAS as soon as practicable and not later than 7 days after it is filed.
63. Disciplinary Tribunal proceedings are recorded using digital equipment. The appellant must include a copy of the transcript of the original proceedings in his/her bundle, together with the report of the Disciplinary Tribunal.
64. **Appeal hearings:** The full appeal hearing ordinarily takes place in public at the Royal Courts of Justice. Date and time of the hearing is fixed by the Listing Office.
65. The Court has the power to strike out the whole or part of the appellant's or respondent's notice where there is compelling reason to do so. The Court has all the powers of the Disciplinary Tribunal and may affirm, set aside or vary any order of the Disciplinary Tribunal or order a new hearing. If the Court strikes out an appellant's notice or dismisses an appeal and it considers that the notice or appeal is totally without merit it will record that fact.
66. The appeal hearing will be limited to a review of the Disciplinary Tribunal's decision unless the Court considers that in the circumstances of an individual appeal it would be in the interests of justice to hold a re-hearing. Unless it orders otherwise the Court will not receive oral evidence or evidence which was not before the Disciplinary Tribunal.
67. An appeal will be allowed where the Disciplinary Tribunal's decision was wrong in law or unjust due to a serious procedural matter or other irregularity at the tribunal stage.
68. In most cases the Court will give its decision orally at the end of the appeal hearing. However the Court may decide to reserve judgment and issue the final decision in the form of a written judgment after the hearing. The decision of the Court is final and therefore no appeal lies against its decision except to the Court of Appeal in the case of a decision to disbar a barrister.
69. **Appeal costs:** The Court may make an order for the costs of an appeal and may have regard to the means of the parties and all the circumstances of the case. More information on appeals against decision of a Disciplinary Tribunal can be found at:  
<https://www.barstandardsboard.org.uk/complaints-and-professional-conduct/disciplinary-tribunals-and-findings/appeals/>

## Fairness, natural justice and the Human Rights Act 1998

70. **Introduction:** In 1923 the then Lord Chief Justice, Lord Hewart, observed in the course of a judgment:

*"... it is not merely of some importance but is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done."*

*R v Sussex Justices, Ex parte McCarthy* ([1924] 1 KB 256, [1923] All ER Rep 233)

71. That is a principle to which all members of the COIC Disciplinary Tribunal Pool should have regard when performing their duties. The purpose of this section is to explain particular applications of this broad principle in the Disciplinary Tribunal context.
72. Regulation rE165 of the Disciplinary Tribunal Regulations state the "rules of natural justice" apply to the proceedings of a Disciplinary Tribunal. These "rules" consist of a number of principles which the common law has established through case law. Amongst them are two broad propositions:
- the right to a hearing before an unbiased Tribunal; and
  - the right to be heard (i.e. to be able to properly put one's case) before that tribunal.
73. The European Convention on Human Rights ("the Convention") became part of English substantive law with effect from 2 October 2000 following the enactment of the Human Rights Act 1998. The relevant provision of the Convention is Article 6, which provides that:
- "In the determination of his civil rights and obligations...everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."*
74. The European Court of Human Rights has held that the right to practise a profession is a civil right within the meaning of Article 6. Because disciplinary proceedings before a COIC Disciplinary Tribunal could result in the respondent being deprived, either by suspension or disbarment, of the right to practice as a barrister, Article 6 applies to the proceedings of the Tribunal.
75. For present purposes, the English common law principles of natural justice and the requirements of Article 6 of the Convention can be regarded as identical. The summary that follows is intended as a brief guide to what is a very extensive area of the law and is in no way a comprehensive document.
76. **An independent and impartial tribunal:** The requirements of the Convention for an independent and impartial tribunal correspond to the need to avoid actual and apparent bias in the rules of natural justice. In the paragraphs directly below, each form of bias shall be described in turn.
77. **Actual Bias:** Actual bias occurs where a decision-maker in proceedings is partial, whether consciously or not. Apart from favouring one party over another for reasons other than the merits of the case, the obvious example of actual bias is where a member of a Tribunal has an interest (which may not be financial) in the subject matter of the proceedings, unless it can be disregarded as trivial. This corresponds to lack of independence under Article 6 and upholds the fundamental maxim of English law that "no man is to be a judge in their own cause".

78. In the old case of *Dimes v Proprietors of Grand Junction Canal and others* [HL 26 Jun 1852] a judge was disqualified from sitting on an appeal involving a company in which he owned some shares.

79. A prominent and relatively recent example of a non-financial interest acting to disqualify a judge arose in 2000 when the former dictator of Chile, General Pinochet, tried to avoid extradition from the United Kingdom to Spain. In the House of Lords, a number of interested parties, including Amnesty International, were allowed to make submissions. When it was disclosed that Lord Hoffman, one of the Law Lords who had sat in the appeal, was a director of Amnesty International Charity Limited, an organisation wholly controlled by Amnesty International, the judgment of the House of Lords had to be set aside and the case re-heard (*R v Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No 2)*). Lord Hoffman was held to have had, because of his position, an interest in the outcome of the case, notwithstanding that no-one suggested he was consciously biased.

80. In *P v The General Council of the Bar; Re P (A Barrister)*; 24 Jan 2005 a lay member of the Committee which then decided on prosecutions of barristers was disqualified from sitting on an appeal by a barrister who had been suspended from practice. This was because of her membership of the Committee, even though she had not attended the meeting of the Committee when the decision was taken to prosecute him. Because of her membership of the Committee, she was held, like Lord Hoffman, to have an interest in the outcome of the appeal.

81. Proof of actual bias always requires the disqualification of the Tribunal member, or the decision being set aside if actual bias is only subsequently demonstrated. This can be avoided only where there has been full disclosure at the outset and the parties have had a reasonable opportunity to consider their positions and agree to carry on notwithstanding the member's particular interest.

82. Mere membership of a particular group or cause will not usually be enough to lead to automatic disqualification of a decision-maker. However, as is demonstrated by the *Pinochet* and *Re P* cases, active involvement in and promotion of it may well do. Subsequent cases have stressed the exceptional nature of the *Pinochet* case. The Privy Council has held that, where a complaint was brought by a Bar Association, the fact that two members of the Advisory Council dealing with the case were members of the Bar Association did not lead to their disqualification.

83. **Apparent Bias:** Apparent bias is a less precise concept. It is concerned with the notion that "justice should manifestly and undoubtedly be seen to be done." Various members of the judiciary have also identified its importance in guarding against the pernicious influence of "sub-conscious" bias.

84. The test for apparent bias has been framed as follows:

*"whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased."*  
*Porter v Magill* [2001] UKHL 67

85. This is an objective test dependent on the set of circumstances. The courts have held that the fair-minded and informed observer as a reasonable member of the public is neither complacent nor unduly sensitive or suspicious. Situations which may give rise to a conclusion that there is real possibility of bias are endless. A textbook cites as examples: expressions of personal hostility, or friendship, familial relationship or close acquaintance with a party or witness. Commencing a hearing with a preformed view or a 'closed mind' will obviously defeat the requirement of impartiality. Thus, previously expressed views on a question at issue in extreme and unbalanced terms may well arouse suspicion that the Tribunal member is unable to try the issue objectively.



However, the expression of a provisional view subject to hearing evidence or submission on the points is legitimate, so long as its tentative nature is made clear.

86. Conversely, objections cannot soundly be made on the basis simply of shared or different religion, ethnic origin, gender, age, class, means or sexual orientation between the decision maker and the respondent or witness. Nor ordinarily should a decision-maker be recused on the basis of social, educational or employment background or history, previous political associations or membership of social, sporting or charitable bodies (though see above). Prior knowledge of a party or witness will not, of itself, represent apparent bias unless the prior relationship was close or the circumstances suggest the likelihood of bias. However, failure to disclose a prior contact, close or not, may well, of itself, give rise to suspicion. Knowledge of previous findings against a barrister is normally a valid ground for objection, though a Tribunal member with such personal knowledge must disclose it and would be wise to withdraw unless there is no objection.

87. In *Lawal v Northern Spirit Limited* [2003] UKHL 35, it was held that apparent bias arose where one (lay) member of the Employment Appeal Tribunal (EAT) hearing an appeal had sat previously in another case in the EAT with a part-time judge who appeared as counsel for one party in the present appeal. The fair-minded and informed observer might have concluded that the lay member might have been (though there was no evidence that he would have been) unduly influenced by his previous experience of the barrister in the latter's judicial capacity.

88. Consequently, if a Tribunal member is in any doubt, the sensible course is either to decline to sit or, if the position does not become apparent until immediately before or at the start of the hearing, to make full disclosure at the beginning of the hearing so as to give the parties the opportunity to apply for the matter to be adjourned to a differently constituted Tribunal. There is no embarrassment in this; far more embarrassing would be a situation where, after a hard fought hearing, the proceedings are set aside to be re-heard by a fresh Tribunal because of a Tribunal member's non-disclosure.

89. Regulations rE133 and rE134 permit the respondent to give notice, on grounds which must be specified, objecting to one or more proposed members of the Disciplinary Tribunal and for the nomination of substitute members.

90. Some safeguards have been put in place to avoid COIC Disciplinary Tribunal members finding themselves in situations of apparent bias. For instance, Regulation rE144 stipulates that an individual is ineligible to serve on disciplinary tribunals if s/he is a member of the Bar Council or any of its committees, or the Bar Standards Board or any of its committees. Moreover, if an individual who has been appointed to serve as a Disciplinary Tribunal panel member subsequently joins the Bar Council or the Bar Standards Board (or one of their respective committees), s/he will be, from that point onwards, automatically disqualified from continuing to act as a disciplinary tribunal panel member.

91. The COIC Appointments Protocol reflects these provisions, and provides additional protections. Under its terms, before becoming eligible to apply to serve as COIC Disciplinary Tribunal panel member, a two year 'quarantine' period is imposed upon an individual who was on the Bar Council or BSB (or any of their respective committees) or who was employed by either of those organisations.

92. **The right to be heard:** This broad heading encompasses a number of related matters:

93. **The right to prior notice of the case against the respondent.** The allegations which the Respondent must face must be identified with sufficient clarity to enable him or her properly to

prepare his or her defence. This applies not just to the charges but requires disclosure of copies of the documents on which the charges depend or which may be necessary to the barrister's defence. The rule applies both to the case originally sought to be made against the respondent and to any significant amendment to that case during the course of the proceedings.

94. Reflecting this, under Regulation rE102, a copy of all the charges against the respondent must be circulated to him or her no later than 10 weeks (or 5 weeks if the BSB Professional Conduct Committee has directed that prosecution of the charges be expedited) after the case was first referred to the Disciplinary Tribunal. Regulations rE103-rE105 also provide a list of the categories of documents that must be served upon the respondent in order for him or her to adequately prepare his case.
95. **The right to adequate time to prepare for the hearing.** This applies both to the fixing of the hearing itself and to any changes to the prosecution case once proceedings have been started. If significant new material is forthcoming at a late stage, this may be a reason to grant an adjournment of the hearing. It might be, for example, that the respondent wishes to call a witness to deal with the new material who is unable to attend the hearing. Or it may be that new material has come to light which the prosecution wishes to investigate. The grounds for seeking an adjournment are almost unlimited and Tribunals must consider the arguments for and against carefully in the light of the potentially very serious consequences for the barrister who genuinely needs more time to put forward a proper defence, the duty of the prosecution to put forward a proper case and the need of both parties to speedily resolve the matter.
96. Under Regulation rE154, the Disciplinary Tribunal has a general power to adjourn proceedings. A specific power to adjourn hearings where the charge or charges have been amended is found at Regulation rE161.
97. **The right to equality of arms.** This does not mean that the respondent has a right to the same level of representation as the prosecution; e.g., if the BSB retained Queen's Counsel it would not follow that the respondent barrister would have the right to the same level of representation. Instead, the test is a broader one, namely that the respondent must be afforded a reasonable opportunity to present his/her case under conditions that do not place him/her at a substantial disadvantage vis à vis his/her opponent.
98. The respondent has the right either to represent himself/herself or to be represented by counsel before the Disciplinary Tribunal. Since barristers can usually obtain representation via their professional indemnity insurance, lack of representation is unlikely to be an issue (although representation is not available in relation to all charges and there may be reasons why cover is not available in individual cases).
99. Regulation rE183-rE184 is an exception to this rule and permits the Disciplinary Tribunal to proceed in the respondent's absence where it is satisfied either that the relevant procedure has been complied with or that it has not been practicable to comply with the relevant procedure.
100. **The right to a hearing within a reasonable time.** The principal reasons for this are obvious: first, it is oppressive for the respondent to have hanging over him or her, for a prolonged period, pending proceedings which may affect his/her livelihood and second, where factual matters are in dispute, the passage of time is likely to affect witnesses' recollections. If an unreasonable amount of time has passed, this may form the subject of an application for charges to be struck out or form a ground of appeal. However, case law indicates that the delay would need to be substantial (a term which cannot be more closely defined, depending as it does on the circumstances, but many months at least) before it would undermine the validity of the proceedings.

101. **The right to a public hearing.** It is a fundamental requirement of Article 6 and the rules of natural justice that hearings are held in public. Secret justice is anathema. This is to ensure proper scrutiny of the administration of justice and to retain public confidence in the court and tribunal system. This principle applies equally to COIC Disciplinary Tribunals. Thus Regulation rE156 of the DTRs provides that all hearings before a Disciplinary Tribunal must be in public unless it has been directed that a hearing shall not be held in public. Such a direction may be given, exceptionally, on the application of a party if the Tribunal is convinced it is necessary to do so for the maintenance of public order or the proper protection of private life. Simply because a barrister, complainant or witness is embarrassed by the fact that the hearing is in public and may be reported by the media is no reason for directing that it be held in private. Judgment must be given in public or at least be published and accessible (and see below).
102. **The right to address all matters considered by the Tribunal to be relevant.** The Tribunal must not take into account a matter of law, fact or opinion which has not been raised with the parties in a way which has allowed them to address the matter. If the Tribunal is concerned about a point which has not been raised by either party, the Tribunal should itself raise it with the parties and invite submissions on it.
103. **The right to a reasoned decision.** Regulation rE199 of the DTRs requires the finding of the Disciplinary Tribunal on each charge, together with its reasons, to be set down in writing and signed by the chairman and all members of the Tribunal. Regulation rE204 provides for broadly the same procedure to be adopted in relation to the sanction passed by the Tribunal. Both parties are entitled to know the factual and legal basis for the Tribunal's decision.
104. Whilst in a complex case the decision need not address every single point which has been canvassed, it must address all the principal points (factual and legal) relied on by each side. It is necessary that both sides have a sufficiently reasoned decision to know how and why the judgment was reached, so as to be able to consider the merits of any appeal.

## Chair's Quick Reference Guide to Disciplinary Tribunals

*The following is intended to provide Panel Chair's with an aide-memoire / quick reference guide to the Disciplinary Tribunal process*

### GENERALLY

- Participants should be introduced.
- Participants remain seated throughout.
- Ensure participants understand the process.
- The Chair should take an active role in managing the hearing to ensure that the case is concluded in a timely manner and within the scheduled time.
- The presumption is that the hearing will be held in public, unless there has been a ruling by a Directions Judge or disciplinary panel that the hearing should take place in private.

### NON-ATTENDANCE OF RESPONDENT BARRISTER

If the respondent barrister is not present, the panel must decide:

- Whether the Convening Order has been correctly served on the respondent; and,
- Whether to proceed in the absence of the respondent.

### ADJOURNMENTS

Sometimes a respondent barrister requests an adjournment of proceedings at short notice before the hearing – this request is sent to the Chair of the Tribunal (and the other panel members) plus any submissions from the BSB on the request). The Chair can either decide whether to adjourn prior to the hearing or to take the issue as a preliminary matter at the Tribunal.

### OPENING

- You should introduce the panel and deal with any preliminary matters.
- You should ask the clerk to read out the charge(s) and he/she should ask the respondent barrister to enter his/her plea(s) (admit or deny).

### PROCEDURE AT THE HEARING

When determining approach, Chairs should note that:

- Bar Disciplinary Tribunals apply the civil standard of proof;
- the order of proceedings generally follow a standard criminal trial process; and,
- proceedings are relatively informal, although the rules of civil and criminal evidence tend to be used as the basis for deciding how to treat any evidential issues that arise.

## **WITNESSES**

- As previously agreed between the clerk and witness, the witness should be sworn in or asked to affirm by the clerk;
- The Chair should ensure that the witnesses are comfortable at all times. This includes ensuring witnesses are given adequate breaks;
- If a witness is to continue to give evidence after a break, the witness must be reminded that they are on oath (and what this means) both at the start of the break and on resumption.

## **EVIDENCE**

- The BSB Prosecutor sets out the allegations and presents the evidence in support of the case against the respondent barrister, calling any witness(es);
- The respondent barrister or his/her representative presents evidence in defence and may call any witness(es);
- Normally, written witness statements are taken as evidence-in chief, with any witness(es) only giving oral evidence when cross-examined. Panel members may also put questions to the witness(es);
- Closing speeches may be requested if the panel considers that this would be of assistance.

## **FINDINGS**

The panel retires to consider findings. Panel members should:

- raise any points on which they are uncertain;
- raise any concerns that they may have about any part of the process from the original complaint to panel deliberations;
- ask for explanation or clarification of any points of law or of legal practice and process that are relevant to the case; and,
- assess matters against the civil standard of proof.

Each panel member should then indicate their view as to the guilt or innocence of the respondent and the reasons why they hold that view. Panel debate and discussion should follow on findings and reasons, leading to a panel decision being reached on the finding, whether by unanimous or majority view.

The Chair, with the assistance of the other panel members, is to draft the findings sheets (with reasons). The findings sheets should be signed by all the panel members before the panel returns to give its findings. It should be noted that the provision of reasons gives transparency to the process. Although the reasons given on the sheet need not necessarily be lengthy they should show how, and why, and what particular evidence influenced the panel in making its finding.

Panel returns and Chair delivers the panel's oral verdict with reasons. This 'judgment' as orally delivered, will be used to produce the full Report of Finding and Sanction which will be subsequently posted on the BTAS website.

## **SANCTION**

The panel then hears submissions on sanction. The BSB prosecutor will:

- draw the panel's attention to the relevant sections of the appropriate version of the BTAS Sanctions Guidance; and,
- inform the panel of any previous disciplinary findings against the respondent barrister, providing copies of relevant documentation.

The respondent barrister may put forward mitigation.

The Panel should (by reference to the BTAS Sanctions Guidance) agree sanction, giving written reasons for the sanction imposed on the Findings and Sanctions sheets (as supplied by BTAS) and recording any aggravating or mitigating circumstances. This must be signed by all members of the Panel and the Clerk.

The Chair should provide the sanction and reasons orally at the conclusion of the hearing, which again will be used to produce the Report of Findings and Sanction that will be posted on the BTAS website.

## **AFTER THE HEARING**

If judgment was reserved at the hearing, the Chair should agree with the clerk and other panel members the process for producing the full Report of Finding and Sanction.

Once the Report is completed, all documentation for the hearing should be given to the BTAS Administrator for secure disposal.

## Panel Members' Quick Reference Guide to Disciplinary Tribunals

*The following is intended to provide Panel Members with an aide-memoire / quick reference guide to the Disciplinary Tribunal process*

### PRE-HEARING PREPARATION

On receipt of hearings bundle (usually 10 days prior to hearing):

- Immediately consider whether there is any conflict of interest which would require you to step down and if there is, contact the BTAS Tribunal Administrator.
- Study and analyse the bundle:
  - check the contents;
  - study the charge sheet;
  - study the contents of the bundle;
  - make notes and identify areas for clarification;
  - prepare questions for the hearing; and,
  - prepare a chronology of events.

### PRE-HEARING DISCUSSION

The letter issued by BTAS re date/time etc of hearing will ask panel members to attend at least 30 minutes before the start of the hearing for the preliminary discussion (if more time required for discussion, the Chair should have informed BTAS of this on receipt of the hearings bundle).

At pre hearing discussion, the Chair should:

- ensure that panel members have all the papers and are aware of any developments since the issue of the bundle;
- ask panel members if they have any questions or concerns etc;
- discuss how the hearing will be handled and how the panel will conduct itself; and,
- agree any breaks.

### OPENING

Chair introduces panel and deals with any preliminary matters, such as an application for an adjournment or for the hearing to be held in private.

The clerk reads out the charge(s) and invites the barrister to state how they wish to plead ('admit' or 'deny' the charges).

### EVIDENCE

The BSB Prosecutor sets out the allegations and presents the evidence in support of the case against the barrister, calling any witness(es).

The barrister or his/her representative presents evidence in defence and may call witness(es).

Normally written witness statements are taken as evidence-in chief, with witnesses only giving oral evidence when cross-examined. Panel members may also put questions to the witness(es). Closing speeches may be requested if the panel considers that this would be of assistance.

## **FINDINGS**

After retiring, panel members should:

- raise any points on which they are uncertain;
- raise any concerns that they may have about any part of the process from the original complaint to panel deliberations;
- ask for explanation or clarification of any points of law or of legal practice and process that are relevant to the case; and,
- assess matters against the civil standard of proof.

Each panel member should then indicate their view as to whether the charges have been proved to the requisite standard and the reasons why they hold that view. Panel debate and discussion should follow on verdict and reasons, leading to an agreed panel decision being reached, whether by unanimous or majority view, on the findings.

The Chair will draft written findings and reasons, and a judgment to be delivered orally, with the assistance of panel members. The findings sheets should be signed by all the panel members before the panel returns to give its findings. It should be noted that the provision of reasons gives transparency to the process. Although the reasons given on the sheets need not necessarily be lengthy they should show how, and why, and what particular evidence influenced the panel in making its finding.

The Panel returns and Chair delivers the panel's oral findings with reasons. This 'judgment' as orally delivered, will be used to produce the full Report of Finding and Sanction which will be subsequently posted on the BTAS website.

## **SANCTION**

The panel then hears submissions on sanction. The BSB prosecutor will:

- draw the panel's attention to the relevant sections of the BTAS Sanctions Guidance; and,
- inform the panel of any previous disciplinary findings against the barrister, providing copies of relevant documentation.

The respondent may put forward mitigation.

The panel retires to consider sanction. Having regard to the relevant version of the BTAS Sanctions Guidelines, the Panel should agree sanction, giving written reasons for the sanction imposed, whether it was reached by unanimous or majority decision, and recording any aggravating or mitigating circumstances. This findings and sanctions sheet must be signed by all members of the Panel and the Clerk.



The Panel returns and the Chair will normally provide the sanction and reasons orally at the conclusion of the hearing. The clerk should make a note of the timings of the judgment.

#### **AFTER THE HEARING**

If judgment was reserved at the hearing, the Chair should agree with the clerk and other panel members the process for producing the full Report of Finding and Sanction.

Once the Report is completed, all documentation for the hearing should be given to the BTAS Administrator for secure disposal.

## Clerks' Quick Reference Guide to Disciplinary Tribunals

*The following is intended to provide Clerks with an aide-memoire / quick reference guide to the Disciplinary Tribunal process*

### **PRE-HEARING**

Clerks will be sent a copy of the Convening Order for the Hearing at least 14 days before the hearing, together with the Charge Sheet and directions.

Any correspondence or telephone calls received by a clerk after his/her appointment, from either the parties or panel members, should immediately be referred to the BTAS Tribunal Administrator.

### **IMMEDIATELY BEFORE THE HEARING**

The clerk will be provided with the Tribunal Administrator's case file of papers prior to commencement of the hearing so that the clerk is in a position to answer questions, if any arise, about service of the Convening Order. This file will include the BSB's bundle, any defence documents which may have been sent and a blank Record of Tribunal Determination(s) and Outcome(s). The clerk should check:

- that the hearing room is ready for the hearing;
- that all the members of the Panel are present, as well as the parties to the case;
- with both the BSB and the respondent barrister what witness(es) they intend to call and whether they are present; and
- whether either party intends to make any preliminary applications such as amendments to the original Charge Sheet. If this is the case, the panel should be alerted.

If any issues arise regarding the attendance of the parties, or their witness(es), the clerk will need to liaise with the parties already present to obtain their views on how the hearing should proceed. The clerk should then inform the Chair of the situation and ask him/her to decide what action should be taken.

The panel will assemble for a pre hearing discussion (usually arriving 30 minutes before the start of the hearing). The clerk takes no part in these discussions.

If witnesses are to be called, the clerk should ensure that a copy of the BSB bundle (supplied by the BSB) is available on the "witness table" for reference purposes if cross examined (N.B. to be accessed by witnesses in these circumstances only).

Clerks should confirm with the respondent barrister prior to the hearing whether he/she understands the hearing process, if not, the clerk should give a brief overview of the proceedings.

Clerks should not give legal advice or make any comment, other than procedural, on any applications that might be made.

Clerks should check with the witness, before entering the hearing room, whether they wish to be sworn or to affirm and which, if any, oath or affirmation is required.

## COMMENCEMENT OF THE HEARING

Both three and five person Disciplinary Tribunal proceedings are normally recorded using digital equipment. The clerk must ensure the recording equipment is activated before the hearing commences.

Once the Panel is ready to enter the room, the clerk should lead the Panel into the room, saying as the Panel enters “All rise please”. The Panel and the clerk will then take their seats.

The Chair will introduce the panel and deal with any preliminary matters.

## CHARGES

The Chair will direct the clerk to read the charges to the barrister. The clerk should ask the barrister respondent:

- to stand;
- (and after each charge is read) whether he/she “*admits*” or “*denies*” the charge; and,
- (and once the charges have been read and the pleas entered), to sit down.

Clerks should not use the terms “guilty” or “not guilty”, as these are not criminal proceedings.

## WITNESSES

The clerk should:

- escort witnesses to and from the Tribunal room, as necessary;
- invite the witness to sit at the witness desk; and,
- ask the witness to take the pre-agreed oath or affirmation as to the truth of their evidence.

## EXHIBITS AND DOCUMENTS

If additional documents or exhibits are handed to the Panel during the course of the hearing (beyond the bundle provided to the clerk), the clerk should:

- number the documents in consecutive order;
- date the documents;
- initial the documents; and,
- make a note of document details.

The additional paperwork should be placed in the BTAS case file and passed to the Tribunal Administrator at the conclusion of proceedings.

## RETIREMENT OF THE PANEL

The Panel may retire during the hearing to deliberate on the following:

- preliminary applications such as applications to add charges or amendments to existing

- charges;
- interim applications such as applications of no case to answer after the prosecution case has concluded;
- whether the charges are proved beyond reasonable doubt; and
- the sanction to be imposed on the barrister where charges are proven by the BSB.

The panel will retire without the clerk. When the panel retires, the clerk should ask how long the panel thinks it will need for deliberations and, depending on the timescale, whether the parties may be released during that period of deliberation. The clerk should keep parties informed as to the panel's likely time of return.

## NOTE TAKING

Clerks should:

- keep a note of the **decisions** made by the Tribunal;
- the **pleas** entered by the respondent barrister; and
- details of any **documents handed to the panel** during the hearing.
- make a note of the timings of the judgment.

## RECORD OF TRIBUNAL DETERMINATION(S) AND OUTCOME(S)

The clerk should then provide the Panel with a copy of the Record of Tribunal Determination(s) and Outcome(s) (provided by BTAS) for completion. The Clerk must ensure that the Chair and members of the Panel complete, sign and date the Record of Tribunal Determination(s) and Outcome(s) *before* they leave the Tribunal venue.

Once completed, the clerk should place the Record of Tribunal Determination(s) and Outcome(s) in the case file and ensure it is returned to the BTAS Administrator, together with the other documentation, after the hearing.

## CHAIR'S REPORT

Normally, the Tribunal's Report on Findings and Sanction will be given orally by the Chair at the end of the hearing, and a written version subsequently produced from the digital recording (for this reason it is important that the clerk makes a note of the timings of the judgment). It is nevertheless important that the Clerk takes a note of the key decisions and outcomes in the event of any technological failure.

If judgment was reserved at the hearing, the Chair should agree with the clerk and other panel members the process for producing the full Report of Finding and Sanction.

## AFTER THE HEARING: DOCUMENTS:

Unless judgment was reserved, the clerk should collect the Panel's documentation and return it to the BTAS Administrator for secure disposal.

Where the barrister has been ordered to attend on a nominated person to be reprimanded or be given advice as to their future conduct, the clerk should clearly mark the relevant paperwork for the attention of the BTAS Administrator.

If the hearing is for more than one day, the clerk should ask the BTAS Administrator about the secure holding arrangements for documentation.

Once the Report is completed, all documentation for the hearing should be returned to the BTAS Administrator for secure disposal.

## Annex 1: Judgment Checklist

It is suggested that the following points should be addressed where appropriate:

- i. The Tribunal considered the preliminary application(s) to...
- ii. The Respondent, Mr/Mrs/Ms..., faced 3 charges. (*Set them out*). He or she pleaded...
- iii. The burden of proving these charges lay upon the BSB throughout. The Respondent did not have to prove his or her innocence or any particular fact. The standard of proof is the civil standard. The Tribunal cannot convict the Respondent upon any charge unless it is satisfied on the balance of probabilities that it has been proved.
- iv. The Tribunal heard the following evidence from.....The Tribunal read the statements of..... and the documents placed before it. The Tribunal had the benefit of Counsel's submissions for which it is grateful.
- v. The Tribunal found the agreed background (*briefly*) to be as follows.....
- vi. The main issues were.....
- vii. The Tribunal's assessment of the witnesses was as follows....
- viii. The Tribunal found the following facts..... (*Set them out clearly. You may need to offer some further explanation as to why, if not obvious from what you have found under vii above.*)
- ix. The Tribunal applied the following relevant law to those facts...
- x. The Tribunal decided... (*set out your decision, giving your reasons, in relation to each charge. You must state whether the decision is unanimous or by majority in relation to each charge. Make sure you are all aware of and in agreement with the whole judgment.*  
  
*If any charge is proved...*
- xi. The Tribunal heard from the BSB... (*previous disciplinary findings etc, if there are any*)
- xii. The Tribunal heard the following mitigation from the Respondent...
- xiii. The Tribunal considered the following guidelines... and the following relevant aggravating/mitigating factors... (*There is a helpful checklist in the 'Sanctions Guidance'.*)
- xiv. The Tribunal retired to consider the question of sanction... The sanction(s) and reason(s) for imposing it are as follows... (*You must state whether the decision is unanimous or by majority in relation to every sanction imposed.*)
- xv. (*If appropriate*) The Tribunal made the following consequential directions...
- xvi. (*If appropriate and at the discretion of the Chair*) The Tribunal, in the light of the evidence given to it, believes that the following matters appear to require investigation or comment.

*If charges are not found proved...*

- xvii. *(If appropriate)* The Tribunal, while not finding the charge(s) proved to the criminal standard of proof, is satisfied that there is sufficient evidence of a breach of the Handbook by the respondent on the balance of probabilities, and that it is proportionate and in the public interest, to refer the following matters back for the BSB to consider whether administrative sanctions should be imposed... *(list all breaches being referred back)*.