



The Bar Tribunals  
& Adjudication  
Service

The Council of the Inns of Court

# **Sanctions Guidance Review**

## **Consultation**

**April 2021**

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## About this consultation

### Who is it for?

This consultation will be of general public interest, particularly consumers of legal services, members of the Bar, Bar Tribunals and Adjudication Service (BTAS) panel members and other regulators.

BTAS considers it essential that a wide range of interested parties are able to contribute to the revision of this sanctions guidance. In particular, BTAS would welcome comments from those with experience of supporting victims of misconduct not just in relation to barristers but more widely in other similar professional settings.

### What is its purpose?

BTAS is seeking initial views on proposed revisions to parts of the BTAS Sanctions Guidance, which is used to guide the Bar's Disciplinary Tribunals and the BSB's Independent Decision-Making Body<sup>1</sup> when considering the appropriate sanctions to impose following findings of professional misconduct against barristers<sup>2</sup>. It is the first of two consultations and covers issues in relation to Part 2 of the Guidance, i.e. the detailed guidance on indicative sanctions for specific types of breaches. The responses to this consultation will inform the contents of the final draft Guidance which will be subject to a second consultation commencing in July 2021.

### How long will the consultation run for?

The consultation will run for just over six weeks from **29 April 2021 to 14 June 2021**.

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<sup>1</sup> Under the Determination by Consent Procedure

<sup>2</sup> This first consultation paper focuses on sanctions in relation to individual barristers because, as at the date of publication, there have been no disciplinary cases brought against entities regulated by the BSB. However, the full guidance, which will be the subject to a second consultation, will include information on the approach to sanctioning entities.

## How to respond to the consultation

Responses should be sent to Margaret Hilson, the Bar Tribunals Administrator

By email to [consultation@tbtas.org.uk](mailto:consultation@tbtas.org.uk)

By post to: Bar Tribunals and Adjudications Service  
9 Gray's Inn Square  
London  
WC1R 5JD

Responses can also be provided by telephone by prior arrangement. Please contact Margaret Hilson at the addresses above or on 020 3432 7348 to arrange a suitable time.

You are welcome to address all or some of the issues set out in this consultation paper and also to provide observations on issues not specifically covered by the questions.

We will summarise the responses received and will publish the summary document on our website. If you do not want your response or a summary of it published, please make this clear when you reply.

## Introduction

1. The Bar of England and Wales comprises approximately 17,000 practising barristers and approximately 54,000 unregistered (non-practising barristers). It is regulated by the Bar Standards Board (BSB) and all those who are called to the Bar are expected to act in accordance with the provisions of the BSB Handbook (the Handbook) and the Code of Conduct set out in the Handbook. The responsibility for enforcement of the Handbook lies with the BSB as the regulator of the profession. This includes taking disciplinary action where a breach of the Handbook provisions is so serious as to amount to professional misconduct.
2. The average number of barristers subject to disciplinary action for professional misconduct each year is very small. Over the last three years, there were on average only 28<sup>3</sup> barristers subject to disciplinary action<sup>4</sup> each year which resulted in sanctions being imposed. This represents 0.04% of the total number of barristers called to the Bar and 0.16% of the practising Bar. These extremely low numbers are, to a large extent, a reflection of the high standards of the profession, but conversely may also be a reflection of the underreporting of incidents of potential misconduct, particularly in areas such as sexual misconduct, harassment, and discrimination.
3. The BSB's role in enforcing the terms of the Handbook is central to maintaining public confidence in the profession and maintenance of the expected standards. It is also important in helping to deter others from engaging in similar conduct and encouraging reporting of incidents of potential breaches. Therefore, where the BSB has evidence of potential serious breaches of the Handbook, and considers disciplinary action for professional misconduct is necessary, disciplinary charges will be brought for determination by independent tribunals or a panel of the Independent Decision-Making body.

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<sup>3</sup> The average number of cases subject to sanctions was 32 per year because some barristers were the subject of more than one disciplinary case.

<sup>4</sup> This includes barristers subject to the sanctions under the Determination by Consent procedure

4. The Bar Tribunals and Adjudication Service (BTAS) is responsible for appointing and administering the independent Disciplinary Tribunals tasked with adjudicating on charges of professional misconduct brought by the BSB. These services have been provided by BTAS since 2013 under a Services Agreement between the BSB and the Council of the Inns of Court.
5. Since its inception, BTAS has provided guidance to Disciplinary Tribunal members on the appropriate sanctions to impose where findings of professional misconduct are made: the “BTAS Sanctions Guidance” (the Guidance). The first version of the Guidance was issued in 2009, prior to the creation of BTAS and was adopted by BTAS in 2014. The Guidance has since been updated on a number of occasions and has incorporated changes in the BSB’s regulatory arrangements; it is now in its fifth edition. Its substantive contents, including the recommended sanctions, have not been subject to public consultation since 2014. A copy of the current Guidance can be found at <https://www.tbts.org.uk/wp-content/uploads/2019/10/BTAS-Sanctions-Guidance-2019.pdf>
6. BTAS and the BSB recognised in 2019 that a substantive review of the Guidance was required to ensure that it remains relevant and reflects societal views of behaviour by professionals. A review project was therefore set up in April 2020 to take this work forward. It had been anticipated that the review would be completed within a year but unfortunately, the pandemic impacted on the speed at which progress could be made. The intention now is to issue the final revised Guidance in November 2021.
7. In recent months, the sanctions imposed for findings related to sexual misconduct, in particular, have been subject to public criticism for their leniency in themselves but also compared to sanctions imposed for other types of misconduct. A range of public views on the appropriate sanctions in such cases has been expressed with most views strongly in favour of increasing sanctions.

8. The consultation process is in two stages. At this point, the focus is on a proposed revised approach to the Guidance, including indicative sanctions. This important step will provide essential feedback to inform the content of the rest of the document. A second round of consultation on a final draft of the full Sanctions Guidance will then take place.
9. The current Guidance is divided into two main parts. Part 1 provides general guidance on the principles related to sanctioning, while Part 2 provides detailed guidance on the indicative sanctions for particular types of misconduct. The intention is to retain this format in the future Guidance but to revise substantially the contents of Part 2. The contents of Part 1 will be slightly rearranged but will cover the same ground including the purpose and principles of sanctions, and the available sanctions and their appropriate use.
10. The focus of this first consultation is limited to the proposed contents of Part 2 of the Guidance – indicative sanctions. When considering the proposals in this consultation paper it is important to bear in mind that the Guidance is intended to promote consistency and transparency in decision making. Further, the purposes of regulatory sanctioning are not to punish but to:
  - a. Protect the public and consumers of legal services;
  - b. Promote and maintain public confidence in the profession;
  - c. Promote and maintain proper standards of behaviour at the Bar; and
  - d. Act as a deterrent to the individual and/or the wider profession from engaging in the misconduct subject to sanction.
11. The areas on which views are sought in this first consultation are as follows:
  - Levels for fines and suspensions (see Section 3)
  - A clearer structured approach to deciding sanctions (see Section 4)
  - New misconduct “Groups” for the indicative sanctions (see Section 5)
  - Revised approach to recommended indicative sanctions (see Section 6)

- Proposed sanction ranges for specific “Groups” of misconduct (see Section 7) i.e.:
  - i. Dishonesty
  - ii. Misconduct of a sexual nature
  - iii. Discrimination and non-sexual harassment
  - iv. Behaviour towards others
  - v. Use of social media and other digital communications
  
- Equality Impacts (see section 8).

12. We are seeking views on 22 questions arising from the above, which are summarised below and can be found at appropriate places within this paper.

13. The questions are:

*Question 1 – Do you agree that the revised Guidance should remove reference to fine levels for entities regulated by the BSB?*

*Question 2 – Do you consider there is a more appropriate alternative to having categories of fines? Please provide further details.*

*Question 3 – Do you agree that the three categories for fines should be retained in the revised guidance?*

*Question 4 – Do you agree with the proposed revised financial brackets for each of the fine categories? If not, in what way do you think they should be amended?*

*Question 5 – Do you agree that a descriptor should be added for each of the fine categories, and do you agree with the proposed descriptors?*

*Question 6: Do you agree that the categories for suspension should be reduced to two?*



*Question 7 – Do you agree that the categories should be up to 12 months and over 12 months? If not, what do you consider the categories should be?*

*Question 8 – Do you agree with the general culpability and harm factors as set out at Annex 1?*

*Question 9 – Do you agree with the general aggravating and mitigating factors as set out at Annex 1?*

*Question 10 – Do you agree that the structured approach outlined above is appropriate?*

*Question 11 – Are there any adaptations to the approach you consider should be made?*

*Question 12 – If you disagree with the structured approach outlined above, what approach to imposing sanctions do you consider decision-makers should take?*

*Question 13 – Should misconduct involving violence, in the absence of a criminal conviction, be included in Behaviour towards others or a separate Group?*

*Question 14 – Do you agree with the concept of creating Groups of types of misconduct?*

*Question 15 – Do you agree with the proposed Groups outlined above?*

*Question 16 – Do you have any suggestions for amendments to the titles of the Groups and/or the intended coverage of each?*

*Question 17 – Do you agree with the concept of including the Guidance bands for sanctions within the ranges?*

*Question 18 – Do you agree with proposed descriptors for the lower, middle, and upper bands for each range?*

*Question 19 – Do you agree with the range for each of the Groups (see paragraphs 79-86)?*

*Question 20 – Do you agree with the specific culpability and harm factors included for each Group? Are there any additional factors that should be included?*

*Question 21 – Do you agree with the specific aggravating and mitigating factors included for each Group? Are there any additional factors that should be included?*

*Question 22 – Do you agree with where the lower, middle, and upper bands for the ranges have been pitched for each Group? Do you consider any adjustments should be made to the bands? Please give reasons.*

*Question 23 – Do you consider that the equality impacts rehearsed above provide a basis for departing from any of the proposals in this paper?*

*Question 24 – Are there any other equality issues BTAS should take into account when developing further the contents of the Sanctions Guidance?*

## Section 1 - Research to inform the proposals

14. The proposals in this paper have been developed by a Working Group led by the Chair of the Tribunals, HHJ Jonathan Carroll and including the Registrar of BTAS, lay and barrister members of the BTAS Disciplinary Tribunal panel, the BSB's Director of Legal and Enforcement and the Head of Investigations and Enforcement at the BSB.

15. To inform the proposals the Working Group carried out a range of research as summarised in the paragraphs below.

### Desk top review of guidance of other regulators

16. The Working Group gathered and considered sanctions guidance currently used by 17 other professional regulatory bodies/tribunals, both legal and non-legal. Most of the Guidance documents were reviewed in 2019 or 2020.

17. The outcome of this research indicated that the majority of regulators use a similar structure for their guidance as used by BTAS, covering the same issues of principle such as proportionality, totality and aggravating and mitigating factors as well as the range of sanctions available to each regulator and when, in broad terms, they might be appropriate to impose. Many of the regulators include sections on specific types of misconduct, such as dishonesty, sexual misconduct, discrimination, and criminal convictions, but only high-level guidance on the seriousness with which such misconduct is viewed and the issues to take into account when deciding on sanction are cited.

18. Notably, only two regulators take the approach of setting out comprehensive indicative sanctions for specific breaches of the relevant professional code of conducts in a similar way to the current contents of Part 2 of the BTAS Sanctions Guidance.

## Survey of users

19. The Working Group carried out an online survey of direct users of the BTAS Guidance to establish how useful they found it; what problems they had encountered in using it; whether they considered adjustments should be made to the structure and, if so, in what areas; whether the indicated sanctions were appropriate in the context of the cases they had dealt with; and whether and what gaps existed in the Guidance.

20. The survey was sent to all members of the BTAS Disciplinary Tribunal, relevant members of staff at the BSB, BSB tribunal representatives (counsel), members of the BSB's Independent Decision-Making Panel and past Professional Conduct Committee members.

21. In total 52 responses were received. The following summarises the responses:

- The overwhelming majority (92%) indicated that they found the Guidance useful and generally effective in assisting them in performing their role. A wholesale rewrite was not considered necessary and 86% considered that there were no areas that should be removed, however, it needed to be updated, gaps filled and made more focussed
- The majority (78%) considered the structure of the Guidance was effective and 81% consider that Part 2 of the Guidance, which includes specific indicative guidance on the sanctions to impose for specific types of breaches was helpful and should be retained (77%). However, many comments alluded to the need to make the interrelationship between the two parts of the Guidance clearer. Also, the current format is insufficiently flexible and often breaches do not fit within the specific sections or are not covered at all
- In terms of gaps that should be addressed, the following main areas were raised (some of which had been identified in the survey questions by the Working Group):

- Use of social media (conduct in non-professional life)
  - Impact of criminal sanctions on regulatory sanctions
  - Impact of delay in bringing proceedings on sanction
- In relation to the “starting points” for breaches as set out in the current Part 2, the following feedback was received:
    - Sexual misconduct – too lenient
    - Criminal convictions including drunk driving – too lenient
    - Conduct involving violence – too lenient
    - Conduct involving drugs – guidance inconsistent
    - Fine levels require review

### **Review of disciplinary cases decided in the last three years**

22. Statistics were gathered on the findings made in the last three years specifically in relation to the nature of the misconduct involved. This was designed to inform where there are gaps in the current guidance. This research revealed that some of the “common breaches” currently listed in Part 2 are not in fact now “common”. For example, there were no proved charges in the last three years for: breach of the cab rank rule; accepting instructions when professionally embarrassed; late withdrawal; failures to comply with court orders; convictions for drug offences; using status to influence; or delay.

23. In contrast, the research showed that there were some more frequently occurring proved charges<sup>5</sup> that are not covered in the current guidance such as: failure to promote the best interests of clients (6 charges in the last three years); convictions falling outside those currently listed in Part 2 (7 charges); and possession/supply of drugs in the absence of a criminal conviction (6 charges).

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<sup>5</sup> “Charges” do not denote separate cases and multiple proved charges could arise from one hearing involving a single barrister.

## **Review of current indicative sanctions included in Part 2**

24. An exercise was carried out to create a matrix of the current “starting points” and escalating recommended sanctions as set out in the current Part 2. This proved interesting and showed that for most breaches the “starting point” was a reprimand or advice as to future conduct with no significant difference in the starting points for different types of behaviour with any differences being reflected in the higher end of the indicative sanctions for certain breaches.

25. Further, the review showed, when placed together, the current “possible circumstances” were not necessarily internally consistent and were a mixture of “circumstances” and rehearsals of general aggravating and mitigating factors applicable to all forms of misconduct. The overall conclusion was that the recommended sanctions in the current Part 2 are calibrated towards lenient “starting points” in many areas.

## **Case law review and reported sanctions by other regulators**

26. A review of the current case law on regulatory sanctioning was also carried out along with a review of reported cases of sanctions imposed by other regulators including cases that were subject to appeal through the courts.

27. The current case law revealed no significant issues that are not covered in the current Guidance although inevitably it indicated that some areas of Part 1 need updating to reflect the latest cases.

28. In relation to sanctions imposed under other regulatory regimes, while there may be commonality in approach across professional regulators including the seriousness with which certain types of misconduct are viewed, there is inevitably a disparity in sanctioning depending on the nature of the profession and also the sanctions available (e.g. some regimes do not have fines as a sanction). The research showed that the range of sanctions imposed for what could be seen as similar behaviour by different types of professionals differed to such a degree, and were so fact specific,

as to make it difficult to draw any clear conclusions that would be of benefit in informing the indicative sanctions for the Bar.

29. Nevertheless, some clear trends did emerge in certain areas. Generally, outside the legal profession, sanctions imposed for sexual misconduct most usually attracted suspensions from practice of 12 months or a more serious sanction, often erasure/strike-off. It was noted that in many of the cases that led to erasure/strike off for sexual misconduct related to children/images of children. Discrimination and harassment of a non-sexual nature also attracted suspensions albeit starting at lower than 12 months.

30. All the above information was used to inform the proposals for revisions as set out in this paper and covered in the Sections below.

## Section 2 – Overview of proposed revisions to Part 2 - “Misconduct Groups: Guidance on Sanctions”

31. The research referred to above indicates that, overall, the current format and structure of the Guidance remains appropriate and effective.

Therefore, there is no proposal to make any substantial changes to either. The revised Guidance will remain in two parts: Part 1 covering general guidance and Part 2 providing guidance on the appropriate sanctions to impose for particular types of breaches.

32. However, changes in approach are proposed in relation to the contents of Part 2. These are summarised below and expanded on in the remaining Sections of this paper:

- Revision of the category levels for fines and suspensions (see Section 3)
- A clearer structured approach to guide decision-makers will be included at the beginning of Part 2 to assist with ensuring a consistent approach to all decisions on the imposition of sanctions (see Section 4)
- The concepts of culpability and harm in determining seriousness will be included in a more structured way in the decision-making process to ensure that these matters are properly taken into account (see Section 4)
- “Groups” of types of misconduct will be introduced to replace the current format of setting out “common breaches” according to breaches of specific provisions of the BSB Handbook (see Section 5)
- An indicative “sanctions range” for each “Group” will be set out with the decision on where in the range a sanction could be imposed based on the assessment of seriousness (see Sections 6 and 7)



## Section 3 – Revision of the levels for fines and suspensions

33. The current guidance includes categories and levels for fines and suspensions. A number of professional regulators do not have the power to impose fines and of those that do, only the Institute of Chartered Accountants in England and Wales (ICAEW) and the Solicitors Disciplinary Tribunal (SDT) provide guidance on the level of fines that should be imposed. In the case of the latter, the guidance only applies to those imposed on individuals as opposed to entities (firms). None of the regulators researched includes specific periods for suspensions unless stipulated in their regulations.
34. The Working Group considered whether it was appropriate to retain guidance on the levels for fines and suspensions and came to the conclusion they should be retained as they provide helpful assistance for panel members and promote consistency in sanction decisions. However, the proposal is that the levels should be amended as set out in the following paragraphs.

### Fines

35. **Fines for BSB authorised entities:** the current Guidance includes separate levels of fines applicable to proved misconduct by BSB Legal Services Bodies and BSB Licensed Bodies. However, despite such bodies coming into existence seven and five years ago respectively, there has yet to be a disciplinary case against any such body. We intend to revise the fine levels for individuals (see paragraphs 36-40 below). To stay in step with these revisions, we would also need to consider revisions to the levels of fines for entities. However, there is no means by which we can gauge whether the current, or any revised, fine levels for entities would be meaningful or relevant. The proposal therefore is that we take the same approach as set out in the sanctions guidance for the SDT and only include specific fine levels in relation to sanctions for individuals. However, Part 1 of the Guidance will include general principles applicable to deciding sanctions misconduct by BSB entities, including fines.

***Question 1 – Do you agree that the revised Guidance should remove reference to fine levels for entities regulated by the BSB?***

36. **Fines for individuals:** the current Guidance includes three recommended levels of fines: low, medium, and high. Only two other regulators of those researched set categories for levels of fines. However, the feedback from the user survey (see paragraphs 19-21 above) indicated that the levels were helpful but were generally calibrated at too low a level.
37. The Disciplinary Tribunal Regulations, at Part 5: Section B of the BSB Handbook provide that the maximum fine that can be imposed on an individual is £50,000. However, the current categories of fine levels as set out in Part 2 of the Guidance are out of kilter with this maximum. The highest fine category has a starting point of only £3,000 going up to £50,000, with the lowest level having a limit of £1,000. As a result, the fines imposed never reach anywhere near the maximum and it is rarely that fines of over £10,000 are imposed. In contrast the SDT regularly imposes fines of £20,000 or more on individual practitioners albeit that there is no upper limit to the fines the SDT can impose.
38. The proposal therefore is that the three levels of fines are retained but the brackets for each are revised to make the imposition of fines a more meaningful sanction that can reflect the seriousness of some misconduct that falls short of warranting a suspension.
39. The revised brackets should be viewed in the context that the individual's financial means will always be considered when deciding on the imposition, and level, of a fine. It is therefore possible that a fine might fall into a lower bracket due solely to consideration of means.
40. The proposed revisions to the fine levels are set out in the table below as compared to the current fine levels. It is also proposed that a description of each of the fine categories is included in Part 2 to assist decision-makers in determining the level of fine to impose.

<b>Current level</b>	<b>Current bracket</b>	<b>Proposed revised bracket</b>	<b>Description (new)</b>
Low	up to £1,000	up to £5,000	Sufficiently serious to justify a fine
Medium	£1,000 - £3,000	£5,000 - £15,000	Moderately serious
High	over £3,000 and up to £50,000	£15,000 - £50,000	Serious misconduct that does not warrant a suspension to protect the public interest

***Question 2 – Do you consider there is a more appropriate alternative to having categories of fines? Please provide further details.***

***Question 3 – Do you agree that the three categories for fines should be retained in the revised guidance?***

***Question 4 – Do you agree with the proposed revised financial brackets for each of the fine categories? If not, in what way do you think they should be amended?***

***Question 5 – Do you agree that a descriptor should be added for each of the fine categories, and do you agree with the proposed descriptors?***

## **Suspension**

41. The current guidance has three categories of suspensions: short; medium; and long. Again, these categories are not necessarily reflective of the upper limit on suspensions. While this is not prescribed in the BSB regulations, good practice indicates that generally a maximum of a three-year suspension is appropriate – anything over this would suggest that the

misconduct is so serious that disbarment is more appropriate. Therefore a “long” suspension with a lower level of six months is out of keeping with this “maximum” level and thus means that suspensions in the other categories are inevitably calibrated at a low level.

42. Further, the categories and the lengths applicable to each do not correlate to the sentencing powers of three and five person panels: the former have the power to imposed suspensions up to 12 months, whereas the latter can impose suspensions of any length. This makes it difficult for both the BSB, when making decisions on which type of panel to refer matters, and the three-person Tribunal panels when deciding whether conduct falling within the mid-range of the “long” suspension category should be referred to a five-person panel for sanctioning.

43. The proposal therefore is to reduce the suspension categories to two and bring the categories in line with the sanctioning powers of three- and five-person Tribunal panels as set out in the table below. This will also allow for more flexibility in considering the nuances of misconduct that warrants a suspension and hopefully give three person panels more confidence to use up to their maximum sentencing powers without the need to consider referring the matter to a five-person panel.

<b>Current category</b>	<b>Current bracket</b>
Short	Up to 3 months
Medium	Over 3 months and up to 6 months
Long	Over 6 months and up to three years

<b>Proposed revised category</b>	<b>Revised bracket</b>
Shorter	Up to 12 months
Longer	Over 12 months

***Question 6: Do you agree that the categories for suspension should be reduced to two?***

***Question 7 – Do you agree that the categories should be up to 12 months and over 12 months? If not, what do you consider the categories should be?***

## Section 4 – A clearer structured approach to deciding sanctions

44. The current Guidance includes in Part 1 at Section 3, paragraph 3.5, the steps to determining sanction. While this is helpful, feedback indicated that users would benefit from a clearer and more structured approach.

45. In considering this issue, the Working Group took into account the approaches of other professional regulators as set out in their guidance (see paragraphs 16-18 above). They also took note of the general approach to sentencing adopted by the criminal courts, as set out in the guidance issued by the Sentencing Guidance Council, whilst fully recognising that the regulatory jurisdiction is different to the criminal.

### Proposed revised guidance on approach to decisions on sanction

46. The proposal is that the Guidance includes at the beginning of Part 2 a more explicit structured approach to deciding sanctions, set out as six steps as follows:

#### **Step 1 - Determine the appropriate “Group” under which the proved misconduct falls**

47. The first step would be to determine the most relevant “Group” of behaviours the proved misconduct falls under (for further information on the “Groups” see Section 7 below). Inevitably, a proved charge might span one or more relevant “Groups” and the intention is to include in each “Group” reference to any other Groups that might be relevant although one applicable “Group” should be evident for each proved charge.

#### **Step 2 – Determine the seriousness of the proved misconduct**

48. This step involves an initial assessment of the seriousness of the actual misconduct based on the culpability of the respondent barrister and the harm caused by the conduct. This includes taking into account general

culpability and harm factors that could be applicable to assessing the seriousness of any type of misconduct as well as factors that might be specific to a particular Group (see paragraph 80b for more information on the specific factors). Set out at Annex 1 is a list of the general culpability and harm factors. We would welcome views on whether these general factors are appropriate.

***Question 8 – Do you agree with the general culpability and harm factors as set out at Annex 1?***

**Step 3 – Assess where in the sanctions range for the relevant Group the misconduct falls**

49. Each Group will have an associated sanctions range (see Sections 6 and 7 for more detail). Based on the assessment at Step 2, the decision-maker should then decide where in the range they consider the misconduct falls.

**Step 4 – Apply aggravating and mitigating factors**

50. Following the objective assessment of the seriousness of the proved misconduct and where in the range of sanctions this puts the misconduct, relevant aggravating and mitigating factors should be considered. This includes taking into account general factors that could be applicable to any forms of misconduct as well as factors that might be specific to a particular Group. Set out at Annex 1 is a list of the general aggravating and mitigating factors (see paragraphs 80d for more information on the specific factors). We would welcome views on whether these factors are appropriate.

***Question 9 – Do you agree with the general aggravating and mitigating factors as set out at Annex 1?***

51. Inevitably these will overlap to some extent with the culpability and harm factors, but this step of the process is designed to look at the circumstances surrounding the misconduct. Significant mitigation would lead to a sanction at the low or bottom end of the range, or indeed, in exceptional circumstances could support a decision to impose a sanction beneath the range for the Group. Conversely, significant aggravating factors would result in a sanction towards the upper end of the range and could lead, where applicable, to a sanction outside the top end of the range. (For further details on the ranges and their application, see Section 7 below).

### **Step 5 – Consider the totality principle**

52. The previous steps should lead decision-makers to an appropriate sanction to impose for the specific proved conduct. However, sanctions must be proportionate, and decision-makers must consider the totality of the sanctions in contemplation to ensure the outcome is proportionate. This applies in all cases but is particularly important where there are multiple charges arising from one incident, separate incidents, or multiple examples of the same behaviour on different occasions over a period of time. The sanction(s) should reflect these factors and both the separate and combined cumulative impact of the misconduct.

### **Step 6 – Provide written reasons for the sanction imposed**

53. This is an integral part of the decision-making process and panels must agree their reasons for sanctions decision and communicate these clearly in writing ensuring that they address the factors taken into account under the steps outlined above.

54. The view is that following the more structured process as outlined above will provide decision-makers with a more robust and clearer basis for taking decisions on sanctions and also lead to a more consistent and rigorous approach to the imposition of sanctions.



***Question 10 – Do you agree that the structured approach outlined above is appropriate?***

***Question 11 – Are there any adaptations to the approach you consider should be made?***

***Question 12 – If you disagree with the structured approach outlined above, what approach to imposing sanctions do you consider decision-makers should take?***

## Section 5 – Misconduct Groups

55. As indicated previously, it is intended that Part 2 of the Guidance will continue to provide more detailed guidance on the indicative sanctions that are appropriate for “Groups” of offences. BTAS recognises that such detailed indicative guidance is the exception and not the norm, but it has been included in the Guidance for over a decade and our recent survey of direct users shows a very strong preference for retaining it. However, the survey also indicated that there are problems with the current approach that need to be addressed.

56. One of the issues with the current Part 2 is that it is based on “common breaches” and “possible circumstances” as established over 10 years ago. Inevitably, particularly the latter, have not kept up with changes in behaviour and/or attitudes to types of misconduct. Further, experience has shown that this approach has led to gaps when dealing with what, under the current terminology would have to be classed as “uncommon breaches” or other “possible circumstances”. As indicated at paragraphs 22-23 above, the research shows some of the “common breaches” cited in the current Part 2 are not common and conversely some breaches that occur more frequently are not covered.

57. Finally, the “possible circumstances” currently listed in Part 2 can appear arbitrary and produce large gaps in the types of conduct that fall under a particular heading.

58. These issues were also identified in the user survey and indicate that we should move away from the concept of “common breaches/possible circumstances” and try to cover in Part 2, as far as is possible, all types of misconduct that could arise through the use of broader “Group” headings.

## Proposal to introduce a new “Group” format for Part 2

59. The proposal is that, instead of grouping the indicative sanctions according to “common breaches/possible circumstances”, “Groups” of similar types of misconduct should be used. The proposed Groups are listed at paragraph 61. They are intended, as far as it is possible, to encompass all the various types of conduct that are likely to result in proved disciplinary findings. They are based on a combination of the research referred to above at paragraphs 22-23 in relation to proved breaches in the last three years and also the overall terms of the obligations placed on the profession regardless of how frequently breaches fall to be considered by panels.

60. The Groups are intended to put together types of conduct that are of a similar nature, should attract similar ranges of recommended sanctions and are likely to be subject to similar types of culpability/harm and aggravating/mitigating factors. The sanction ranges applicable to each group are discussed in Section 7 below.

61. The proposed Groups are as follows:

- i. **Dishonesty** – this is intended to cover all forms of dishonesty whether in professional or non-professional life and/or subject of criminal convictions.
- ii. **Misconduct of a sexual nature** – this is intended to cover all forms of misconduct of a sexual nature whether in professional or non-professional life and/or subject to criminal convictions. It would include misconduct ranging from inappropriate and grossly offensive sexual comments to sexual assault.
- iii. **Discrimination and non-sexual harassment** – this Group is intended to cover discrimination and all forms of non-sexual harassment.

- iv. **Financial matters** – this Group is intended to cover any misconduct related to financial impropriety, whether in professional or non-professional life.
- v. **Criminal convictions** – this Group is intended to cover all types of criminal convictions that do not fall under the misconduct covered by any of the other Groups. For example, a finding in relation to a criminal conviction for sexual offence would be covered by the “Misconduct of a sexual nature” Group and the conviction considered as a serious aggravating factor.
- vi. **Misleading** – this Group is intended to cover all forms of misleading, whether in relation to the court or to an individual.
- vii. **Administration of justice** – this Group is intended to cover general duties to the courts and misconduct that impacts on the course of proceedings including witness handling.
- viii. **Formal orders** – this Group is intended to cover any breach by a barrister of formal orders made by any body, tribunal or court which place personal obligations on them to comply. Examples include failure to comply with court orders, orders of BTAS Tribunals and formal determinations made by the Legal Ombudsman.
- ix. **Behaviour towards others** – this is a wide Group intended to cover personal behaviour of barristers towards others that is not encompassed by the other Groups. It covers discourtesy and rudeness and threatening behaviour through to violence towards others both in professional and non-professional life. Misconduct cases involving violence by barristers without a criminal conviction are rare and therefore violence towards others is included in this broad Group. However, we recognise that this may not be appropriate and that this type of misconduct involving violence could warrant a separate Group.

***Question 13 – Should misconduct involving violence, in the absence of a criminal conviction, be included in Behaviour towards others or a separate Group?***

- x. **Use of social media and other forms of digital communications** – this Group is intended to cover inappropriate digital communications generally but focussed mainly on inappropriate communications on social media.
- xi. **Formal obligations to clients** – this Group is intended to cover findings in relation to the formal obligations placed on barristers under the BSB Handbook in relation to their clients. It would include matters such as compliance with confidentiality obligations, requirements in relation to instructions and breach of the cab rank rule. Other types of misconduct in relation to clients would be covered under other applicable Groups e.g. misconduct of a sexual nature or discrimination or harassment.
- xii. **Obligations to the regulator** – this Group is intended to cover all the formal obligations to the regulator that are placed on barristers and others regulated by the BSB. It would include, for example, breach of practising and reporting requirements, as well as failure to co-operate with the regulator and breach of public access rules.
- xiii. **Conduct related to status** – this Group is intended to cover misconduct that relates to barristers using their status inappropriately to influence others.

62. It should be noted that the titles for the Groups used above are only working titles at this point and are subject to amendment in the light of consultation responses as is the coverage of each Group.

***Question 14 – Do you agree with the concept of creating Groups of types of misconduct?***

***Question 15 – Do you agree with the proposed Groups outlined above?***

***Question 16 – Do you have any suggestions for amendments to the titles of the Groups and/or the intended coverage of each?***

## Section 6 - Revised approach to recommended indicative sanctions

63. As indicated above, the current Part 2 Guidance provides guidance on indicative sanctions according to “common breaches/possible circumstances” by reference to specific provisions of the BSB Handbook. The proposals outlined move away from this approach and introduce the concept of general “Groups” of types of misconduct. As these Groups are intended to bring together similar types of behaviour of a similar level of seriousness, the intention is that proved misconduct under each of the Groups should attract similar “ranges” of sanctions.
64. Also, the current Part 2 Guidance does not provide for significantly different starting points for particular types of conduct. For most types of misconduct, the “range” is similar - starting with the low-level sanctions and moving, in most cases, through to suspension or disbarment. The only exception is in relation to cases of dishonesty, the sanction for which in the legal profession is governed by case law.
65. The Working Group considers that this wide range of indicative sanctions is not helpful and fails to reflect the comparative seriousness of certain types of conduct. The adoption of “Groups” of types of conduct is intended to assist with setting sanction “ranges” appropriate for each Group and allow for a level of calibration between the various “Groups”. Setting the “ranges” is not scientific and inevitably there will be a wide range of views on the ranges. However, one of the main purposes of this consultation is to seek views on whether the sanctions “ranges” are appropriate.
66. Before considering the ranges themselves, the following paragraphs put into context how they are intended to be applied.

## Lower, middle and upper ranges

67. While the intention is to set a general range for each Group, in most cases the ranges are fairly wide and therefore the view is that more guidance as to where in the range a sanction should be pitched within a Group is required. Therefore, where applicable, the ranges for the Groups have been divided into lower, middle, and upper bands for the range. These bands are intended to inform where in the range the initial view of the sanction should be pitched at Step 3 following the assessment of the culpability and harm factors (see paragraph 49 above).

68. The three bands within a range, are intended to reflect the following:

- **Upper Range** - Where there is high culpability and high harm.
- **Middle Range** - Where there is moderate culpability and harm or where there is high culpability and low harm, or low culpability and high harm.
- **Lower Range** - Where there is low culpability and low harm.

69. Each individual Group section included in Part 2 will provide information on what sanctions may be appropriate within the bands for that Group. In accordance with the steps outlined above at paragraphs 46-54, aggravating and mitigating factors would then be applied. The bottom of the lowest band i.e. the bottom of the range, would be appropriate in cases where the culpability and harm are low, and the individual has no previous relevant disciplinary findings and has admitted the charges at an early stage in the proceedings. Where these factors are present, but there is also significant other mitigation, it may be appropriate to consider a sanction falling beneath the bottom of the recommended range.

70. Decision makers will be required, as is currently the case, to give clear and reasoned decisions for imposing sanctions below, or indeed above, the recommended range.



***Question 17 – Do you agree with the concept of including the Guidance bands for sanctions within the ranges?***

***Question 18 – Do you agree with proposed descriptors for the lower, middle, and upper bands for each range?***

### **CPD Orders and Restrictions on practice**

71. **Continuing Professional Development Orders:** Annex 1 treats orders to undertake continuing professional development (CPD) differently to other sanctions. This is because such orders are rarely imposed as standalone sanctions and are usually combined with other sanctions. Nevertheless, it is perfectly legitimate to impose such orders as the only sanction in relation to a charge(s) of misconduct. Where CPD orders are marked on the graph at Annex 1, this indicates that they fall within the range of sanctions appropriate to the Group but do not necessarily form part of the escalating seriousness of the sanctions that could be imposed for the misconduct.
72. **Restrictions on practice:** such sanctions are considered serious as they impact on a barrister’s ability to pursue their chosen way of working and limit their ability to practise. They form part of the escalating hierarchy of seriousness of sanctions and are potentially standalone sanctions that are considered to be more serious than the imposition of a fine or a lesser sanction in the hierarchy. However, they are also sanctions that are often combined with others.
73. More detail on the approach to these sanctions and combining them with others will be included in Part 1 of the Guidance and covered in the second consultation.

## Section 7 – Group sections and indicative sanctions ranges

74. The proposal is that each of the Groups will have its own section in Part 2, set out in a similar format to that used in the current Part 2 guidance, but adjusted to reflect the structured approach for taking decisions on sanctions described in Section 4 above.
75. The proposed sanctions ranges for each of the new Groups have been developed taking into account the research outlined in Section 1 and the categories for levels of fines and suspensions rehearsed at paragraphs 40 and 43 above.
76. Annex 2 provides a graphical representation of the proposed ranges for each Group ordered in level of seriousness and hopefully provides a global picture of how the ranges interact with each other: something that is missing in the current Guidance.
77. The proposed ranges are intended to signal the level of comparative seriousness in which findings in each Group are viewed. We recognise that views on these issues will differ and one of the main purposes of this consultation is to establish whether the proposals on the sanctions ranges are pitched at the right level or whether adjustments should be made where there is good reason to do so.
78. This Section outlines the proposals in relation to five of the 13 proposed Groups representing the most serious types of misconduct. While Annex 2, includes an indication of the potential ranges for the other seven Groups, the final ranges for these Groups will be formally determined in the light of the responses to this consultation and included in the second consultation.

## Contents of specific Group sections of Part 2

79. Set out at Annexes 3-7 are drafts of the proposed detailed sections for the following Groups:

- Dishonesty (Annex 3)
- Misconduct of a sexual nature (Annex 4)
- Discrimination and harassment (Annex 5)
- Behaviour towards others (Annex 6)
- Use of social media and other digital communications (Annex 7)

80. The previous sections of this consultation paper rehearse the proposals in relation to the approach to creating Groups sections. The paragraphs below demonstrate the practical application of the proposed revisions. In summary, each of the Group sections cover the following:

- Group description** – this sets out the types of misconduct that fall within the Group. It is not designed to be an exhaustive list, but an indication of what behaviours are intended to fall within the Group. Decision-makers will need to make their own assessment of which Group is most applicable according to the individual facts and circumstances of the proved misconduct.
- Seriousness** – this part sets out the specific factors in relation to culpability and harm that could apply to the types of misconduct falling within the Group. These factors are in addition to the general culpability and harm factors that might be applicable to any type of misconduct as set out at Annex 1.
- Indicative range** – this sets out the general recommended range for the Group and includes the demarcation for the lower, middle, and upper bands based on the assessment of culpability and harm (see paragraphs 63-66 and 67-70).
- Application of aggravating and mitigating factors** – this part sets out the specific aggravating and mitigating factors that could apply to the types of misconduct falling within the Group. These factors are in addition to the general aggravating and mitigating

factors that might be applicable to any type of misconduct as set out at Annex 1 and referred to above at paragraph 50.

- e. **Totality** – this part includes standard text for all Groups.
- f. **Reasons** – this part includes standard text for all Groups.

## The proposed ranges

81. The following paragraphs provide an overview of the ranges proposed for the six Groups and a brief explanation of the reasons for setting the applicable range. In all cases, the intention is that decision-makers will be able to impose, where applicable, sanctions above or below the stated range if significant aggravating or mitigating factors are present.

### *Dishonesty (see Annex 3)*

82. The range for this Group starts and finishes at disbarment. This is in line with relevant case law on how proved dishonest behaviour by legal professionals should be treated. The sanction could fall below this in exceptional circumstances, and this will be covered in the general guidance in Part 1.

### *Misconduct of a sexual nature (see Annex 4)*

83. The range for this Group starts at a suspension of over 12 months and finishes at disbarment. This is a significant increase in the recommended sanctions as compared to the current Guidance. The view is that all such behaviour should attract serious sanctions not only to reflect the nature of the behaviour but to send a clear signal that it is entirely inappropriate and will not be tolerated at the Bar. Consideration was given to starting the range at suspension of under 12 months, but this would allow for significant mitigation to take the sanction into the realms of a fine. It is clear from recent public reaction to fines imposed for such misconduct by BTAS panels, in accordance with the current Guidance, that there is widespread and almost unanimous condemnation of the leniency fines represent in addressing such conduct. We recognise, however, there may be contrary

views. We would very much encourage consultees to provide comments on the proposed range.

#### *Discrimination and non-sexual harassment (see Annex 5)*

84. The range for this Group starts at a suspension of over 12 months and finishes at disbarment and is in line with the range for misconduct of a sexual nature. Again, this is a significant increase in the recommended sanctions as compared to the current Guidance. While sanctions for sexual misconduct have attracted widespread public attention, issues of discrimination and harassment are equally as serious. Research indicates that bullying and harassment at the Bar is a significant problem. This range is intended to send a clear signal that such behaviour will not be tolerated within the profession and will result in serious, career changing, sanctions. Again, we recognise that the range here will be subject to differing views and we would very much encourage consultees to provide comments on the proposed range.

#### *Behaviour towards others (see Annex 6)*

85. The range for this Group covers the full extent of the sanctions available, which reflects the wide range of behaviours that fall within the Group. The personal behaviour of barristers towards others can have a serious detrimental impact on the confidence and trust the public places in the profession. However, it can also have relatively little wider impact, for example, serious rudeness towards another individual that caused significant harm to that individual but did not affect anyone else. Flexibility to impose a wide arrange of sanctions in this Group seems appropriate and accommodates the differing level of seriousness of behaviours that could fall within this Group.

#### *Use of social media and other digital communications (see Annex 7)*

86. The range for this Group covers the full extent of the sanctions available and is equivalent to the range for Behaviour towards others (see above).

Again, this reflects the need for flexibility in the sanctions that can be imposed for the varying nature of the behaviour covered in the Group.

### ***Questions in relation to the Misconduct Groups***

87. We would appreciate views in relation to the following questions regarding the contents of the six draft Group sections as set out at Annexes 3-7. To assist with providing responses to the questions, a table is included at Annex 8, [Table for Responses to Consultation](#), which consultees can use to provide their responses.

***Question 19 – Do you agree with the range for each of the Groups (see paragraphs 81-86)?***

***Question 20 – Do you agree with the specific culpability and harm factors included for each Group? Are there any additional factors that should be included?***

***Question 21 – Do you agree with the specific aggravating and mitigating factors included for each Group? Are there any additional factors that should be included?***

***Question 22 – Do you agree with where the lower, middle, and upper bands for the ranges have been pitched for each Group? Do you consider any adjustments should be made to the bands? Please give reasons.***

## Section 8 – Equality Impacts

88. A preliminary Equality Impact Assessment (EIA) has been carried out of the impacts of the changes set out in this consultation paper. It is inevitably difficult to assess the future impact of the proposals in this paper based on solely on past decisions, which is the only information available on which to make such an assessment. However, an attempt was made using the data on the sanctions imposed in the period 2018 – 2020 as a proxy for the potential future impacts.

89. This was a complex exercise given that the correlation between past decisions and potential future ones under the proposed changes is not direct and not necessarily comparable. This was also complicated by a change in 2019 in the BSB recording systems, which has created other issues in terms of analysing the data.

90. Further, as this paper demonstrates, sanctions imposed are fact and circumstance specific and can differ widely even for the same type of misconduct. Added to this, the available data on the protected characteristics of the barristers subject to sanctions, other than sex and ethnicity, was very patchy due to the high proportion of barristers who did not provide this information to the BSB in relation to the other categories.

91. More importantly, the number of cases decided by BTAS panels in the last three years, as alluded to above at paragraphs 1-2, is very small.

92. All these factors, but particularly the low numbers, produce significant difficulties in establishing meaningful trends. For this reason, the detailed analysis carried out focussed only on the available data on sex and ethnicity as such information was available for most of the barristers subject to disciplinary sanctions. Even then, in research terms, the numbers are too small to produce statistically robust or reliable conclusions.

93. Therefore the following paragraphs summarise the outcome of this analysis at a very high level without, on the whole, reference to numbers or percentages given the risk of such analysis creating misleading and unreliable impressions. Nevertheless, it is important to put the conclusions below into context.

94. The analysis carried out related to the following impacts:

- i. increasing the fine level brackets (see paragraphs
- ii. reducing the suspension categories to two at higher levels than the current three categories; and
- iii. increasing the indicative sanctions for misconduct of a sexual nature and discrimination and harassment;

95. In the last three years, 84<sup>6</sup> individual barristers were subject to one or more findings of professional misconduct by a Tribunal which resulted in sanctions being imposed. 67 barristers (nearly 80%) were male and 17 (20%) were female. 18 barristers (just over 21%) identified as being from a black or minority ethnic group<sup>7</sup> and 54 (64%) as being from a white group<sup>8</sup>. 12 barristers (14%) did not provide information in relation to their ethnicity. This represents an overrepresentation of male barristers and barristers from a minority ethnic group compared to the makeup of the practising Bar as a whole.<sup>9</sup> This may indicate potential disparity in treatment under the current sanctioning regime that should be explored, but that is not a subject for this consultation paper. These numbers formed the basis for the conclusions in the following paragraphs.

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<sup>6</sup> This number in itself is subject to caveats in terms of reliability given the complexity of analysing cases with multiple charges/sanctions against the same barrister and multiple different cases in relation to the same barrister.

<sup>7</sup> For the purposes of this analysis, given the small numbers, all those identifying as being in a black and minority groups were amalgamated into one group and the same approach was taken to the white groups to produce two main groups. It is fully recognised that this is not ideal and not reflective of the potential nuances of different impacts on range of ethnicities with the two groups. However, a more granular approach would not have produced any meaningful data on which to assess the potential impacts.

<sup>8</sup> Ibid - see footnote above.

<sup>9</sup> As of 1/12/20, 60.7% of the practising Bar were male and 38.2% were female, and 74.8% were white and 14.1% were from a minority ethnic group (the remainder did not provide information on their gender/ethnicity).



## Increasing the fine level brackets

96. Given that the proposal is that all the fine level brackets should be substantially increased (see paragraphs 35-40), it is inevitable that nearly all those who were subject to fines in the last three years, could be exposed to higher level fines if they were to be sanctioned under the proposed revised Guidance.

97. The maximum single fine imposed for a charge of misconduct in the last three years was under £8,000 and the most common level of fine for an individual charge was under £1,000 (92% of all fines imposed<sup>10</sup>). The data indicates that proposals in this paper would impact most on white male barristers mainly because white males make up the majority of those sanctioned under the current regime. However, based on past sanctions, the statistics above indicate that male and minority ethnic barristers may be subject to greater exposure than female and White barristers to the possibility of increased fines under the new proposals.

## Increasing the suspension levels

98. Approximately 25 barristers were subject to suspensions in the last three years of which only five received suspensions of over six months. In terms of sex, 28% (7) of the total figure were female and 72% (18) male. In terms of ethnicity, two barristers opted for “prefer to say” thus, of those who identified an ethnicity, and were subject to suspension, 39% (9) identified as being in a minority group as compared to 61% who identified as white. This represents an overrepresentation of male barristers and barristers from a minority ethnic group compared to the makeup of the practising Bar as a whole. This may indicate potential disparity in treatment under the current sanctioning regime that should be explored, but that is not a subject for this consultation paper.

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<sup>10</sup> Some barristers were subject to more than one fine for multiple charges and therefore this percentage does not reflect the total number of individual barristers subject to the imposition of fines.

99. Nevertheless, the statistics above indicate that male and minority ethnic barristers may be subject to greater exposure than female and White barristers to longer suspensions as a result of the proposals in this paper.

### **Increasing the indicative sanctions for misconduct of a sexual nature and discrimination and harassment**

100. The numbers of cases where sanctions were imposed in relation to misconduct of a sexual nature and discrimination and harassment are very small. However, what is clear is that all those subject to sanctions for these types of misconduct were white males. Therefore the proposed increase in the indicative sanctions for these offences will potentially expose this group, with intersecting characteristics, to higher levels of suspensions.

### **Conclusions**

101. The rehearsal above, despite its high-level nature, indicates that the equality impacts from the proposed changes outlined in this paper are mixed. They clearly must be taken into account when weighing up whether to proceed with the proposals. At this stage, views are sought on whether the implications of the high level, proxy impacts outlined above provide a basis to amend any of the proposals in whole or in part.

***Question 23 – Do you consider that the equality impacts rehearsed above provide a basis for departing from any of the proposals in this paper?***

***Question 24 – Are there any other equality issues BTAS should take into account when developing further the contents of the Sanctions Guidance?***

## General Factors

### Culpability and harm, and, aggravating and mitigating factors

This Annex lists the proposed general factors that would be used to assess seriousness of the misconduct (Step 2 – Culpability and Harm) and in applying aggravating and mitigating circumstances (Step 4).

The lists are non-exhaustive but are intended to cover the most common factors that might be applicable in relation to all types of proved misconduct.

#### Culpability

- Whether the misconduct was intentional or reckless
- The respondent's motivation for the misconduct
- Whether the misconduct was planned or spontaneous
- Whether the respondent attempted to conceal the misconduct or lay blame elsewhere
- The extent to which the respondent acted in breach of position of trust
- The extent to which the respondent had control over or responsibility for the circumstances giving rise to the misconduct
- The respondent's level of experience
- The extent to which the misconduct occurred due to lack of supervision
- Whether the conduct included an element of discriminatory behaviour
- Whether the misconduct was a one-off incident or part of a course of action
- Whether the misconduct involved taking advantage, or exploitation, of a vulnerable person
- Whether the respondent caused, encouraged or coerced others to be complicit
- Whether the misconduct involved conspiring with others
- Putting own interests above that of the client
- Whether actions of others contributed to the misconduct

#### Harm

- The actual harm caused e.g. physical, mental, financial or reputational

- The risk of harm or further harm
- The number of people/organisations adversely affected or potentially
- The impact on the public confidence in the legal profession
- The harm (or risk of harm) caused to vulnerable individual(s)
- Whether the misconduct involved, or resulted in, adverse impact on the administration of justice
- The extent of the remedial work required as a result of the misconduct
- The duration of the harm

### **Aggravating factors**

- Previous disciplinary finding(s)/criminal conviction(s) for similar offences
- Previous disciplinary findings of any type particularly where the breaches show an unwillingness to comply with the Handbook
- Lack of remorse
- Lack of insight
- Failure to cooperate or engage or act in any other way that frustrates the administration of disciplinary processes
- Failure to attend a Tribunal without a reasonable explanation
- The misconduct involved the commission of a criminal offence
- Failure to self-report
- The likelihood of repetition
- Whether drug or alcohol misuse was linked to the misconduct

### **Mitigating factors**

- Whether the respondent admitted the misconduct, particularly at an early opportunity
- The respondent promptly self-reported the misconduct
- Genuine remorse
- The extent to which the respondent co-operated with investigation
- Whether voluntary steps were taken, or attempted, to remedy or rectify the breach
- Evidence of attempts to prevent recurrence

- The respondent acted having taken professional or expert advice on the conduct
- Personal circumstances, or health issues, that provide a reasonable explanation for the behaviour e.g. physical or mental health issues, bereavement, relationship breakdown\*
- Previous good character/unblemished career\*
- Good references (only of limited applicability and very much dependent on the nature of the offence and the role and identity of the referee)\*

*\*These areas of mitigation need to be treated with caution in the regulatory context and guidance on how to approach them will be given in Part 1.*

## Annex 2 – Proposed sanctions ranges

	CPD	Advice as to future conduct / Reprimand	Fine (low)	Fine (medium)	Fine (high)	Conduct of litigation – removal/suspension	Prohibition on accepting public access instructions	Conditions on practising certificate	Suspension - 12 months or less	Suspension - over 12 months	Disbarment
Dishonesty											■
Misconduct of a sexual nature										■	
Discrimination and harassment (non-sexual)	●									■	
Financial matters					■	■	■	■	■	■	■
Criminal convictions				■	■	■	■	■	■	■	■
Misleading				■	■	■	■	■	■	■	■
Administration of Justice				■	■	■	■	■	■	■	
Formal orders				■	■	■	■	■	■	■	
Behaviour towards others	●	■	■	■	■	■	■	■	■	■	■
Use of social media and other digital communications	●	■	■	■	■	■	■	■	■	■	■
Formal obligations to clients	●	■	■	■	■	■	■	■	■	■	
Obligations to the regulator	●	■	■	■	■	■	■	■	■	■	
Conduct related to status	●	■	■	■	■	■	■	■	■		

## Misconduct Group – Dishonesty

### Description of Group (Step 1)

This Group covers findings of misconduct which involve dishonesty. As has been outlined in Part I of this Guidance, any dishonesty on the part of a member of the Bar is inherently serious. Public interest requires, and the general public expects that members of the Bar are completely honest and are of the highest integrity. Dishonesty is incompatible with the duties placed on barristers to safeguard the interests of clients and their overriding duty to the court.

Misconduct within this group covers a range of dishonest behaviours, for example:

- Completing documents with false information or otherwise falsifying documents
- Making false declarations and statements
- Dishonestly concealing information
- Lying
- Dishonesty in connection with disciplinary proceedings (but dishonesty during current proceedings must form the basis of a new charge)
- Conduct that amounts to a criminal offence involving dishonesty such as theft, perjury, or fraud whether the subject of a conviction or not
- Dishonest use of clients' money

### Seriousness (Step 2)

Case law indicates that, for legal professionals, proved findings of dishonesty should result in disbarment except where there are exceptional circumstances. In determining whether such circumstances apply, decision makers should take into account the general factors set out at Annex 1 and the factors listed below, which are particularly relevant in the context of dishonesty.

Culpability	Harm
<ul style="list-style-type: none"> <li>• <i>the nature, scope and extent of the dishonest misconduct</i></li> <li>• <i>whether the misconduct was a fleeting or momentary act/lapse of judgement or over a lengthy period of time</i></li> <li>• <i>Whether the dishonesty was calculated</i></li> <li>• <i>whether the respondent benefited from the dishonesty</i></li> </ul>	<ul style="list-style-type: none"> <li>• <i>whether the dishonesty had an adverse effect on others including any client</i></li> </ul>

Indicative Sanctions Range (Step 3)	
Seriousness	Indicative Sanctions
<b>Upper range</b> (significant culpability and harm and aggravating factors)	Disbarment
<b>Middle range</b> (moderate culpability and harm, some aggravating factors)	Disbarment
<b>Lower range</b> (low culpability, limited or no harm and mitigating factors)	Disbarment
<p><b>Apply aggravating and mitigating factors (Step 4)</b></p> <p>Given that disbarment is indicated for all forms of dishonesty, no specific aggravating factors are listed below. Where the assessment of seriousness (Step 2) indicates that exceptional circumstances may apply, decision makers should take into account the general factors set out at Annex 1 and the factors listed below.</p>	
Aggravating factors	Mitigating factors
	<ul style="list-style-type: none"> <li>• <i>The Respondent's record was otherwise unblemished</i></li> <li>• <i>The Respondent promptly self-reported the incident</i></li> </ul>
<p><b>Totality (Step 5)</b></p> <p>Where there are multiple charges arising from one incident, separate incidents, or multiple examples of the same behaviour on different occasions over a period of time decision makers should ensure that the totality of the sanctions is warranted based on the cumulative seriousness of the charges. Decision makers will need to decide, where applicable, whether the sanction on each charge should run concurrently or consecutively.</p>	
<p><b>Reasons (Step 6)</b></p> <p>Decision makers must give full reasons for the sanction imposed in accordance with the guidance set out in [ ]</p>	



**Notes**

In deciding whether there are exceptional circumstances that would not result in disbarment the most important factor to be given most weight in determining sanction is the nature and extent of the dishonesty and degree of culpability.<sup>11</sup>

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<sup>11</sup> SRA v James EWHC Admin [2018] 2058

## Misconduct Group – Misconduct of a sexual nature

### Description of Group (Step 1)

This Group covers misconduct of a sexual nature. Misconduct of this type should attract serious sanctions not only to reflect the nature of the behaviour but to send a clear signal that it is entirely inappropriate and will not be tolerated at the Bar. Such misconduct can take place face to face, physically, in writing (any form including social media), by phone or via images.

Misconduct within this Group covers a range of behaviours, that fall far short of the standards expected from the profession, whether or not resulting in a criminal conviction, for example:

- Unwanted behaviour of a sexual nature, of any kind, that violates a person’s dignity or creates a hostile working environment
- Sexual assault
- Sexual misconduct involving images of children

### Seriousness (Step 2)

As well as the [general factors](#) affecting culpability and harm set out at Annex 1 decision makers should also consider the following specific factors which may go towards determining the seriousness of the misconduct within this Group:

Culpability	Harm
<ul style="list-style-type: none"> <li>• Abuse of trust/power/authority/seniority in a professional context</li> <li>• Predatory behaviour</li> <li>• Using position to pursue inappropriate relationship</li> <li>• Misconduct directed at a person in a vulnerable situation or place</li> <li>• Pattern of behaviour against a background of repeated requests to stop</li> <li>• Intention to humiliate</li> <li>• Abuse or exploitation of a child</li> </ul>	<ul style="list-style-type: none"> <li>• Causing fear, humiliation and/or anxiety</li> <li>• Impact on working life/career of those affected by the misconduct</li> <li>• Impact on mental health/well being of those affected by the misconduct</li> </ul>

### Indicative Sanctions Range (Step 3)

The indicative sanctions range for this Group is from over 12 months suspension to disbarment.

Seriousness	Indicative Sanctions
<b>Upper range</b> (significant culpability and harm and aggravating factors)	Disbarment
<b>Middle range</b> (moderate culpability and harm, some aggravating factors)	Up to 3 years suspension <sup>12</sup>
<b>Lower range</b> (low culpability, limited or no harm and mitigating factors)	Over 12 months suspension

### Apply aggravating and mitigating factors (Step 4)

As well as the general aggravating and mitigating factors set out in the Introduction to Part 2 the panel should note the following specific factors that may be applicable in this group:

Aggravating factors	Mitigating factors
<ul style="list-style-type: none"> <li>• Behaviour resulted in a criminal conviction or court order</li> <li>• Placed on Sexual Offenders Register</li> <li>• Behaviour includes breach of any relevant order (such as restraining order)</li> </ul>	<ul style="list-style-type: none"> <li>• Immediate apology and attempts to remedy harm</li> <li>• Isolated incident of short duration with low risk of repetition</li> </ul>

### Totality (Step 5)

Where there are multiple charges arising from one incident, separate incidents, or multiple examples of the same behaviour on different occasions over a period of time decision makers should ensure that the totality of the sanctions is warranted based on the cumulative seriousness of the charges. Decision makers will need to decide, where applicable, whether the sanction on each charge should run concurrently or consecutively.

### Reasons (Step 6)

<sup>12</sup> See General Guidance - where a suspension of more than three years is contemplated, serious consideration should be given to imposing a disbarment

Decision makers must give full reasons for the sanction imposed in accordance with the guidance set out in [ ]

**Notes**

## Misconduct Group – Discrimination and non-sexual harassment

### Description of group (Step 1)

This group covers misconduct arising from unlawful discrimination, non-sexual harassment and bullying. For guidance on sanctions for sexual harassment, please see “Misconduct of a sexual nature”. Misconduct of this type should attract serious sanctions not only to reflect the nature of the behaviour but to send a clear signal that it is entirely inappropriate and will not be tolerated at the Bar. Such misconduct can take place face to face, physically, in writing (any form including social media), by phone or via images

Misconduct in this Group covers a wide range of behaviours that fall far short of the standards expected from the profession, for example:

- Discrimination, whether direct or indirect, against individuals or groups in the provision of services/allocation of work/treatment of colleagues
- Discrimination, whether direct or indirect, against individuals or groups in employment or recruitment
- Complicity in discrimination by others
- Unwanted behaviour that is offensive or makes the recipient feel intimidated, degraded and/or humiliated
- Demonstrable unfair treatment e.g. in allocation of work
- Sustained serious undermining of individuals, particularly in the work context
- Persistent, unwanted attention to a person
- Behaviour that amounts to stalking e.g. following a person, watching or spying on them or forcing contact with them through any means, including social media.

### Seriousness (Step 2)

As well as the general factors affecting culpability and harm set out at Annex 1 decision makers should also consider the following specific factors which may go towards determining the seriousness of the misconduct within this Group:

Culpability	Harm
<ul style="list-style-type: none"> <li>• Abuse of trust/power/authority/seniority in a professional context</li> <li>• Course of conduct over a sustained period of time</li> </ul>	<ul style="list-style-type: none"> <li>• Causing fear, humiliation and/or anxiety</li> <li>• Impact on working life/career of those affected by the misconduct</li> </ul>

<ul style="list-style-type: none"> <li>• Predatory behaviour</li> <li>• Misconduct directed at a person in a vulnerable situation or place</li> </ul>	<ul style="list-style-type: none"> <li>• Impact on mental health/wellbeing of those affected by the misconduct</li> <li>• Impact on course of proceedings where behaviour took place in Court</li> </ul>
<p><b>Indicative Sanctions Range (Step 3)</b></p> <p>The indicative sanctions range for this Group is from over 12 months suspension to disbarment.</p>	
<b>Seriousness</b>	<b>Indicative Sanctions</b>
<b>Upper range</b> (significant culpability and harm and aggravating factors)	Disbarment
<b>Middle range</b> (moderate culpability and harm, some aggravating factors)	Up to three years suspension <sup>13</sup>
<b>Lower range</b> (low culpability, limited or no harm and mitigating factors)	Over 12 months suspension
<p><b>Apply aggravating and mitigating factors (Step 4)</b></p> <p>As well as the <u>general aggravating and mitigating factors</u> set out in the Introduction to Part 2 the panel should note the following specific factors that may be applicable in this group:</p>	
<b>Aggravating factors</b>	<b>Mitigating factors</b>
<ul style="list-style-type: none"> <li>• Behaviour resulted in a criminal conviction or court order</li> <li>• Behaviour includes breach of any order</li> <li>• Pattern of behaviour against a background of repeated requests to stop</li> <li>• Deliberate behaviour for personal gain</li> <li>• Includes element of incitement to others to discriminate against another</li> <li>• Behaviour directed at a vulnerable person</li> <li>• Intention to humiliate</li> </ul>	<ul style="list-style-type: none"> <li>• Immediate apology and attempts to remedy harm</li> <li>• Isolated incident of short duration with low risk of repetition</li> </ul>

<sup>13</sup> See General Guidance - where a suspension of more than three years is contemplated, serious consideration should be given to imposing a disbarment

<b>Totality (Step 5)</b>	
<p>Where there are multiple charges arising from one incident, separate incidents, or multiple examples of the same behaviour on different occasions over a period of time decision makers should ensure that the totality of the sanctions is warranted based on the cumulative seriousness of the charges. Decision makers will need to decide, where applicable, whether the sanction on each charge should run concurrently or consecutively.</p>	
<b>Reasons (Step 6)</b>	
<p>Decision makers must give full reasons for the sanction imposed in accordance with the guidance set out in [ ]</p>	
<b>Notes</b>	

## Misconduct Group – Behaviour towards others

### Description of group (Step 1)

This Group covers unacceptable behaviour towards others. This is a wide Group intended to cover personal behaviour of barristers towards others that is not encompassed by the other Groups. It covers discourtesy and rudeness and threatening behaviour through to violence towards others both in professional and non-professional life.

Misconduct within this Group covers a wide range of behaviours, which will vary in gravity, for example:

- Discourtesy and rudeness in professional life
- Inappropriately aggressive or threatening behaviour towards a client, colleague or those involved in legal proceedings
- Violent behaviour (non-sexual) towards others whether or not resulting in a criminal conviction

### Seriousness (Step 2)

As well as the general factors affecting culpability and harm set out at Annex 1 decision makers should also consider the following specific factors which may go towards determining the seriousness of the misconduct within this Group:

Culpability	Harm
<ul style="list-style-type: none"> <li>• Abuse of trust/power/authority/ seniority in a professional context</li> <li>• Misconduct directed at a person in a vulnerable situation or place</li> <li>• Course of conduct over a sustained period of time</li> <li>• Repeated pattern of behaviour against a background of repeated requests to stop</li> <li>• Discriminatory motivation</li> <li>• Intention to humiliate</li> <li>• Use of weapon</li> </ul>	<ul style="list-style-type: none"> <li>• Behaviour caused humiliation and/or fear</li> <li>• Impact on working life/career of those affected by the misconduct</li> <li>• The extent of any injury caused to victim</li> <li>• Directed towards a vulnerable person</li> </ul>



**Indicative Sanctions Range (Step 3)**

The indicative sanctions range for this Group covers the full range of sanctions from advice as to future conduct/reprimand through to disbarment.

Seriousness	Indicative Sanctions
<b>Upper range</b> (significant culpability and harm and aggravating factors)	Over 12 months suspension to disbarment
<b>Middle range</b> (moderate culpability and harm, some aggravating factors)	Medium level fine to up to 12 months suspension
<b>Lower range</b> (low culpability, limited or no harm and mitigating factors)	Advice as to future conduct/reprimand to low level fine

**Apply aggravating and mitigating factors (Step 4)**

As well as the general aggravating and mitigating factors set out in the Introduction to Part 2 the panel should note the following specific factors that may be applicable in this group:

Aggravating factors	Mitigating factors
<ul style="list-style-type: none"> <li>• Behaviour resulted in a criminal conviction or court order</li> <li>• Previous criminal convictions for similar behaviour</li> <li>• Behaviour includes breach of any order</li> <li>• Lack of co-operation with the police</li> </ul>	<ul style="list-style-type: none"> <li>• Immediate apology and attempts to remedy harm</li> <li>• Nature of environment in which behaviour took place</li> <li>• Response to extreme or sustained provocation</li> <li>• Health issues (supported by evidence) indicating that the barrister did not realise what they were doing.</li> <li>• Isolated incident in difficult or unusual circumstances</li> <li>• Element of self-protection or protection of others/property</li> <li>• No evidence that the behaviour may be repeated</li> </ul>

**Totality (Step 5)**

Where there are multiple charges arising from one incident, separate incidents, or multiple examples of the same behaviour on different occasions over a period of time decision makers should ensure that the totality of the sanctions is warranted based on the cumulative seriousness of the charges. Decision makers will need to decide, where applicable, whether the sanction on each charge should run concurrently or consecutively.

**Reasons (Step 6)**

Decision makers must give full reasons for the sanction imposed in accordance with the guidance set out in [ ]

**Notes**

## Misconduct Group - Use of social media and other digital communications

### Description of group (Step 1)

This Group covers misconduct in the use of social media and/or other digital communications. The group is not limited solely to online communications, such as communication on sites such as Twitter, content communities and online business promotion or networking, but also includes communications by email.

Breaches may occur in communications made by a barrister in both their professional and non-professional life. Where the misconduct amounts to harassment or unlawful discrimination, decision-makers should refer to “Discrimination and nonsexual harassment” or “Misconduct of a sexual nature”.

Misconduct within this Group may occur within a range of contexts, for example:

- Posting or sharing offensive material online
- Making offensive, derogatory, or abusive remarks to or about others on social media
- Breaching confidentiality in digital communications of any kind, including sharing images
- Intimidating others in digital communications
- Making discriminatory or racist comments or inciting hatred and/or discrimination in social media (depending on the circumstances, the misconduct may fall into the ‘Discrimination and Harassment’ Group)
- Inappropriate use of social media to approach client/professional colleague outside professional relationship
- Making comments that undermine the administration of justice

### Seriousness (Step 2)

As well as the [general factors](#) affecting culpability and harm set out at Annex 1 decision makers should also consider the following specific factors which may go towards determining the seriousness of the misconduct within this Group:

**Culpability**

**Harm**

<ul style="list-style-type: none"> <li>• The degree of offensiveness of content</li> <li>• Degree to which the material is disseminated</li> <li>• Role in escalation of arguments online</li> <li>• Deliberate, calculated attempts to offend/humiliate or reckless as to whether offence/humiliation is caused</li> <li>• Content involves a child or other vulnerable person</li> <li>• Persisting in inappropriate use of social media/digital communications even when requested or warned to stop</li> <li>• Repetition or escalation of offensive comments including in response to others</li> <li>• Repetition of conduct and/or continuation over a period across multiple platforms or means of communication</li> <li>• Discriminatory motivation</li> <li>• Content involves a child or other vulnerable person</li> </ul>	<ul style="list-style-type: none"> <li>• Offence, humiliation or fear caused to a named individual (s) or persons otherwise identifiable</li> <li>• Impact on working life/career of those affected by the misconduct</li> <li>• Impact on mental health/wellbeing of those affected by the misconduct</li> <li>• Potential for damage to a person's reputation</li> <li>• Intrusion into another's private life</li> <li>• Potential for widespread damage to public confidence in the profession or the administration of justice</li> </ul>
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### Indicative Sanctions Range (Step 3)

The indicative sanctions range for this Group covers the full range of sanctions from advice as to future conduct/reprimand through to disbarment.

Decision-makers have discretion to impose sanctions outside the range where there are substantial reasons for doing so and reasons should be given for such a decision.

Seriousness	Indicative Sanctions
<b>Upper range</b> (significant culpability and harm and aggravating factors)	Over 12 months suspension to disbarment
<b>Middle range</b> (moderate culpability and harm, some aggravating factors)	Medium level fine to up to 12 months suspension

<b>Lower range</b> (low culpability, limited or no harm and mitigating factors)	Advice as to future conduct/reprimand to low level fine
<p><b>Apply aggravating and mitigating factors (Step 4)</b></p> <p>As well as the <a href="#">general aggravating and mitigating factors</a> set out in the Introduction to Part 2 the panel should note the following specific factors that may be applicable in this group:</p>	
<b>Aggravating factors</b>	<b>Mitigating factors</b>
<ul style="list-style-type: none"> <li>• Behaviour resulted in a criminal conviction or court order</li> <li>• Behaviour includes breach of any order</li> <li>• Deliberate behaviour for personal gain</li> </ul>	<ul style="list-style-type: none"> <li>• Early recognition of offence caused and efforts to remedy harm, e.g. removal/deletion of offensive content or the issuing of a public apology</li> <li>• Ill health causing confusion or disinhibition</li> <li>• Response to extreme or sustained provocation</li> <li>• Isolated incident of short duration with low risk of repetition</li> </ul>
<p><b>Totality (Step 5)</b></p>	
<p>Where there are multiple charges arising from one incident, separate incidents, or multiple examples of the same behaviour on different occasions over a period of time decision makers should ensure that the totality of the sanctions is warranted based on the cumulative seriousness of the charges. Decision makers will need to decide, where applicable, whether the sanction on each charge should run concurrently or consecutively.</p>	
<p><b>Reasons (Step 6)</b></p>	
<p>Decision makers must give full reasons for the sanction imposed in accordance with the guidance set out in [ ]</p>	
<p><b>Notes</b></p>	

BTAS consultation - Sanctions Guidance Review <sup>14</sup>

## Responses to Questions 19 - 22

Name/organisation:

Group	Question 19 response Do you agree with the range for each of the Groups?	Question 20 response Do you agree with the specific culpability and harm factors included for each Group? Are there any additional factors that should be included?	Question 21 response Do you agree with the specific aggravating and mitigating factors included for each Group? Are there any additional factors that should be included?	Question 22 response Do you agree with where the lower, middle and upper bands for the ranges have been pitched for each Group? Do you consider any adjustments should be made to the bands? Please give reasons.
Dishonesty				
Misconduct of sexual nature				
Discrimination and harassment				
Behaviour towards others				
Use of social media and other digital communications				

<sup>14</sup> A Word version of this document can be found at the following link [Table for Responses to Consultation](#)