The Bar Tribunals & Adjudication Service

The Council of the Inns of Court

BTAS Sanctions Guidance Review

Response to first consultation

Introduction

1. The first stage of the public consultation on the review of the BTAS Sanctions Guidance ran for just over six weeks, from 29 April 2021 to 14 June 2021. The consultation can be found at: Sanctions-Guidance-review-Consultation-paper-April-21-FINAL.pdf (tbtas.org.uk) . This report summarises the responses received and the action which BTAS will be taking in response.

Background

2. 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.

3. 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 been updated on multiple occasions and is now in its fifth edition. The current Guidance can be found at: https://www.tbtas.org.uk/wp-content/uploads/2019/10/BTAS-Sanctions-Guidance-2019.pdf.

4. 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. Progress on this project has unfortunately been delayed due to the coronavirus pandemic. Meanwhile, in recent months, some sanctions imposed under the current Guidance for findings related to sexual misconduct, in particular, have been subject to public criticism for their leniency.

5. The feedback received during the first stage of the public consultation, was detailed and extensive and can only be summarised in this report. The responses will inform the content of the final draft of the revised Guidance. The second stage of the consultation will invite comment on that final draft and is intended to run from the beginning of September 2021 to the middle of October 2021, with the final revised Guidance scheduled for issue in December 2021 and implementation at the beginning of 2022.

The Consultation

6. 24 questions were asked, on nine different areas relating to proposed changes to the Sanctions Guidance:

- Fines
- Suspensions
- General culpability and harm factors
- General aggravating and mitigating factors
- Structure of approach to determining sanction
- Misconduct groups
- Revised approach to recommended indicative sanctions
- Group sections and indicative sanction ranges
- Equality impacts

7. The full list of questions asked is attached to this response paper at Annex 1.

8. BTAS received 41 responses and is very grateful to all those who took their time to express their views.

9. The responses received came from:

- 14 individual barristers;
- 11 BTAS panel members, of whom four are also barristers and two are Judicial Chairs;
- 13 Bar representative or campaigning groups;
- Two legal regulators;
- One legal community support charity.

10. A full list of those who responded is included at Annex 2; the names of individual respondents have not been included.

11. Not all respondents answered all questions.

12. Those who did not answer all questions commonly replied primarily or exclusively to questions about the Sanctions Guidance as it applies in sexual misconduct cases.

13. A high-level summary of statistics relating to the responses to the 24 consultation questions is attached to this paper at Annex 3. The percentages set out in the Annex are calculated on the basis of the number of respondents who provided a response to the question and agreed with or supported the relevant proposal. In reviewing the

responses we were mindful of the fact that some responses were submitted on behalf of groups or organisations.

14. Some responses included comments on issues not directly related to the 24 consultation questions, including some issues which fall outside the scope of the review of BTAS's Sanctions Guidance. BTAS has passed these comments on to the BSB where appropriate. The BSB is grateful for, and will give consideration to, all such feedback.

Overview

15. As can be seen at Annex 3, the majority of respondents agreed with nearly all proposals contained in the first consultation paper. BTAS therefore intends to proceed broadly in line with the proposals subject to amendments, additions or adjustments as set out in this paper. We are grateful for the detailed comments and drafting suggestions made by respondents, all of which have been carefully considered and where appropriate will be included in the next iteration of the Sanctions Guidance.

16. This paper groups the respondents' feedback under themes and our responses are included within, or at the end of, each theme.

Fines (questions 1-5)

17. Respondents generally agreed with the proposals set out in the consultation paper regarding fines. No one suggested an alternative approach to having categories of fines, and almost all respondents supported retaining three categories. One respondent suggested that, as there would likely be a concentration of fines in the low and medium fine categories, it might be helpful to have more categories to differentiate between cases at the lower end of the scale and emphasise that the highest fines are for very serious failings. Another respondent was concerned that using the names "*low*", "*medium*" and "*high*" for the categories could wrongly suggest that misconduct which attracts a fine in the "*low*" category is of little importance.

18. A common theme in responses was concern that the level of fine must be such as to make it a meaningful sanction for the misconduct in question. Some respondents felt that, in some cases (e.g. serious sexual misconduct or discrimination), a fine would not be an appropriate sanction. It was stressed that, in such cases, imposing a fine may

make the person who was targeted by the misconduct feel that a price is being put on their self-worth.

19. Several respondents said that it should be possible to impose a fine alongside a suspension or even disbarment.

20. The view that fines should be means-assessed was also expressed in some responses, with one suggesting that appropriate fine levels should be linked explicitly to the barrister's income. For example, low-level fines could be up to 1 month's remuneration and high-level fines up to 6 months' remuneration.

Proposal to remove levels of fines for BSB entities

21. Most respondents (72%) agreed with removing the separate levels of fines for BSB entities from the Guidance. Some of those said that Part 1 of the Guidance should include general principles to help panels decide on appropriate sanctions for BSB entities, including fines. It was queried whether the culpability and harm factors should be 'tweaked' to make them suitable to apply to entities.

22. Some disagreed with removing fine levels for entities because it is possible that cases might arise in the future where this part of the Guidance would be useful. One respondent was concerned that, if no cases involving fines being imposed on BSB entities occur soon, investigation may be needed into whether entities have been prosecuted and, if not, why not.

Proposed revised financial brackets for fines imposed on individuals

23. Some respondents (10%) did not agree with the proposed financial brackets for each of the fine categories or expressed mixed views (7%) on these proposed changes. One such respondent favoured retaining the current brackets, out of concern about the impact of increasing fine brackets on barristers conducting primarily direct access work. Other respondents favoured increasing some or all of the financial brackets. One felt that, in cases involving particularly high-earning barristers, an unlimited fine could be justified. It was also pointed out that, as the categories are currently defined, the upper limits of the low and medium categories are the same as the lower limits of the medium and high categories respectively (£5,000 and £15,000). It was suggested that this should be changed so that the medium and high categories start at "*over £5,000*" and "*over £15,000*" respectively.

Proposed descriptors for fine categories

24. Almost all respondents (89%) agreed that descriptors should be added to the fine categories, and most (73%) agreed with the specific descriptors proposed. However, some expressed the view that it would be helpful for one or more of the descriptors (in particular, "*moderately serious*" for the medium fine category) to be given further clarification. "*Sufficiently serious to warrant a moderate fine*" was suggested as an alternative descriptor for the medium fine category, as was "*misconduct justifies a significant financial penalty*". "*Serious misconduct that nonetheless does not warrant a suspension*" (without reference to the "*public interest*"), or alternatively "*sufficiently serious to merit a larger fine*" were suggested as descriptors for the high category. One response suggested that the factors which would "*justify a fine*" (wording from the descriptor for the lowest category) should also be clarified.

25. Five respondents said it should be made clear in the Guidance that misconduct which would ordinarily fall into the low or medium category should be elevated to a higher category if the conduct is repeated or sustained. It was also suggested that where misconduct was targeted towards a vulnerable victim, this should elevate the misconduct into a higher fine category.

BTAS response

26. There was broad agreement in relation to the proposals regarding fines including the bands and the levels. We therefore intend to proceed with the proposals, subject to the following:
    a. The guidance relating to sanctioning entities will be strengthened in Part 1 of the Guidance though entity fine levels will not be included;
    b. Further guidance will be included on imposing fines and suspensions together and on assessing means;
    c. Further consideration will be given as to whether the fine level descriptors need further definition;
    d. We will change the categories for fines from 'low/medium/high' to 'Level 1/Level 2/Level 3';
    e. We will remove overlap in the fine levels; and
    f. We will provide further guidance on where in the levels sanctions should be pitched.

Suspensions (questions 6 and 7)

27. While the majority of respondents (63%) supported the proposed new categories of suspension, about a third of those who gave an opinion on these proposals disagreed with them. Those who disagreed with reducing the categories of suspension to two commonly felt that this would place too much emphasis on the 12-month cut-off point between the categories. Some of those who responded suggested retaining three suspension brackets, but amending them to: up to 12 months, 12 to 24 months, and 24 to 36 months. Two respondents, including the Chancery Bar Association, considered that the three brackets should be: up to three months, three to 12 months, and over 12 months. Two respondents supported retaining the three current suspension brackets (i.e. up to three months, three to six months, and six months to three years).

28. Among those who supported reducing the categories of suspension to two, reasons given included: it is sensible for the different categories to match the respective sentencing powers of 3- and 5-person tribunals; it would encourage 3-person tribunals to use the full range of their sentencing powers in appropriate cases; and it would provide greater flexibility.

29. One respondent questioned whether suspensions shorter than 6 months should be available to panels at all, on the basis that they were not sure that a suspension of less than 6 months would appropriately reflect culpability and harm, or that the availability of suspensions of less than 6 months would help to encourage panels to impose longer suspensions where these are justified. Another respondent suggested that, as a suspension of longer than 3 years is not encouraged, this should be formalised in the Guidance with the maximum length of suspensions being capped at 3 years. It was also suggested that barristers suspended for 12 months or longer should be required to complete a course designed to ensure that they are a fit and proper person upon their return to practice.

30. One respondent felt that the number of categories was less important than providing detailed guidance which ties in with the categories and is neither too prescriptive nor too lenient. They considered that there may be a benefit to the Guidance being more prescriptive about appropriate periods of suspension than it currently is.

31. Another respondent queried whether it would still be possible for short periods of suspension to be postponed.

BTAS response

32. We recognise that a number of respondents considered that two proposed suspension categories were not sufficient, however, the suggestions for change differed. On balance we consider there is insufficient disagreement to warrant recalibrating the suspension categories and there remains good reason to link the categories to the sanctioning powers of the Tribunals to allow for flexibility. However, we will be providing further guidance on making CPD orders and/or imposing conditions of practice alongside suspensions. We do not consider it appropriate to put a formal cap on the length of suspensions as this will unduly fetter the discretion of panels. Suspensions of longer than three years are not usually considered good practice but in exceptional cases a slightly longer suspension might be appropriate.

Culpability and harm (question 8) and aggravating and mitigating factors (question 9)

33. Responses indicated broad agreement with the general culpability and harm factors and aggravating and mitigating factors in Annex 1. Many respondents also suggested some additional factors to be added. Some respondents were concerned about overlap between the culpability and harm factors on the one hand, and the mitigating and aggravating factors on the other, as well as the resulting possibility of double-counting.

34. The Black Barristers' Network said that, for some culpability and harm factors, it was unclear whether they pointed to greater or less culpability or harm – for instance, "*whether actions of others contributed to the misconduct*". They suggested that playing a leading role in the commission of misconduct by a group would be an appropriate factor increasing culpability, but that playing a lesser role in group conduct may not be appropriate as a factor lessening culpability in the context of professional discipline. Another respondent was concerned that this factor should not be used to blame a victim of sexual harassment for "*encouraging*" or "*contributing to*" the misconduct targeted at them.

35. Inner Temple expressed the view that it was important to make clear that Tribunals may identify and take account of other factors which indicate the level of culpability or harm, in addition to those set out in Annex 1, provided that they clearly explain their

reasoning when doing so. One respondent suggested that the Guidance should make clear that the culpability and harm factors are not in any order of priority.

36. Some respondents expressed views on which factors could appropriately be related to culpability and harm, and which should properly be classed as aggravating and mitigating factors. For example, five respondents felt that the respondent's "*level of experience*" should be classed as a mitigating or aggravating feature rather than a factor relating to culpability. The same was said by some of "*whether the conduct included an element of discriminatory behaviour*".

37. One respondent felt that all aggravating and mitigating factors should be included in the general list, rather than also providing group-specific factors in the misconduct group sections of the Guidance.

Culpability factors

38. Some respondents suggested additional factors going to culpability. These included: the victim was targeted; the harm could reasonably have been foreseen; significant disparity in age or experience; the respondent attempted to prevent the reporting of the misconduct; the respondent's actions would comprise a standalone criminal offence; the misconduct involved violence; the misconduct took place in a professional context (e.g. at court, in conference, in chambers, at a solicitor's offices); the misconduct involved using a position of perceived power, authority or seniority.

39. LawCare suggested that, in relation to the culpability factor "*the extent to which the misconduct occurred due to the lack of supervision*", the Tribunal should take into account not only the supervision arrangements directly relevant to the progress of work and dealing with legal issues, but also supervision relating to the emotional effects which the work may have had – such as vicarious trauma, particularly in areas such as family or immigration law or where barristers are working with vulnerable clients.

40. Spontaneity of the conduct was said by some respondents to be inappropriate as a factor lowering culpability for certain types of misconduct, such as discrimination and sexual harassment. It was queried by one respondent whether conduct could be "*reckless*" but not "*spontaneous*", or "*planned*" but not "*intentional*".

41. Some concerns were also expressed over the inclusion of "*whether the misconduct was a one-off incident or part of a course of action*" as a factor going to culpability, because in some instances a single incident could be more serious and blameworthy than a series of minor incidents. It was also suggested that the duration of an incident or course of conduct should be taken into account alongside whether it was a one-off

or not. The need to consider individual incidents against multiple complainants as part of a course of conduct by the barrister concerned was also mentioned.

42. One respondent expressed concerns that the list of culpability factors offers repeated opportunities for misconduct to be "*excused*".

Harm factors

43. With regard to the proposed general harm factors, some respondents suggested reframing these. Gray's Inn expressed the view that the wording "*e.g. physical, mental, financial or reputational*" in reference to harm caused could be read as wrongly implying a scale from more serious to less serious types of harm. They preferred for reference made to "*the extent of the actual harm caused*" to reflect that the level of harm will be fact-specific in each case. Another respondent felt that reference to "*emotional*" and "*psychological*" harm should be added (possibly instead of "*mental*"). Several responses said that "*mental*" harm should include injury to feelings and one response stressed that Tribunals must be clear that no evidence of psychiatric illness is needed for this factor to apply. The fact that someone appears to be resilient does not mean harm has not been done, especially where this is because the target of the behaviour has become accustomed to repeated discrimination.

44. A few respondents stressed that, when considering the seriousness of the misconduct, the Tribunal should consider not only the harm actually caused, but also the seriousness of the harm which *could* have been caused and the likelihood of that harm being caused. Another concern was that the harm taken into account should include harm to the communities to which those affected by misconduct belong or are perceived to belong, e.g. barristers and aspiring barristers who share their relevant protected characteristics.

Aggravating factors

45. The following additional aggravating factors were suggested: additional degradation (e.g. taking photos as part of an offence); elements of wrongful discrimination; the scale or depth of national concern about a particular issue; initial denial where facts are found proved; lack of attempts at remediation; elements of bullying or harassment; abuse of power/trust/seniority; level of experience which indicates that the barrister should know better.

46. One respondent said that, as the risk of further harm is already captured in the list of harm factors, the likelihood of repetition should not also be included in the list of aggravating factors.

47. Not all respondents agreed with the inclusion of drug or alcohol misuse as an aggravating factor. One respondent suggested that, in some cases, it may explain how the misconduct came about and be viewed as a neutral factor – where it contributes to or constitutes the misconduct, it could be included as a separate disciplinary charge in its own right. Another respondent said that drug or alcohol misuse might be linked to personal circumstances which are otherwise mitigating, such as burnout, stress or vicarious trauma – in which case, it might not be right to regard it as an aggravating factor.

48. On failure to engage with the disciplinary process, LawCare stressed that consideration should be given to why the barrister is not engaging, and whether they need support, before this is used as an aggravating factor. Some barristers who do not engage may be depressed, frightened, or struggling to cope without external support. It was suggested that BTAS could signpost barristers who may need support to LawCare.

Mitigating factors

49. The following additional mitigating factors were proposed: elements of provocation or threat which may have affected the respondent's judgment; inexperience (where relevant to the misconduct in question).

50. Several respondents expressed concerns that serious misconduct such as sexual or violent misconduct, discrimination and harassment should not be considered capable of being "*explained*" by personal circumstances such as relationship breakdown. The Chancery Bar Association suggested including in the Guidance an explanatory note to the effect that only misconduct in the groups towards the bottom of the table at Annex 2 in the consultation (e.g. inadequate professional service) may reasonably be "*explained*" by unfortunate personal circumstances. They agreed with the barrister who tweets as CrimeGirl that the reference to "*reasonable explanation for the behaviour*" might be better deleted and replaced simply with a reference to "*significant personal mitigation*".

51. One respondent stressed that "*previous good character*" should not be a relevant mitigating factor in cases of dishonesty, sexual misconduct or violent behaviour. It was noted that the Guidance does refer to the need to treat these mitigating factors with caution, and this respondent stressed that they should be treated with "*extreme caution*". Gray's Inn suggested that the mitigating factor "*unblemished career*" should be replaced with "*absence of prior complaints or regulatory findings*", so as to avoid

suggesting that someone's professional success or standing might be a mitigating factor.

52. Further, the reference to "*good references*" was said to be perpetuating an "*old boys' club mentality*". The Midland Circuit Women's Forum suggested that "*good references*" should be deleted from the list of mitigating factors, noting: "*Arguably, someone who has hidden a propensity for the conduct being sanctioned – such that their victim was less likely to be believed and had to find even greater courage to come forwards – is a greater danger than someone known for such conduct.*"

BTAS response

53. The responses provided some very helpful suggested amendments to both the general culpability and harm factors and the aggravating and mitigating factors and we agree with many of the suggestions. We will therefore reflect these in the next iteration of the Guidance. In addition, we intend to include further guidance on:
    a. how to apply these general factors;
    b. what is meant by vulnerability;
    c. the use of factors outside those listed and the need for Tribunals to state what those factors were;
    d. types of harm, e.g. physical, mental, financial, reputational and harm to feelings;
    e. how factors can apply both positively and negatively in different contexts;
    f. how the general factors are used in relation to cases falling within the misconduct of a sexual nature and discrimination and harassment Groups; and
    g. avoiding double-counting when applying the culpability and harm and aggravating and mitigation factors.

Structure of approach to determining sanction (questions 10 to 12)

54. About three-quarters of respondents agreed that the structured approach to determining sanction proposed in the consultation paper was appropriate. Respondents said that the approach was helpful and logical, provided a useful structure, and would promote greater consistency of decisions, without unduly

limiting the discretion of the panel. The need to provide a detailed framework of guidance while not being too prescriptive was mentioned in multiple responses. It was also stressed that the Guidance needs to be flexible enough that it could be used to deal appropriately with cases involving unusual facts.

55. Inner Temple suggested (and Gray's Inn agreed) that steps 2 and 3 should be combined, so that the seriousness of the misconduct would be determined by reference to both the general culpability and harm factors and those specific to the relevant misconduct group, and an assessment would be made of where the conduct falls within the range for the relevant group, all in a single step. Another respondent considered that the panel should be broadly directed to assess the seriousness of the misconduct, considering culpability, harm, aggravation and mitigation all together, to avoid the potential problems of overlap and double counting between these factors.

56. One respondent said that the Tribunal should take the approach applied in the case of *Fuglers v SRA* [2014] EWHC 179, which involves: firstly, assessing the seriousness of the misconduct; secondly, keeping in mind the purpose for which sanctions are imposed by such a Tribunal; and finally, choosing the sanction which most appropriately fulfils that purpose, considering the seriousness of the misconduct.

57. Some respondents felt that it was insufficiently clear at which points misconduct should be considered to increase or decrease in seriousness from one level to the next and they were concerned that this could lead to disparity in sanctions between cases. One respondent said that additional guidance on what combinations of factors would make misconduct serious, moderate, or lower level would be helpful.

58. The Bar Council and the Black Barristers' Network stressed that clear, explicit written reasons should be given in Tribunals' decisions in order to increase confidence in the disciplinary process – particularly in discrimination, harassment, and sexual harassment cases. The Bar Council identified several areas which should be specifically addressed in Tribunals' reasons in discrimination cases: why the Tribunal has found that there was discrimination; where known, the effect on the person who experienced the discrimination; any mitigating factors which have been considered; and how the decision will further the aim of ensuring public confidence in the disciplinary system.

BTAS response

59. Again, there was broad support for the structure proposed. While a few respondents suggested combining steps or adjusting them, our view remains, and accords with the majority, that the steps outlined are sufficiently clear and will promote consistency

without fettering flexibility. We therefore intend to retain the structure as proposed. However, as stated above, further guidance will be provided regarding the application of culpability, harm, aggravating and mitigating factors so as to avoid double counting and also how the factors should be used to move the matter from one sanctions level to another. We are already intending to include as an Annex, guidance on written reasons, which we hope will reflect the issues raised on what should be included in such decisions.

Misconduct Groups (questions 13 to 16)

60. The vast majority of respondents broadly agreed with the concept of groups of misconduct, and most generally agreed with the title and scope of the specific groups proposed. A common theme of these responses was that the groups would be helpful to panels, provide clarity, and help to ensure an appropriate sanction is imposed.

61. However, one respondent did not agree with the concept of groups of misconduct and argued that Part 2 of the Sanctions Guidance should be deleted entirely. This was based, amongst other reasons, on concerns that the Groups could not cover all eventualities and some behaviours could fall under more than one category thus running the risk of incorrect decisions.

Potential overlaps between groups

62. Several respondents, including the Solicitors Regulation Authority, expressed concern generally about the potential for overlap between groups, which could lead to panels having to choose one of two or more possible groups to focus on and, in doing so, limiting the range of sanctions available. One respondent felt that there were too many groups and that some should be combined – for example, with misconduct involving the use of social media being dealt with under "Discrimination and non-sexual harassment", "Misconduct of a sexual nature" or another relevant group depending on the nature of the communications. It was suggested that linking the groups more closely to relevant sections of the BSB Handbook would assist in avoiding overlap between groups. "Discrimination and non-sexual harassment", "Behaviour towards others" and "Use of social media and other forms of digital communications" were identified as groups which might overlap with each other. Similarly, some respondents felt that "Misleading" and "Dishonesty" are part of the same spectrum of conduct and so should be in the same group. A few respondents, including Behind the Gown, also raised concerns about a lack of direct reference to bullying in either the

"Behaviour towards others" or "Discrimination and non-sexual harassment" groups, and it was said that it was not clear which of these groups bullying should fall into.

Suggested amendments to the groups

63. Several respondents suggested additional groups to be included in the Guidance. Misconduct involving possession and sale of drugs, driving-related conduct, and breaches of court orders or behaviour contrary to justice were each proposed as additional misconduct groups by more than one respondent. "Bringing the profession into disrepute" and "Other misconduct" were other suggestions for additional groups.

64. Furthermore, nearly half of respondents felt that misconduct involving violence, in the absence of a criminal conviction, should be in a separate group of its own rather than being included in "Behaviour towards others". Those who gave reasons for this view commonly considered that it was not appropriate for violent conduct to be included in the same group as, for example, rudeness, given the large disparity in seriousness between these kinds of misconduct. One respondent stressed that threats of violence, as well as actual physical violence, should be included in this separate group.

65. About a third of those who gave a view on how violence should be categorised said that it should be included in "Behaviour towards others". One reason given for this view included that, in practice, such incidents without a criminal conviction are rare. Another respondent stressed that violence is often part of a pattern of abusive behaviour, including gaslighting and other intimidating behaviour, and keeping violent misconduct in the "Behaviour towards others" group allows it to be seen as part of that spectrum. One respondent suggested it should be included in the "Discrimination and non-sexual harassment" group, considering violence or threatening behaviour to be an extreme type of non-sexual harassment. Some respondents were unsure which group it should be included in.

Comments on specific misconduct groups

"Use of social media and other digital communications"

66. The inclusion of "Use of social media and other digital communications" as a standalone group was queried by some, who felt that the inclusion of this group could encourage undue focus on the means of inappropriate communication as opposed to its content – potentially resulting in different sanctions for the same message depending on whether it was sent, for example, via email or in hard copy. It was also said that this group had the potential to overlap with other groups. On the other hand, the Bar Council and the Black Barristers' Network welcomed the inclusion of specific guidance on misconduct involving social media use, noting that inappropriate use of social media among barristers has become more common in recent years. Gray's Inn

considered that the word "*digital*" should be removed from the title of this group so as not to exclude, for example, abusive hard-copy letters from its scope. They raised concern, however, about the reference to "*inappropriate*" social media use, because what is "*inappropriate*" is subjective and may be determined differently by different panels. Another respondent felt that the mere giving of offence, referred to in relation to this misconduct group, did not – without more – amount to a regulatory matter. They emphasised that ECHR Article 10 protects free speech even when it may be offensive to some and suggested that a more appropriate reason for deciding that conduct involving social media should be a regulatory matter would be where it brings the profession into disrepute. The Bar Council suggested that "*Behaving in a way that diminishes the trust and confidence the public places in the profession*" should be added to the bullet-point list of possible contexts in the guidance section for this group.

"Misconduct of a sexual nature"

67. Some respondents, including Inner Temple, were concerned that the groups "Misconduct of a sexual nature" and "Discrimination and non-sexual harassment" could cover a very wide range of different kinds of behaviour, of different levels of gravity – not all of which, in their view, would necessarily warrant the 12-month suspension starting point applicable to these groups as a whole. This is discussed further below in reference to the responses to question 19.

68. The Bar Council's response referred to Section 26(3) Equality Act 2010, which says that it is harassment to treat a person differently because they have rejected, or submitted to, unwanted sexual activity. They suggested that this could be set out explicitly as a type of sexual misconduct – or, alternatively, that it should be an aggravating factor in other misconduct as set out in the response to question 21 below.

69. One respondent noted that "*sexual misconduct involving images of children*" is included as an example of behaviour which would fall within this category, but sexual abuse of children is not. They suggested that this might be an unintentional discrepancy.

"Discrimination and non-sexual harassment"

70. As with the "Misconduct of a sexual nature" group, some respondents were concerned by the very wide range of behaviour which could fall under "Discrimination and non-sexual harassment". Inner Temple commented on the fact that, while at least two incidents are required for behaviour to amount to harassment under the Protection from Harassment Act 1997, this misconduct group includes single incidents of harassment. They stressed that suspending a barrister has an impact not only on the barrister, but also on their clients, and that that impact must be justified in the public interest, saying: "*We fully support the objective of sending a clear message to*

the profession about the importance of stamping out sexual misconduct, bullying and harassment but nevertheless suggest there are likely to be more appropriate and proportionate ways of dealing with cases at the bottom end of the spectrum of seriousness than a 12 month suspension." It was suggested that behaviour at the lower end of the spectrum in this group could be dealt with under the group "Behaviour towards others".

"Behaviour towards others"

71. Gray's Inn were concerned that the Guidance on "Behaviour towards others" includes reference to certain types of conduct, such as rudeness, which are not explicitly mentioned in the BSB Handbook. It was argued that this means that the range of conduct for which a barrister could be sanctioned is being expanded via revisions to the Guidance, rather than through the proper route of amending the Handbook.

BTAS response

72. The majority of those who provided responses to these questions supported the proposals with 86% agreeing with the concept of Groups and 61% with the proposed Groups. Therefore, we intend to retain the Group structure in the final guidance along, broadly, with the original Groups proposed.

73. We have considered the views expressed by the two Inns that the structure of the current guidance, which is based on potential breaches of the BSB Handbook, should be retained. However, the current structure had its basis in the old "rules" contained in the Code of Conduct and does not lend itself well to principle-based regulation as reflected in the terms of the BSB Handbook. With the introduction of Core Duties, some of those Duties can cover a wide range of very different types of conduct, particularly Core Duty 5 (diminishing public confidence and trust in the profession or the barrister). Our view is that sanctions should focus on the facts and circumstances of the proved misconduct and not on the BSB Handbook provisions under which the BSB has chosen to charge the misconduct in the particular circumstances of an individual case.

74. In light of the detailed suggestions for adapting the Groups, we intend to make changes to both the titles and descriptive contents of some of the Groups. We agree with the views expressed that the lack of specific reference to "bullying" is a gap in the titles of the Groups and therefore we intend to the amend the title of the "Discrimination and non-sexual harassment" Group to include this as well as include in the description of the conduct falling under that Group more explicit reference to bullying.

75. We also intend to amend the "Use of social media and other digital communications" Group to remove the word "digital", so that the Group covers any communications that are intended for dissemination and we will include more detail within that Group as to what it covers.

76. We have carefully considered the responses in relation to whether the "Behaviour towards others" Group should include violence absent a conviction or whether it should form a separate Group. The views expressed on this issue were mixed, with 44% saying it should be in a separate group. We have decided to retain the proposed contents of this Group as we remain of the view, as supported by some of the responses, that such conduct is on a continuum, and potentially an escalation, of other behaviours covered in the Group. In any event, cases of violence absent convictions are rare and we do not consider it warrants a group of its own.

77. Finally, under these questions, a number of concerns were raised in responses about what decision-makers should do where proved conduct overlaps more than one Group. We agree that this is an issue, and we intend to include more detailed information in the final draft Guidance about this.

Revised approach to recommended indicative sanctions (questions 17 and 18)

78. The vast majority of respondents (93%) agreed with including guidance bands for sanctions within the ranges for each group. The guidance bands were said to be helpful to panels, to assist with determining appropriate sanctions, and to facilitate consistency between cases. One respondent commented that the panel should be able to fairly determine within which band misconduct falls using the bands and that this would be reinforced by the requirement to give reasons.

79. However, the Chancery Bar Association felt that the guidance bands introduced an unnecessary level of complexity to this part of the Guidance and could be confusing. It was said that the description of the middle band at paragraph 68 of the consultation paper ("where there is moderate culpability and harm or where there is high culpability and low harm, or low culpability and high harm") differed from the description of the middle band in the misconduct group sections, Annexes 3-7 ("moderate culpability and harm, some aggravating factors"), which could confuse panels. It was argued that panels should not be forced, for example, to impose a high

sanction in a case with low culpability and high actual harm, where that harm was not foreseeable. Further, the reference to aggravating factors at step 3 in Annexes 3-7 was queried, since aggravating factors are covered separately at step 4.

80. Another suggestion from one respondent was to tailor the numbers and nature of sanction bands to each individual group – so, for example, in the "Behaviour towards others" category, there could be a sanction band for rudeness, a separate sanction band for aggressive behaviour, and so on.

81. The Bar Council expressed the view that there should be more guidance on where within the ranges sanctions should be pitched, and that a lack of clarity surrounding culpability and harm factors meant that the descriptors were less effective than they otherwise might be.

BTAS response

82. We intend to retain the concept of three commonly described "bands" for all the Groups and ranges given the high level of support for this approach. Our view is that creating different descriptors for the bands within Groups runs the risk of confusion. However, it is clear from the responses that more work needs to be done on the descriptors for the bands and the distinctions between them, and that the reference to aggravating and mitigating factors at Step 3 should be removed. It is also clear that more general guidance is needed on where within the ranges and bands sanctions should be pitched. Further consideration needs to be given as to how best to do this without reducing the flexibility that the bands are intended to provide. Amendments will be made and included in the final draft guidance.

Group sections and indicative sanction ranges (questions 19 to 22)

83. The majority of respondents generally agreed with the proposals in this section of the consultation paper.

84. Not all respondents commented on every group and the "Misconduct of a sexual nature" group drew the most comments.

Sanctions ranges (question 19)

85. There was broad agreement with the ranges for each of the misconduct groups as detailed below and in summarised at Annex 3.

Comments on the ranges for specific groups

"Dishonesty"

86. Most respondents (88%) agreed with the "range" for dishonesty (i.e. disbarment, except in exceptional circumstances) and some commented that this was in line with existing case law. A few, however, felt that there should be some scope for lesser sanctions than disbarment without the barrister having to prove "exceptional circumstances". One respondent cited case law from healthcare regulators suggesting that a more nuanced approach should be taken, involving considering the gravity of the dishonesty, whether it was a central feature of the finding, and other factors before determining sanction (*Lusinga v NMC* [2017] EWHC 1458 (Admin); *Watters v NMC* [2017] EWHC 1888 (Admin)). One respondent noted that the striking-off of junior solicitors for short-lived dishonesty in difficult circumstances in several recent cases has been considered by many to be overly harsh. LawCare stressed that it is very difficult in practice to establish "exceptional circumstances" and that the working environment can affect both mental health and competence, giving the recent SDT case of Sovani James as an example. They suggested that consideration should be given to widening the range of sanctions normally available in cases of dishonesty, so that it is not singularly disbarment. One respondent said they agreed with the range for dishonesty if it is applied only to cases where the barrister intended to be dishonest. Finally, one response stated that it is confusing to refer to a "range" of sanctions for dishonesty because the single sanction of disbarment is not a "range".

"Misconduct of a sexual nature"

87. Many respondents (69%) agreed with raising the starting point for sanctions for misconduct of a sexual nature to 12 months' suspension. It was said that this would send a clear message that sexual misconduct in the profession would not be tolerated. The Midland Circuit Women's Forum emphasised that knowing serious sanctions would be imposed would encourage victims of sexual misconduct to pursue complaints, and that this would help to effect change.

88. Some respondents – including Women in Criminal Law and the Black Barristers' Network – expressed the view that findings which would amount to a contact sexual offence or sexual assault if proven to the criminal standard should have a starting point of disbarment (whether there is a criminal conviction or not). The starting point

of 12 months' suspension for sexual misconduct was contrasted with dishonesty, for which the normal range of sanctions starts and ends with disbarment. Women in Criminal Law alluded to the distress which could be caused to a victim of a sexual offence upon discovering that the prosecuting lawyer who is making decisions in their case has recently been found to have acted in a way that would amount to a sexual offence themselves.

89. Another response emphasised that the Guidance should take into account case law such as *CRHP v GDC and Fleischmann* [2005] EWHC 87 (Admin) and *SRA v Main* [2018] EWHC 3666, which suggest that it is not appropriate for a barrister to be allowed to practise while serving a suspended sentence or community sentence or while on the sex offenders' register.

90. While a starting point of 12-months' suspension was widely accepted and welcomed as being appropriate for serious cases of sexual misconduct, some respondents – including Inner Temple and Gray's Inn – felt that this starting point would be disproportionate for some less serious types of misconduct which might fall within this group, since it could cover a very wide range of behaviour. This could include, for example, telling a crude joke, wolf-whistling, sending a message of a sexual nature on social media, or consensual sexual activity with a partner in a public place. One respondent suggested that sexual comments which fall short of being grossly offensive, for instance, should not be dealt with in the "Misconduct of a sexual nature" group unless the conduct is connected to the barrister's professional life. Several responses raised the suggestion that sexual misconduct at the less serious end of the spectrum could be dealt with under the group "Behaviour towards others" instead.

91. One respondent felt that setting a high starting point of 12 months' suspension for all cases involving misconduct of a sexual nature was "virtue signalling" – they stressed that the sanction imposed in each case must be warranted on the facts of the misconduct, rather than being used to send a signal to the public. They suggested that the whole range of sanctions should be available for this group.

92. Other respondents, including Behind the Gown, expressed the view that CPD requirements and/or conditions on practice should be imposed on barristers who are suspended for sexual misconduct upon their return to practice. The CPD requirements would be aimed at re-educating and remediating offending barristers, while conditions on practice could be used to prevent, for instance, barristers who have been found to have committed sexual assaults from acting in criminal sexual offences cases. Other suggested uses of conditions included preventing those who have sexually harassed pupils from supervising pupils in future or requiring barristers to request removal of their names from legal directories. The response from Behind the Gown included observations from "V", who experienced conduct amounting to sexual

assault by a practising barrister. “V” questioned why the perpetrator continued to be marketed as a leader in their field in directories after the finding of sexual misconduct.

“Discrimination and non-sexual harassment”

93. More than three-quarters of respondents agreed with the range for this category.

94. Concerns were expressed by several respondents that this group could cover a very wide range of behaviours, some of which may not warrant a 12-month suspension. An example given was indirect discrimination, which in some cases could be perpetrated without knowledge or intention. One respondent felt that the terms “bullying” and “harassment” were not sufficiently well defined to ensure that a starting point of 12 months’ suspension was justified for all conduct which might fall within this group. It was suggested in one response that the full range of sanctions should be available for this group but that the explanatory notes should make clear that, in cases of deliberate discrimination or serious harassment, the most serious sanctions should be imposed.

95. The Midland Circuit Women’s Forum expressed concern that, without a minimum level of suspension, a barrister might decide that they are willing to risk a financial penalty in order to continue behaviour which amounts to discrimination or harassment. They proposed a 3-month minimum suspension for this type of misconduct.

96. Respondents also suggested that CPD requirements, such as unconscious bias training, and/or conditions on practice should be used in combination with suspension in this misconduct group.

“Behaviour towards others”

97. The vast majority (95%) of those who responded agreed with the range of sanctions for this misconduct group. Responses stressed that, due to the wide range of types of behaviour covered by this group, it should be made clear that the sanction must reflect the seriousness of the misconduct in each case (for example, with violent misconduct attracting serious sanctions). One respondent stressed that bullying should not attract lower sanctions if it is dealt with under the “Behaviour towards others” group as opposed to “Discrimination and non-sexual harassment”.

“Use of social media and other digital communications”

98. Almost all respondents (95%) agreed with the range for the “Use of social media and other digital communications” group. The wide range of behaviours which could fall within this group was noted.

Other misconduct groups

99. The barrister who tweets as CrimeGirl said that the range of sanctions for "Misleading" proposed in the consultation paper had too low a starting point, as this type of misconduct is "dishonesty adjacent" and should be treated as such.

100. The Chancery Bar Association suggested that the sanction of disbarment may be needed for some instances of misconduct in the "Formal Orders" and "Administration of Justice" groups.

101. One respondent felt that, where a barrister has received a custodial sentence for any criminal offence – whether it is a suspended sentence or not – the sanction should automatically be disbarment.

102. Another commented that, for all groups except "Dishonesty", "Misconduct of a sexual nature" and "Discrimination and non-sexual harassment", sanctions starting from a reprimand should be available. The respondent was concerned about the impact of the new proposed starting point of medium-level fines for some misconduct groups on barristers who rely primarily on direct access work, who may struggle to obtain "competitive" fees compared with those charged by barristers instructed by solicitors.

BTAS response

103. Given the broad support for the proposed ranges, we intend to retain them as set out in the consultation document including the starting point of 12 months suspension for misconduct of a sexual nature and discrimination and harassment. We recognise these bands cover a wide range of types of conduct, but we cannot agree that what is termed "low level" misconduct in some of the responses should attract lesser sanctions. Sanctions imposed by Tribunals can only follow a finding of professional misconduct, which by definition means the proved misconduct was considered to be serious. If conduct falling within these Groups has reached this stage of the disciplinary process, then our view remains that it should attract a serious sanction if public trust and confidence in the profession is to be maintained. It should be noted that decisions as to what types of alleged misconduct should form the subject of a disciplinary charge are matters for the BSB.

104. We will, however, be making amendments in the following areas:

    a. including more detail on "exceptional circumstances" and dishonesty;

    b. including CPD orders and relevant restrictions on the respondent's practice in the ranges for misconduct of a sexual nature and discrimination and

harassment and guidance on the use of such orders will be included Part 1 of the Guidance;

c. providing further guidance regarding the interplay between criminal sentences/registration on the Sex Offenders Register and the length of suspensions from practise; and

d. clarifying how online discrimination and harassment fits within the Groups (it should fall within the discrimination and harassment group).

105. The comments in relation to the "Other Groups" will taken into account when developing the detailed guidance for these groups.

Group-specific culpability and harm factors (question 20)

106. Some respondents expressed concerns about the specific mischief of misconduct targeted at those with certain protected characteristics starting out at the Bar. The Bar Council suggested that, either in general or in relation to harassment and sexual harassment specifically, this should be singled out as a factor indicating seriousness. Another respondent felt that it might be helpful to use the word 'loss' in addition to 'harm' in reference to factors relating to the effect of the misconduct on others.

Culpability Factors

107. Comments on the culpability factors for specific groups are set out below.

"Dishonesty"

108. The following were suggested as additional culpability factors: abuse of position of power, trust or responsibility; sophisticated dishonesty; significant planning; whether the barrister involved others through pressure and influence, or was involved by others; "*persistent*" dishonesty, which may all occur within a short period of time; attempts to cover up misconduct; expected or intended benefit to the barrister (as distinct from actual benefit); barrister's level of experience; supervision arrangements; the barrister's health; conduct during the disciplinary process. One respondent cited the case of *Nicholas-Pillai v GMC* [2009] EWHC 1048 (Admin) as authority for taking account of a lack of integrity or lack of insight demonstrated during the disciplinary process.

"Misconduct of a sexual nature"

109. Proposed additional culpability factors included: link to alcohol or drug use; misconduct took place in view of others; respondent intoxicated; sustained or

prolonged behaviour; removal or attempted pulling aside of clothes; penetration by body part or other object; contact with bare skin; sexual touching (over or under clothing); misconduct committed with others; use of alcohol or drugs to commit offence; grooming; use of a weapon.

110. The Midland Circuit Women's Forum suggested that "*conduct committed within a professional setting e.g. Chambers or court*" should be a further factor indicating higher culpability both for this group and for the "Discrimination and non-sexual harassment" group, as "*frequently comments made in such situations amounting to harassment are designed to or have the effect of undermining the victim so as to cause both reputational harm, with clerks, colleagues or the court/judiciary and psychological harm*".

111. Gray's Inn suggested that the words "*in a professional context*" should be deleted after "*abuse of trust/power/seniority*" because any abuse of trust, power or seniority should be seen as a factor making the conduct more serious. It was also said that the meaning of the culpability factor "*predatory behaviour*" is insufficiently clear and that it should be deleted.

"Discrimination and non-sexual harassment"

112. As mentioned above, it was suggested that "*conduct committed within a professional setting e.g. Chambers or court*" should be added as a culpability factor in this group. Gray's Inn suggested deleting the factor "*predatory behaviour*" on the basis that its meaning is unclear. Some respondents were also concerned that there should be specific reference to bullying in the seriousness factors for this group.

"Behaviour towards others"

113. The following were proposed as additional culpability factors: taking a leading role in group conduct; planning or premeditation; targeting a vulnerable victim; the misuse of power, position and/or role. Inner Temple suggested that a health factor which shows the barrister did not know what they were doing might also go to culpability, rather than merely going to mitigation.

114. As with the "Misconduct of a sexual nature" group, Gray's Inn suggested deleting the words "*in a professional context*" after "*abuse of trust/power/authority/seniority*". "*Pattern of behaviour*" and "*requests to stop*" were considered to be better kept as separate factors rather than combined into one factor. (It was also said to be unclear why this was included as a culpability factor for the "Behaviour towards others" group but an aggravating factor for other groups.)

115. "*Discriminatory motivation*" was felt by some to be better categorised as an aggravating factor than one going to culpability. The Black Barristers' Network stressed that discriminatory motivation should be seen as a serious factor due to the

effect that behaviour motivated by discrimination can have on marginalised groups. Meanwhile, the Bar Council considered that an act of misconduct carried out for a discriminatory motive would necessarily amount to an act of discrimination and should be treated as such, instead of merely viewing the discriminatory motive as a factor increasing culpability.

"Use of social media and other digital communications"

116. One respondent felt that some additional guidance on how to deal with racist or other discriminatory comments would be helpful.

Harm factors

117. Comments on harm factors for specific misconduct groups are set out below.

"Dishonesty"

118. The following were suggested as additional harm factors: effect on public perception of the profession; victim of misconduct vulnerable (due to factors including but not limited to their age, financial circumstances, mental capacity); adverse impact on the administration of justice; number of people affected and how they were affected; whether those affected were vulnerable.

"Misconduct of a sexual nature"

119. Additional harm factors were proposed, which included: significant disparity in age or experience; respondent used drink or drugs in the commission of the misconduct (plying, for example); recording of the misconduct by respondent; sustained incident; violence or threats of violence; physical harm; psychological harm; vulnerability of victim; location of misconduct (whether in victim's home or office); abuse of the position of the offender or of the victim. The response from the Bar Council stressed that injury to feelings and the effect on the mental health and wellbeing of those affected should be included in the harm factors for this group. This would recognise injury to feelings as a significant component of the harm suffered by those who are subjected to sexual harassment, as is the case in civil cases, particularly those relating to the workplace.

120. Another respondent expressed concerns that the current harm factors might be interpreted as excluding a wide range of mental, emotional and physical effects which should be included – for example: depression, PTSD, panic attacks, loss of motivation, suicidal ideation, eating disorders, headaches, disturbed sleep and feelings of anger, shame, guilt, betrayal and violation.

"Use of social media and other digital communications"

121. The extent of publication (e.g. size of readership, number of followers, or number of hits or views) was proposed as an additional harm factor for this group.

122. Also, in relation to the harm factor "*intrusion into another's private life*", the Bar Council suggested adding the words "*and the level of seriousness of the intrusion*" to reflect that there may be different levels of breach of privacy.

BTAS response

123. The consultation responses have provided a wealth of suggestions for amendments to the specific culpability and harm factors many of which we agree with and will be reflected in the next version of the Guidance. It is not possible to detail here all the intended amends, but there will be an opportunity to comment on them in the next consultation. In particular, we will be including many of the additional culpability and harm factors for the "Misconduct of a sexual nature" and "Discrimination and non-sexual harassment" Groups referred to in the summary above. This should assist decision-makers to gauge the seriousness of the conduct and where in the ranges sanctions should be pitched.

Group-specific aggravating and mitigating factors (question 21)

124. Many respondents broadly agreed with the group-specific aggravating and mitigating factors. Some suggestions for amendments were also made. One respondent suggested that the Guidance should make clear that there may be other aggravating and mitigating factors not listed which the Tribunal may wish to take into account. It was also suggested that, for groups where "*behaviour directed at a vulnerable person*" is an aggravating factor, specific guidance should be given on what makes a person "*vulnerable*" (e.g. being a junior barrister, pupil or aspiring barrister may make someone vulnerable).

Aggravating factors

125. Comments on the aggravating factors for specific groups are set out below.

"Dishonesty"

126. Inner Temple disagreed with the absence of aggravating factors from the Guidance on dishonesty, saying that Tribunals would be assisted by a list of both aggravating and mitigating factors, which would help to set out decisions on sanction in a clear manner. It was said that a record of aggravating and mitigating factors would also be relevant in informing the public about the circumstances of the misconduct, in the event that the barrister were to offer (non-reserved) legal services to the public after being disbarred.

127. The following were proposed as aggravating factors for this group: drug or alcohol use and conduct during the disciplinary process.

"Misconduct of a sexual nature"

128. A variety of suggestions for additional aggravating factors were made for this group. These included: location of the misconduct; timing; professional nexus to complainant; specific targeting of an individual; domestic nature of misconduct; steps to prevent reporting of incident; abuse or exploitation of a vulnerable person; discrimination on the basis of other protected characteristics as part of the sexual misconduct (e.g. racial harassment); treating a person differently because they have either rejected or submitted to unwanted sexual behaviour (which is defined as a form of harassment by section 26(3) Equality Act 2010).

129. Five respondents did not agree with "*behaviour resulted in a criminal conviction or court order*" being included as an aggravating factor in cases involving misconduct of a sexual nature. As Behind the Gown said, "*There are many reasons why a victim does not report… misconduct which amounts to a criminal offence, and this should not be a factor reflected in a lesser sanction*". This was said to be particularly true where the victim is a barrister, who may not want professional contacts (e.g. at the Crown Prosecution Service) to hear about their experience, or who can anticipate the likely outcome and does not wish to put themselves through the trauma of the criminal process. Having said this, one respondent acknowledged that in certain circumstances a criminal conviction and sentence will have implications as to the appropriate regulatory sanction – e.g. a barrister should not be permitted to practise while on the sex offenders' register.

130. One respondent observed that if the person subjected to sexual misconduct decides not to report it to the police or to pursue other legal proceedings against the perpetrator this effectively means that there are no aggravating factors. They felt that this is wrong.

131. Further, the barrister who tweets as CrimeGirl used a theoretical example of a female pupil whose bottom is grabbed by an older, senior male barrister in a robing room – she laughs off the incident at the time but is upset and later reports the behaviour to her pupil supervisor and the BSB. The senior barrister later claims it was a non-sexual

"smack", as a "joke". In this example, the factors which CrimeGirl identified as aggravating – i.e. the disparity in age and experience, the time and place, the presence of others and the fact the misconduct was denied – are not included either in the general aggravating factors or those specific to the "Misconduct of a sexual nature" group. CrimeGirl argued that it is not right that this type of behaviour should fall to be classed as low-level sexual misconduct as a result, nor that the complainant should have to give evidence as to the harm caused in order for the behaviour to be considered more serious.

132. Gray's Inn considered that "*pattern of behaviour*" and "*requests to stop*" should be separate aggravating factors, not joined together as one factor.

133. It was also suggested that the mitigating factor "*isolated incident of short duration*" should be reworded to read "*single incident*", in light of the low levels of reporting of this type of misconduct noted in paragraph 2 of the consultation paper. Meanwhile, the Black Barristers' Network expressed the view that this is an inappropriate mitigating factor for misconduct of a sexual nature, since even a single incident of short duration can have a profound detrimental impact upon the person subjected to it.

"Discrimination and non-sexual harassment"

134. As above, "*pattern of behaviour*" and "*requests to stop*" were said to be better included as separate aggravating factors.

135. As with sexual misconduct, some respondents felt that a criminal conviction or other court order should not be an aggravating factor, because there are many reasons why a person subjected to discrimination or harassment may choose not to report it to the police and this should not result in a comparatively lesser sanction for the perpetrator.

"Behaviour towards others"

136. Respondents suggested that conduct towards public sector workers and steps to prevent the reporting of misconduct should be included as aggravating factors. Additionally, if violence is included with "Behaviour towards others" and not given a separate group, one respondent felt that it should be added as an aggravating factor here.

"Use of social media and other digital communications"

137. One respondent was particularly concerned that the giving of offence should not be an aggravating factor. They stressed that ECHR Article 10 protects freedom of speech even with regard to speech which may cause offence.

Mitigating factors

138. While there was general agreement with the group-specific mitigating factors, some responses expressed concern that "*attempt to remedy harm*" should not be included as a mitigating factor, particularly in relation to sexual misconduct, discrimination and non-sexual harassment cases. This is because it could invite unwanted interference with complainants (which may be perceived as the perpetrator attempting to prevent them from reporting misconduct). One respondent stressed that a complainant might wish not to have any contact with the perpetrator at all, including if they offer to apologise.

139. A common theme raised in several responses was that evidence of a mitigating factor should be properly scrutinised before that mitigating factor is said to apply. For example, reasons why there is said to be a "*low risk of repetition*" must be properly considered, and it should be borne in mind that an apology may be made disingenuously with a view to using it as mitigation – in which case, it should not count as mitigation. The Bar Council expressed concern in relation to sexual misconduct in particular that barristers may attempt to distance themselves from their behaviour by describing it as "*banter*" or offering apologies which are not genuine, meaning that apologies must be properly scrutinised before being counted as mitigation.

140. Comments relating to the mitigating factors for specific groups are set out below.

"Dishonesty"

141. The following were suggested as additional mitigating factors in cases of dishonesty: any element of pressure or coercion from a third party (especially someone in a position of authority); health; personal circumstances.

"Misconduct of a sexual nature"

142. "*Isolated incident of short duration with low risk of repetition*" was said by three respondents to be an inappropriate mitigating factor in cases of sexual misconduct. This is because an incident of sexual misconduct of a short duration could have a very serious effect both on the person subjected to it and on public confidence in the profession.

143. The Bar Council expressed concerns that there is a risk of behaviour being wrongly characterised as a one-off when the same barrister has acted similarly towards multiple people, but not all have come forward with complaints. However, it was acknowledged that evidence of this scenario would be difficult to obtain either way.

"Discrimination and non-sexual harassment"

144. As above, one respondent suggested amending "*isolated incident of short duration*" to "*single incident*" in light of the low levels of reporting noted at paragraph 2 of the

consultation paper, while another respondent felt that this was not an appropriate mitigating factor for discrimination and non-sexual harassment cases because even incidents of short duration can have a profound detrimental impact.

"Behaviour towards others"

145. One respondent commented that "*nature of environment*" could be either an aggravating or a mitigating factor, depending upon the circumstances. The view was also expressed that some health factors might properly go to culpability, while others would go to mitigation. Gray's Inn suggested that the reference to "*health issues (supported by evidence) indicating that the barrister did not realise what they were doing*" should be changed to "*ill health (supported by evidence) causing automatism/confusion/disinhibition*".

146. The Bar Council expressed the view that the mitigating factor "*isolated incident in difficult or unusual circumstances*" should not be used without some evidence as to why the behaviour is unlikely to be repeated in the future. The same was said about the factor "*no evidence that the behaviour may be repeated*" if non-sexual harassment and discrimination cases falling below the threshold for the "Discrimination and non-sexual harassment" group are dealt with under "Behaviour towards others".

"Use of social media and other digital communications"

147. The Bar Council suggested that "*the public interest in freedom of expression and the right to receive and impart information, including whether the material highlighted is a matter of public interest*" should be included as a mitigating factor in this group, to take into account Article 10 of the European Convention on Human Rights. As such matters may be highly complex, sensitive and contentious, it was said that specific guidance should address how such matters should be approached and how competing rights should be balanced.

BTAS response

148. As with the responses to Question 20, a wealth of pertinent suggestions for amends and adaptations to the aggravating and mitigating factors was provided by those who responded to this question. Again, we agree with many of them albeit that some we consider fall more properly under culpability factors, and they will be reflected in the next version of the Guidance but are not detailed here. We also intend to include, in Part 1 of the Guidance, more information about how the aggravating and mitigating factors should be applied and the distinction between these and the culpability and harm factors.

Lower, middle and upper bands within misconduct groups (question 22)

149. Respondents tended to agree with the where the lower, middle and upper bands within the misconduct groups were pitched. Some comments on the overall range for specific groups were made in response to this question and have been summarised in the overview of responses to question 19 above.

150. Several responses indicated that further guidance on how panels can ensure misconduct is placed in an appropriate band would be helpful, including guidance on which culpability and harm factors make the lower, middle or upper band within each group appropriate. It was also queried how many aggravating factors would need to be present for the middle or upper band to be appropriate, and one respondent felt that "*significant*" and "*moderate*" culpability (in the descriptors for the bands within each group) were insufficiently well-defined.

151. Some respondents felt it was unclear where the boundary between the lower and middle bands should be in the "Misconduct of a sexual nature" and "Discrimination and non-sexual harassment" groups. (In both groups, the lower band is described as "*over 12 months' suspension*" and the middle band as "*up to 3 years' suspension*".) One respondent suggested that the line between the lower and middle bands should be drawn at 24 months' suspension.

BTAS response

152. It is clear that while the concept of bands is supported, including the three levels, the view is that more guidance is needed as to where in the bands sanctions for conduct within a Group should be pitched. We want to avoid making the guidance too prescriptive and thereby removing the flexibility decision-makers should have to impose an appropriate sanction that fits the facts and circumstances of cases. Nevertheless, we agree that further guidance needs to be given in this area to create the clarity that is needed particularly in relation to how the culpability and harm, and aggravating and mitigating factors should be applied to inform where in the ranges sanctions should be pitched. Relevant amendments will be made and included in the next draft version of the Guidance.

Equality and diversity (questions 23 and 24)

153. The majority of respondents (87%) considered that the equality impacts set out in the consultation paper did not provide a basis to depart from the proposals in the paper.

154. Some respondents mentioned the relatively small sample size on which this section of the consultation paper was based (84 barristers) and one respondent commented that this was so small that they were not sure whether meaningful conclusions could be drawn from it.

155. Concerns were raised about the disproportionate use of disciplinary proceedings and findings against barristers from ethnic minorities, particularly Black barristers. The Black Barristers' Network expressed concerns about the potential for the level of sanction imposed on ethnic minority barristers and particularly Black barristers to be disproportionately high. However, it was also said that the Sanctions Guidance should be updated as soon as possible in light of recent decisions which have been viewed as being too lenient, particularly in sexual misconduct cases.

156. Some respondents suggested other equality issues which should also be taken into account. These included: how to balance barristers' right to express religious beliefs against others' rights not to be subjected to unwanted conduct which might be captured under, e.g., "Behaviour towards others"; the right of all persons not to be sexually harassed, assaulted and/or otherwise demeaned; the impact on barristers with disabilities; that non-sexual harassment and discrimination can include failure to make reasonable adjustments for disabled people; the impact on the wider community of those with protected characteristics; the effect of a lenient sanction on the victim of misconduct; the need for explicit and specific guidance on sexual misconduct cases; the degree to which the calibration of sanctions can aid or inhibit good relations between members of different protected characteristic groups at the Bar and in wider society; the possibility that disproportionate complaints will be made against Black barristers, and the need for the BSB/BTAS to deal with these in a fair manner. Respondents also suggested that decision-makers should receive training which allows them to understand the lived experiences of marginalised groups before dealing with complaints or hearings, to ensure parity of outcomes for all barristers.

157. The Bar Council felt that the equality impact assessment in the consultation paper had failed to take into account the impact on those other than the barristers subject to disciplinary proceedings – for instance, the impact on those members of the Bar who have particular protected characteristics in relation to their likelihood of experiencing discrimination and harassment. They said that all terms of the Public Sector Equality Duty under Section 149 Equality Act 2010 should be taken into account before the second stage of the consultation, and evidence should be gathered on the potential

impact on all aspects of that duty and all protected characteristic groups covered by it. This would include carrying out an assessment of how proposed changes to the Guidance may affect relations between various protected characteristic groups and impact on the confidence of those with various protected characteristics in wider society.

BTAS response

158. Nearly all of those who responded did not see the equality impacts detailed in the consultation paper as a reason not to move ahead with the proposed revised Guidance. We note the helpful comments provided by the Bar Council as to further research that could be carried out.

159. The BSB holds the data, where available, on the protected characteristics of those who are subject to disciplinary proceedings. We have consulted with them as to the possibility of producing reliable data on the protected characteristics of victims of proved sexual misconduct, harassment and discrimination and thereby allow us to assess the potential impacts of the Guidance on those groups. The BSB is exploring this, but the initial view is that the low number of cases and the nature of the information held, is unlikely to produce data that could be relied on to assess impacts in any meaningful way. We note the wider impacts the Bar Council refers to regarding the way in which the proposals may affect relations between various protected characteristic groups and the confidence of the various protected groups in wider society. In relation to the former, we are pleased at the number of representative groups who responded to the consultation and the views they have expressed provide some evidence of how the proposals may impact on some of the protected characteristic groups. We intend to gather more information about this as part of the next consultation and ensure that we have reached out directly to a wider range of groups representing those with protected characteristics both within and outside the profession including holding some round table meetings to obtain views.

160. In terms of wider societal impacts, we are consulting with the Bar Council as to the nature of any further research that it would be realistic for us to carry out , bearing in mind resources and the potential efficacy of any such research in providing evidence that would create a basis for altering the proposals. We do not, however, consider that any research of this nature, if viable, should delay the issue of revised Guidance.

161. We will of course be providing training for all panellists on the use of the revised Guidance. In designing that training, we will be taking into account the useful suggestions such as the inclusion of awareness training.

Bar Tribunal and Adjudications Service

July 2021

Annex 1 - List of questions asked in the first stage of the Consultation

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?

Annex 2 - List of respondents

BTAS received 41 responses and is very grateful to all those who took their time to express their view. Names of individual respondents are not included in this list. Responses were received from:

- 14 individual barristers
- 11 BTAS panel members, of whom four are also barristers and two are judicial chairs
- 13 Bar representative or campaigning groups/individuals
    - Bar Association for Local Government and the Public Service
    - Bar Council
    - Behind the Gown
    - Black Barristers' Network
    - Chancery Bar Association
    - Crime Girl
    - Honourable Society of Gray's Inn
    - Honourable Society of The Inner Temple
    - Midland Circuit Women's Forum
    - North Eastern Circuit Women's Forum
    - South Eastern Circuit
    - Women in Criminal Law
    - Women's Retention Panel of the Bar Council
- Two legal regulators
    - Legal Services Board
    - Solicitors Regulation Authority
- One legal community support charity
    - LawCare

Annex 3 - Summary of Statistics

Below is a high-level overview of the responses received for each question.

Not all respondents answered all questions.

Some questions prompted respondents to make suggestions (such as additional mitigating or aggravating factors to be included in the Guidance). For these questions, the below statistics show how many of the total number of respondents made suggestions, and how many did not.

For other questions which prompted a yes or no answer, we have only counted answers from those who expressed a view (whether in direct response to that question or as a general comment). The number of responses to these questions (which include on-topic general comments) are also shown.

Where a respondent has given an answer which comments on only some aspects of the relevant part of the Guidance, we have presumed that they broadly agree with the other aspects of that part of the Guidance. This means that those who suggested only minor additions or amendments have been recorded as agreeing with the proposals unless they have stated otherwise, while those who suggested more extensive changes or expressed clear disagreement with part of a proposal have been recorded as having mixed views or disagreeing.

Question 1: Do you agree that the revised Guidance should remove reference to fine levels for entities regulated by the BSB?		
Agree	18	72%
Disagree	4	16%
Neutral or mixed views	3	12%
Number of responses	25	

Question 2: Do you consider there is a more appropriate alternative to having categories of fines? Please provide further details.		
Suggested an alternative	0	0%
Did not suggest an alternative	41	100%

Question 3: Do you agree that the three categories for fines should be retained in the revised guidance?		
Agree	27	96%
Disagree	0	0%
Neutral or mixed views	1	4%
Number of responses	28	

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?		
Agree	24	83%
Disagree	3	10%
Neutral or mixed views	2	7%
Number of responses	29	

Question 5: Do you agree that a descriptor should be added for each of the fine categories…?		
Agree	24	89%
Disagree	2	7%
Neutral or mixed views	1	4%
Number of responses	27	

Question 5: …and do you agree with the proposed descriptors?		
Agree	19	73%
Disagree	2	8%
Neutral or mixed views	5	19%
Number of responses	26	

Question 6: Do you agree that the categories for suspension should be reduced to two?		
Agree	19	66%
Disagree	9	31%
Neutral or mixed views	1	3%
Number of responses	29	

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?		
Agree	17	63%
Disagree	8	30%
Neutral or mixed views	2	7%
Number of responses	27	

Question 8: Do you agree with the general culpability and harm factors as set out at Annex 1?		
Made suggestions	18	44%
Did not make suggestions	23	56%

Question 9: Do you agree with the general aggravating and mitigating factors as set out at Annex 1?		
Made suggestions	23	56%
Did not make suggestions	16	39%

Question 10: Do you agree that the structured approach outlined above is appropriate?		
Agree	20	74%
Disagree	4	15%
Neutral or mixed views	3	11%
Number of responses	27	

Question 11: Are there any adaptations to the approach you consider should be made?		
Made suggestions	14	34%
Did not make suggestions	27	66%

Question 12: If you disagree with the structured approach outlined above, what approach to imposing sanctions do you consider decision-makers should take?		
Made suggestions	4	10%
Did not make suggestions	37	90%

Question 13: Should misconduct involving violence, in the absence of a criminal conviction, be included in Behaviour towards others or a separate Group?		
Behaviour towards others	9	33%
A separate group (of its own)	12	44%
Another answer	6	23%
Number of responses	27	

Question 14: Do you agree with the concept of creating Groups of types of misconduct?		
Agree	25	86%
Disagree	1	3%
Neutral or mixed views	3	10%
Number of responses	29	

Question 15: Do you agree with the proposed Groups outlined above?		
Agree	19	61%
Disagree	4	13%
Neutral or mixed views	8	26%
Number of responses	31	

Question 16: Do you have any suggestions for amendments to the titles of the Groups and/or the intended coverage of each?		
Made suggestions	23	56%
Did not make suggestions*	18	44%

* Where respondents made suggestions only about which misconduct group violence should be included in, we have not counted these as suggestion under question 16 because this issue is already addressed specifically by question 13. We have included such comments in the statistics for question 13 instead.

Question 17: Do you agree with the concept of including the Guidance bands for sanctions within the ranges?		
Agree	25	93%
Disagree	2	7%
Neutral or mixed views	0	0%
Number of responses	27	

Question 18: Do you agree with proposed descriptors for the lower, middle, and upper bands for each range?		
Agree	19	70%
Disagree	6	22%
Neutral or mixed views	2	7%
Number of responses	27	

Question 19: Do you agree with the range for each of the Groups (see paragraphs 79-86)? **Dishonesty**		
Agree	21	88%
Disagree	3	13%
Neutral or mixed views	0	0%
Number of responses	24	

Question 19: Do you agree with the range for each of the Groups (see paragraphs 79-86)? **Misconduct of a sexual nature**		
Agree	22	69%
Disagree	4	13%
Neutral or mixed views	6	19%
Number of responses	32	

Question 19: Do you agree with the range for each of the Groups (see paragraphs 79-86)? **Discrimination and non-sexual harassment**		
Agree	22	81%
Disagree	4	15%
Neutral or mixed views	1	4%
Number of responses	27	

Question 19: Do you agree with the range for each of the Groups (see paragraphs 79-86)? **Behaviour towards others**		
Agree	21	95%
Disagree	0	0%
Neutral or mixed views	1	5%
Number of responses	22	

Question 19: Do you agree with the range for each of the Groups (see paragraphs 79-86)? **Use of social media and other digital communications**		
Agree	20	95%
Disagree	0	0%
Neutral or mixed views	1	5%
Number of responses	21	

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? **Dishonesty**		
Made suggestions	11	27%
Did not make suggestions	30	73%

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? **Misconduct of a sexual nature**		
Made suggestions	16	39%
Did not make suggestions	25	61%

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? **Discrimination and non-sexual harassment**		
Made suggestions	5	12%
Did not make suggestions	36	88%

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? **Behaviour towards others**		
Made suggestions	6	15%
Did not make suggestions	35	85%

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? **Use of social media and other digital communications**		
Made suggestions	7	17%
Did not make suggestions	34	83%

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? **Dishonesty**		
Made suggestions	8	20%
Did not make suggestions	33	80%

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? **Misconduct of a sexual nature**		
Made suggestions	16	39%
Did not make suggestions	25	61%

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? **Discrimination and non-sexual harassment**		
Made suggestions	4	10%
Did not make suggestions	37	90%

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? **Behaviour towards others**		
Made suggestions	7	17%
Did not make suggestions	34	83%

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? **Use of social media and other digital communications**		
Made suggestions	4	10%
Did not make suggestions	37	90%

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. **Dishonesty**		
Agree	15	79%
Disagree	1	5%
Neutral or mixed views	3	16%
Number of responses	19	

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. **Misconduct of a sexual nature**		
Agree	14	67%
Disagree	1	5%
Neutral or mixed views	6	29%
Number of responses	21	

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. **Discrimination and non-sexual harassment**		
Agree	12	60%
Disagree	1	5%
Neutral or mixed views	7	35%
Number of responses	20	

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. **Behaviour towards others**		
Agree	15	88%
Disagree	0	0%
Neutral or mixed views	2	12%
Number of responses	17	

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. **Use of social media and other digital communications**		
Agree	13	76%
Disagree	0	0%
Neutral or mixed views	4	24%
Number of responses	17	

Question 23: Do you consider that the equality impacts rehearsed above provide a basis for departing from any of the proposals in this paper?		
Agree	1	4%
Disagree	20	87%
Neutral or mixed views	2	9%
Number of responses	23	

Question 24: Are there any other equality issues BTAS should take into account when developing further the contents of the Sanctions Guidance?		
Made suggestions	8	20%
Did not make suggestions	33	80%