



The Bar Tribunals  
& Adjudication  
Service

The Council of the Inns of Court

# **Sanctions Guidance**

## **Version 6**

### **Consultation Draft**

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# Foreword from the President of the Council of the Inns of Court

*[To be inserted in the final version]*

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## Section 1: Introduction to the Sanctions Guidance

- 1.1. This Guidance has been developed by The Bar Tribunals and Adjudication Service ('BTAS') in collaboration with the Bar Standards Board ('BSB'), for use by members of BTAS's Disciplinary Tribunals and the Independent Decision-Making Body (IDB) of the BSB (collectively referred to as 'panels'), when considering what sanctions should be imposed where a finding of professional misconduct has been made for a breach of the BSB Handbook.
- 1.2. The Guidance comes into effect on 1 January 2022 and is applicable to all sanction decisions taken by panels on or after that date regardless of when the proved misconduct occurred or when the finding of misconduct was made.
- 1.3. The Guidance provides panels with a basis for considering what sanctions are appropriate in any given case and is intended to promote proportionality, consistency, and transparency in sanctions across all panels.
- 1.4. It must be stressed the Guidance is just that, it is not intended to fetter panels' discretion to impose sanctions that are appropriate and proportionate in the individual circumstances of a case. Panels must exercise their own judgement when deciding on the sanctions to impose. If panels depart to a significant extent from the Guidance, it is essential that clear written reasons are given for doing so.
- 1.5. It should also be stressed that the factors to be taken into account when determining the appropriate sanctions in relation to culpability and harm and aggravating and mitigating factors (see Part 3, Annex 2), are not exhaustive. It would be impossible to list all factors that might be relevant in any individual case. Therefore, the absence of reference to a particular factor in this Guidance should not be taken as an indication that it cannot, or should not, be taken into account. Panels should use their judgement and record in the written reasons all factors that have been taken into account when reaching the decision on sanction.

- 1.6. **Background** - BTAS is responsible for recruiting, appointing and administering Disciplinary Tribunals, which consider allegations of professional misconduct against barristers and BSB-regulated entities<sup>1</sup>.
- 1.7. The BSB is responsible for investigating allegations of breaches of the BSB Handbook and bringing charges of professional misconduct in front of Tribunals for determination. The IDB also has power to determine charges of professional misconduct under the BSB's Determination by Consent procedure, with the powers of sanctioning limited to a maximum of a fine.
- 1.8. The Guidance is publicly available and allows respondent barristers, those raising concerns, the public and other interested parties to gauge, in advance, the potential sanctions that might be imposed in a particular case. For more information on BTAS's Disciplinary Tribunals please visit the BTAS website ([www.tbttas.org.uk](http://www.tbttas.org.uk)). For more information about how the Bar Standards Board investigates concerns about barristers, please see the Reporting Concerns section on the BSB's website ([www.barstandardsboard.org.uk](http://www.barstandardsboard.org.uk)).
- 1.9. BTAS is committed to playing its part in furthering the regulatory objectives set out in the Legal Services Act 2007 to encourage an independent, strong, diverse, and effective legal profession. It is also committed to meeting in full the Equality Duty (section 149 of the Equality Act 2010), as well as complying with the requirements of the Equality Act 2010 (Specific Duties) Regulations.
- 1.10. The Tribunal is committed to equality of opportunity and aims to treat everyone who appears before it fairly and with respect, regardless of their background. Its processes and procedures are designed to be fair, objective, inclusive, transparent, and free from unlawful discrimination. Tribunal Members and everyone acting for the Tribunal are expected to adhere to the spirit and letter of the Equality Act 2010 and other equality legislation.
- 1.11. Treating everyone fairly also includes being aware of, and taking into account, cultural differences that may affect the way people react to situations or

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<sup>1</sup> "BSB entities" includes BSB Authorised Bodies and BSB Licensed Bodies (i.e. Alternative Business Structures). The vast majority of BSB entities are individual barristers who have chosen to provide their services via a corporate model as opposed to providing them via a self-employed model.

communicate. Cultural differences can, for example, affect an individual's demeanour or the way they communicate regret, remorse or an apology either verbally or non-verbally and body-language can be misinterpreted. Panels should be conscious of these issues when assessing what weight to give relevant factors in determining sanctions.

- 1.12. **Publication of decisions** – BTAS and the BSB make all findings of professional misconduct public by posting reports of Tribunal findings and sanctions on their websites. The BSB also posts on its website reports of findings and sanctions arising from the Determination by Consent procedure. All such information remains in the public domain in accordance with the publication policies of the two organisations, which can be found at: <https://www.tbta.org.uk/policies-guidance-and-publications/policies/publication-policy/> and <https://www.barstandardsboard.org.uk/resources/policy-on-publication-of-disciplinary-findings.html>

## Structure of this Guidance

- 1.13. The Guidance is set out in three Parts:

- **Part 1 – General Guidance** - provides general guidance on the approach to determining sanctions, factors and issues that need to be taken into account and the sanctions available to panels.
- **Part 2 – Misconduct Groups** - provides guidance on specific types of misconduct divided into 13 Groups and the range of sanctions that may be appropriate. The Groups are intended to cover most types of conduct that panels are likely to encounter. However, the Groups inevitably cannot be exhaustive, and guidance is given in Part 1 on how to approach conduct that falls outside the stated Groups (see paragraph 3.7).
- **Part 3 -Annexes** – this part contains supplementary information, which includes: a table of the Groups and sanctions ranges; more detailed information about the factors to be applied when determining sanctions; good practice on drafting written reasons; example wording for sanctions; and a glossary of terms.

# **Part 1**

## **General Guidance**

## Section 2: Purpose and Principles of Sanctions

- 2.1. Panels must take into account, when determining the appropriate sanction to be imposed in an individual case, the purpose of sanctioning within a regulatory regime and the general principles which apply.

### Purpose of sanctions

- 2.2. The purposes of applying sanctions for professional misconduct are to:
- i. Protect the public and consumers of legal services;
  - ii. Maintain public confidence and trust in the profession and the enforcement system;
  - iii. Maintain high standards of behaviour and performance at the Bar; and
  - iv. Act as a deterrent to the individual barrister or regulated entity, as well as the wider profession, from engaging in the misconduct subject to sanction.
- 2.3. Sanctions under a regulatory enforcement regime should not be imposed to punish. It may be that the impact of a sanction will have a punitive effect, but panels must ensure that any sanctions are only imposed to meet the purposes listed above.

### Principles of sanctioning

- 2.4. The fundamental principle of sanctioning is that any sanctions imposed should be proportionate, weighing the interests of the public with those of the practitioner or authorised body. The sanctions imposed should be no more than is necessary to achieve the purposes set out above at paragraph 2.2.
- 2.5. Proportionality is not a static concept and will vary according to the nature of the misconduct and the background and circumstances of the individual barrister or authorised body. For example, a first-time breach of the practising requirements (such as continuing professional development) would rarely, if ever, warrant a

suspension or disbarment but a similar breach, having been committed many times without remorse or any attempt to remedy the situation, might warrant consideration of suspension or disbarment.

- 2.6. Proportionality includes considering the totality of the sanctions imposed (for more information on the totality principle, see Section 3 below – paragraphs 3.25-3.30).
- 2.7. In order to maintain public confidence in the profession and professional confidence in the enforcement regime, it is important that sanctioning decisions are transparent. Written reasons should be given for all sanctions decisions including the factors taken into account when determining the sanction to impose (see Part 3, Annex 3 – Guidance on written reasons).

## Section 3: Approach to taking sanctioning decisions

3.1. This section sets out the methodology that should normally be followed when making decisions on sanctions including information on how to approach each step of the methodology. It also covers general issues relevant to the application of the methodology.

### Methodology

3.2. The methodology set out below is designed to promote consistency in decision making and ensure that all relevant factors are taken into account in determining the appropriate sanction. It consists of six steps as detailed below. The steps are only a guide but should be followed as far as possible in all cases. Nevertheless, panels have discretion to depart from them if they are not appropriate in the circumstances of a particular case.

3.3. The six steps are:

- i. Determine the appropriate applicable Misconduct Group for the proved misconduct as set out in Part 2;
- ii. Determine the seriousness of the misconduct by reference to culpability and harm factors;
- iii. Determine the indicative sanction level for the proved misconduct;
- iv. Apply aggravating and mitigating factors;
- v. Consider the totality principle and determine the final sanction(s); and
- vi. Provide written reasons for the sanctioning decision.

3.4. More detail about each of the steps is provided in the paragraphs below.

3.5. A flowchart summarising the six steps and what should be considered at each of them, to be used by panels as an *aide memoire*, can be found at page 55 in Part 2 of this Guidance.

## Step 1 - Determine the Misconduct Group under which the misconduct falls

3.6. The first step is to determine the Misconduct Group, or Groups, the proved misconduct falls within. There are thirteen Misconduct Groups (“Groups”) as follows:

A: Dishonesty	Page 56
B: Misconduct of a sexual nature	Page 58
C: Discrimination and non-sexual harassment	Page 61
D: Financial matters	Page 64
E: Criminal convictions	Page 67
F: Misleading	Page 70
G: Administration of justice	Page 72
H: Formal orders	Page 74
I: Behaviour towards others	Page 76
J: Use of social media and other communications	Page 79
K: Formal obligations to clients	Page 82
L: Obligations to the regulator	Page 85
M: Conduct related to status	Page 88

3.7. An explanation of the type of conduct covered by each Group can be found in the first part of each Group section under the heading “Description of Group”. In some cases, proved charges may span more than one Group and each applicable Group section should be considered in determining the sanctions for each charge (see also step 4 – Totality). If a charge could fit into more than one Group, then the Panel should identify the Group that best reflects the nature and gravity of the misconduct. Where more than one Group remains applicable, panels should read across the relevant Groups and cross refer to them when determining the sanction. If it appears that there is no applicable Group, then panels should use the general culpability and harm factors as set out in Part 3, Annex 2 as the starting point to decide the seriousness of the misconduct, and then cross refer to analogous and

most relevant Groups for guidance on specific factors to apply and the sanctioning ranges.

- 3.8. Once the relevant Group(s) have been identified, panels should go on to consider the seriousness of the conduct (see Step 2 below).

## **Step 2 – Determine the seriousness of the conduct**

- 3.9. The second step is to assess the seriousness of the proved misconduct, panels should consider the general culpability and harm factors at Part 3, Annex 2, as well the specific culpability and harm factors applicable to the relevant Group section(s) as set out under each of the Groups in Part 2. The factors are not listed in any particular order and are not intended to imply a hierarchy.
- 3.10. The general factors at Annex 2 should be taken into account in relation to all proved cases of misconduct to which they apply. The Group-specific factors, set out in Part 2, should be taken into account in relation to proven cases of misconduct falling under the relevant Group.
- 3.11. Culpability factors are designed to assist with determining the degree to which the respondent is responsible or blameworthy for the proved misconduct. The harm factors are designed to assist with assessing the direct and indirect harm caused by the misconduct. The assessment of harm should take into account the actual harm, or risk of harm, which the misconduct did cause, or could have caused. Any type of harm can be taken into account, examples include harm to: identified individuals; the public interest; and public confidence and/or trust in the profession or the effective regulation of the profession in the public interest.
- 3.12. Applying the culpability and harm factors is not a science. Generally, the greater the number of applicable factors, the greater the level of assessed culpability and/or harm will be. However, it is possible that only one, or a couple of factors, will be so serious as to result in an assessment that there is significant overall culpability and/or harm and the sanction should be in the upper range for the relevant misconduct.

## Harm

- 3.13. Harm will take many forms and it is for panels to decide what matters to take in to account in assessing the overall level of harm. Examples of harm include:
- Physical harm (e.g. physical injury, physical illness, destruction of or damage to belongings)
  - Harm to well-being (e.g. injury to feelings, fear, anxiety, humiliation, isolation, loss of motivation)
  - Mental harm (e.g. diagnosed mental health disorders, either caused or exacerbated by the misconduct)
  - Financial harm (e.g. loss of income or other direct financial losses, loss of financial opportunity/gain, damage to credit rating, money being spent to remedy consequences of the conduct)
  - Reputational harm (e.g. caused by being insulted/lie about/belittled in front of others, especially clients/other lawyers/the judiciary, or by being made the subject of negative rumours or gossip online/in chambers or elsewhere).
- 3.14. Panels should always take into account the impact on the health of the person/people affected by the misconduct. It may be that expert reports will be available to evidence this, but it is not a requirement, and it will be for panels to assess the impact of the misconduct in light of all the information provided. Harm to well-being and mental harm are especially likely to be relevant in cases of sexual misconduct, and discrimination, non-sexual harassment and bullying.
- 3.15. When assessing harm, panels should consider not only the extent of harm actually caused, but the risk and extent of the harm which could have been caused by the misconduct, as well as how likely and how foreseeable it was that that harm could have been caused.

### **Step 3 – Determine the indicative sanction level for the misconduct**

- 3.16. Step 3 involves deciding the indicative sanction level applicable to the misconduct. This should be assessed by referring to the recommended range(s) set out in the

“Indicative Sanctions range” section of the Misconduct Groups in Part 2 taking into account the descriptors given for the ranges.

- 3.17. At this stage, panels should identify an indicative sanction (for example, disbarment, a 6-month suspension, or a medium-level fine) which is appropriate for the assessed seriousness of the conduct. Panels should be aiming to identify the least severe sanction which is proportionate considering the seriousness of the conduct.
- 3.18. More than one Group range may need to be considered when deciding the appropriate sanction for single or multiple charges. If this is the case, panels should read across each of the relevant Group ranges and consider which is the most appropriate fit for the misconduct in question.
- 3.19. The indicative sanctions identified at this stage will not necessarily be the final sanctions imposed, because aggravating and mitigating factors (Step 4), as well as the totality principle (Step 5), still need to be taken into account.
- 3.20. Panels should always consider whether a combination of sanctions for one proved charge is appropriate to reflect the seriousness of the misconduct and the risk posed by it. In particular, consideration should be given to whether any form of restriction on practice or conditions should be imposed, either as a standalone sanction or in combination with others (see Section 6 – Sanctions and orders available to panels). For example, a fine combined with a period in which the respondent cannot accept public access instructions might be appropriate, or a short suspension combined with an order to complete a specific type of continual professional development (CPD) training by a specified date/conditions on practise requiring training to be completed.

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

- 3.21. Step 4 involves applying aggravating and mitigating factors to decide whether the indicative sanction(s) should be adjusted, either up or down.

- 3.22. Aggravating and mitigating factors relate to the personal circumstances of the respondent or the wider circumstances of the misconduct as opposed to the seriousness of the misconduct itself, which is assessed at Step 2. Aggravating factors are those that exacerbate the misconduct and therefore indicate that a more severe sanction may be appropriate. Mitigating factors are those which indicate that a less severe sanction may be appropriate. They may overlap with issues of culpability and harm.
- 3.23. Panels should have regard to the general lists of aggravating and mitigating factors at Annex 2 as well as the Group-specific aggravating and mitigating factors set out under each of the Groups in Part 2. The factors are not listed in any particular order and are not intended to imply a hierarchy.
- 3.24. Having considered the aggravating and mitigating factors, panels have the discretion to impose a sanction outside the indicative sanctions, but must set out in writing the reasons for doing so.

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

- 3.25. Sanctions must be proportionate to the overall conduct and therefore, having carried out steps 1-4, panels must consider the totality of the sanctions in contemplation to ensure the outcome is proportionate.
- 3.26. **Multiple charges** – where there are multiple charges that may reflect different elements of misconduct arising from a single incident or perhaps proved charges arising from multiple occasions when similar misconduct occurred, it is particularly important to consider the totality principle. In such circumstances, panels should consider whether the total sanctions in contemplation are proportionate based on the cumulative seriousness of the proved charges. In contrast, where there are multiple proved charges that relate to different incidents and different types of misconduct, consideration should be given to ensuring that the sanctions adequately reflect the seriousness of each individual incident of misconduct.

- 3.27. Where panels are imposing sanctions for multiple findings of misconduct, they should try to avoid imposing one sanction to reflect the most serious charge because this can cause problems if the barrister or authorised body decides to appeal. If a decision is taken on appeal to overturn the finding or sanction on the most serious charge but not any of the other charges, it can be difficult to establish what sanction should apply to those charges that remain or determine how seriously the original Tribunal viewed each of the remaining charges.
- 3.28. To avoid this situation, panels should, as far as it is appropriate, impose a separate sanction for each charge, bearing in mind they should be proportionate to the totality of the misconduct.
- 3.29. It is important to note that, where multiple charges are heard together, different aggravating and mitigating factors, or different culpability and harm factors, may apply to different charges. If this is the case, panel members should make this clear within their reasons.
- 3.30. **Concurrent or consecutive sanctions** – Imposing a concurrent sanction means that the sanctions will run alongside each other, whereas imposing a consecutive sanction means that the sanctions will run after each other. Consecutive sanctions can be imposed when two time-based sanctions are imposed, for example two suspensions. Generally, concurrent sanctions are more appropriate where the proven misconduct relates to conduct arising either from one incident or from multiple incidents of the same conduct arising within a short period. Consecutive sanctions are generally more appropriate where the proven misconduct includes different types of behaviour potentially occurring on different occasions. Panels should be cautious about imposing consecutive sanctions unless they are sure that the totality of the consecutive sanctions is warranted based on the cumulative seriousness of the charges.

## Step 6 – Give reasons

- 3.31. The final stage is to ensure that panels are agreed on the reasons for the sanctions decisions and that these are communicated. Detailed guidance on the content of written reasons can be found at Annex 3, which covers both reasons for findings

and for the imposition of sanctions. In summary, written reasons in relation to sanctions should include:

- i. **A summary** – of the submissions and evidence on sanctions and the panel’s agreed view on their impact and how they have been taken into account;
- ii. **An explanation** – of the panel’s decision on the sanctions imposed with reference to the relevant sections of this Guidance particularly the Group sections and including the culpability, harm and aggravating/mitigating factors that were taken into account. The explanation should include reasons for any significant departure from the recommended ranges set out in Part 2.

### General issues in applying the methodology

- 3.32. **Avoiding double-counting** – There may be some overlap between factors relating to culpability and harm and those which are aggravating or mitigating. If a factor has been taken into account in relation to culpability or harm, it should generally not be taken into account as an aggravating or mitigating factor.
- 3.33. **Factors not listed** – The lists of general factors set out in Annex 2 and the lists of Group-specific factors in Part 2 are not exhaustive. Panels may identify other factors relating to the facts of the misconduct, the respondent’s personal circumstances, or the circumstances of the misconduct which they consider relevant. It is perfectly legitimate for panels to take such other factors into account when determining the appropriate sanction. Any additional factors taken into consideration, and why they were considered relevant, should be clearly stated in the reasons for the decision.
- 3.34. **Positive and negative application of factors** – Panels may consider that the converse of an aggravating factor applies as a mitigating factor, or vice versa. For example, the converse of the aggravating factor “lack of insight” might be said to apply where the respondent has shown good insight into what led to their behaviour, the effect that it had on others, and how they can avoid acting in the same way in future. As with other factors not listed in either Annex 2 or the Group sections of Part 2, panels should state in their reasons where the converse of an aggravating or mitigating factor has been taken into account, and why it was considered to be relevant.

3.35. **Sanctioning outside of the recommended ranges** – Where there is significant mitigation, or aggravating factors, panels may arrive at a decision to impose a sanction which is beneath the lowest point, or exceeds the highest point, in the recommended range for the relevant Misconduct Group (e.g. a suspension for dishonesty or a suspension of less than 12 months for discrimination or harassment). However, sanctioning outside of the recommended ranges should be exceptional and, if such a sanction is imposed, the panel must clearly state why it was considered appropriate to depart from the normal range in their reasons for the decision.

## Section 4: Other important issues to consider

### Meaning of vulnerability

- 4.1. Several of the factors, including those in the Group sections, make reference to the vulnerability of those affected by misconduct.
- 4.2. Some categories of people are recognised as being vulnerable, for example under BTAS's Vulnerable Witness Policy or under Practice Direction 1A Civil Procedure Rules, due to traits which include but are not limited to:
  - a) Age
  - b) Mental disorder
  - c) Impairment in intelligence and/or social functioning
  - d) Physical disability
  - e) Communication or language difficulties
  - f) Social, domestic or cultural circumstances
  - g) Being the victim of sexual or violent misconduct
  - h) Being subject to intimidation
- 4.3. However, the above examples are not the only factors which may make a person vulnerable. A person may be vulnerable for a variety of reasons, which may relate to their characteristics (including protected characteristics) or to their circumstances. Vulnerability may be temporary or permanent. A person may be vulnerable by reason of being in a particular situation or a particular place. Their professional status, or their status relative to another person, may also make them vulnerable in particular circumstances. For example, a pupil or junior barrister who has made a complaint about the behaviour of a senior member of chambers may be considered vulnerable in the circumstances of the behaviour and the complaint.

### Personal mitigation

- 4.4. Panels should note that personal mitigation (the personal circumstances of the barrister), such as ill health, must always be taken into account in assessing the appropriate sanction. However, in regulatory proceedings, where the purpose of sanctions is to protect the public and maintain confidence in the profession, personal mitigation is usually less relevant than it would be to punishing offenders

in the criminal justice system. It should therefore be given less weight in the balancing exercise with the need to maintain public trust and confidence in the profession.

- 4.5. **Health matters** – the respondent’s health, including mental health, at the time the conduct occurred, may have been a contributory factor to the misconduct and should be taken into account when determining the sanction to be imposed. Panels will need to consider what weight should be given to health matters as a relevant factor where they are not supported by medical or other relevant professional reports, for example psychiatric or therapeutic reports.

## Character evidence

- 4.6. Barristers are entitled, as part of their mitigation, to put forward character references/ witnesses to support their submissions. However, while such evidence can be relevant to the sanctions imposed, it should be treated with caution and panels should be wary of becoming distracted from the main issues by an abundance of character evidence. The fact that a barrister was previously of “good character” (see paragraph 4.9 below) and has a good reputation, can only go so far in mitigating his/her behaviour and the more serious the breach, the less weight should be attached to character evidence. The emphasis should be on the nature of the breach and the circumstances in which the breach occurred. In particular, character evidence is likely to hold little weight where it relates to dishonesty, misconduct of a sexual nature or discrimination, non- sexual harassment and bullying. This is because it is very possible that when instances of such proven misconduct come to light, they will be perceived by many as “out of character” but this does not mitigate the conduct itself or the harm it will have caused.
- 4.7. In general, if the character evidence indicates that the person providing it knows the barrister well and has a clear basis for assessing that the behaviour in question was a genuine anomaly/one-off, then some weight may be given to it. However, if the character evidence indicates that the person supplying it can only have limited direct knowledge of the barrister, then it should be treated with caution, and it may be that little or no weight can be given to it. The general approach should be that character evidence is treated with caution and should not unduly affect the sanctions imposed: a person of good character and impeccable reputation can still

commit breaches of the Handbook that, by virtue of the finding of professional misconduct, are serious and warrant the same sanctions as any other barrister. Authors of testimonials will be expected to have been informed of the charges, and general testimonials, not provided for the specific purpose of the disciplinary proceedings, should be accorded no weight. In general, but very much dependent on the nature of the misconduct, the better and longer the author of the character reference has known the barrister, the more weight the reference can be given.

## Previous disciplinary history

- 4.8. The respondent's previous disciplinary history should, in most cases, be taken into account as an aggravating factor. However, panels should take into account the age of the previous findings, their relevance to the conduct in question and the level of seriousness of the previous misconduct. These factors are interconnected and should be considered in combination when determining the impact of previous findings. For example, a very old finding of misconduct of a sexual nature, would still be a significant aggravating factor where misconduct of a sexual nature has occurred again. In contrast, a fairly recent finding of a failure to comply with practising requirements may be less of an aggravating factor where the current misconduct is misleading the court. On the other hand, multiple past incidents of findings of professional misconduct, regardless of their seriousness, could indicate the respondent has a propensity for non-compliance with their professional obligations and therefore is likely to present a higher risk to the public.
- 4.9. The absence of previous disciplinary findings (i.e. the person was previously of "good character") may be taken into account as a mitigating factor when determining sanction, but it can only go so far in mitigating the respondent's behaviour and the more serious the breach, the less weight should be attached to the absence of previous findings. This is particularly so in relation to misconduct of a sexual nature and discrimination, non-sexual harassment and bullying

## Means and financial circumstances

- 4.10. Where a financial sanction is considered an appropriate and proportionate sanction, panels should take into account the financial means and circumstances of

the respondent (see also Section 8 – Costs). Evidence of means will normally be provided either in advance of, or at, the hearing. However, if it is not available and the respondent has not had an opportunity to provide it, consideration should be given to adjourning the sanctioning decision to allow for submissions on means to be provided. An adjournment is not likely to be appropriate where the information has been requested but the respondent has failed to respond or refused to give the information. However, generally, before imposing a financial penalty, the respondent should be given the opportunity to make representations as to their financial means. Whether the respondent provides the information is a matter for them. In the absence of evidence as to means panels are entitled to assume that the respondent's means do not justify any form of adjustment to the level of fine otherwise indicated for the seriousness of the misconduct. Also, unsupported statements of a lack of means should be treated with caution and explored further with the respondent.

- 4.11. **Impact of means on level of financial penalty** – The approach should be, first, to determine whether a financial sanction is appropriate in line with this Guidance and what the level of fine should be absent any information about financial means. This should be the fine imposed unless there is credible evidence that indicates the respondent does not have the means to pay the fine indicated and the impact of imposing the fine would in effect make its imposition disproportionate. Fines should not be increased above the level indicated for the misconduct merely because the respondent can afford it, but an increase in a fine would be appropriate where there is evidence that the respondent has benefitted financially from the misconduct.
- 4.12. When considering financial means, panels should take into account not only the current circumstances but the likely future circumstances. It may be in some cases that it would be more appropriate to give the respondent time to pay rather than reduce the level of the fine. Any time to pay formally ordered by the Tribunal should generally not extend to longer than a year. Panels should also take into account that the BSB is able to agree payment instalments without the need for a formal order by the Tribunal. In rare circumstances, the respondent's means may be such that a financial penalty of any level, while indicated, is not appropriate.

## Criminal convictions/behaviours

- 4.13. In general, a criminal conviction is a serious matter for barristers given their role in the administration of justice and the need to maintain public confidence in the profession. The sanction imposed should relate to the breach of the BSB Handbook and the impact of the conduct in the regulatory context, which may differ to the impact in the criminal context particularly the role of punishment in the criminal justice system, which is not a purpose of regulatory sanctions.
- 4.14. There may also be circumstances where a respondent could have been charged with a criminal offence but in the event was not – for example, where they were given a caution. Conduct which resulted in a caution will be treated the same as conduct for which the respondent was convicted of an offence because the sanction that is imposed should relate to the underlying behaviour which constitutes a breach of the Handbook, rather than the receipt of a caution or conviction in itself.
- 4.15. Further, in some cases, a respondent may have acted in a way which meets the definition of a criminal offence, without having been convicted of any offence. Sometimes this may be because the person targeted by the behaviour chose not to report it to the police. This is particularly likely to be relevant in sexual misconduct, discrimination, and harassment cases. The fact that the person who was targeted did not report the behaviour to the police should not in itself be seen as reducing the seriousness of the behaviour, as there are many reasons why they may have chosen not to report it.
- 4.16. However, where a criminal conviction has been imposed, this may be treated as an aggravating factor, as set out in Annex 2. The duration of the sentence imposed for any such criminal conviction may also affect the appropriate length of sanction, as discussed in paragraph 4.20 below.
- 4.17. Sanctions for conduct which resulted in a criminal conviction or caution should be imposed by reference to the “Criminal convictions” Group section only where the conduct could not be appropriately dealt with under another Misconduct Group. For example, a finding in relation to a criminal conviction for a sexual offence should be covered by the “Misconduct of a sexual nature” Group.

- 4.18. Enforcement action will not usually be brought before a BTAS Disciplinary Tribunal for conduct which may amount to a criminal offence, but for which no conviction or caution has been imposed (e.g. drink driving), where the conduct does not amount to a breach of the Handbook in its own right.

### Impact of criminal sanctions

- 4.19. In cases involving criminal convictions (whether they are dealt with under the “Criminal convictions” Group or another Group), panels should bear in mind that the sentence imposed by a criminal court is not necessarily a definitive guide to the seriousness of the offence in the regulatory context. There may have been circumstances and factors that led the court to impose a particular sentence that are not necessarily relevant in the regulatory context.
- 4.20. As a general principle, where a barrister has been convicted of a serious criminal offence or offences, they should not be permitted to resume unrestricted practice until they have completed their criminal sentence. This includes not just custodial sentences but community sentences, suspended sentences, and being subject to notification requirements under the provisions of the Sexual Offences Act 2003 (also known as being on the Sex Offenders’ Register). In *Fleischmann* [2005] EWHC 87 (Admin) and *Main* [2018] EWHC 3666 (Admin) the Court held that it would not generally be appropriate for a professional to return to practice while on the Sex Offenders’ Register (although the appropriate length of sanction should be considered in the circumstances of each case and need not *necessarily* be coterminous with their presence on the Sex Offenders’ Register). The most important issue for panels to take into account when determining the sanction, is the impact on public confidence and the harm that may be caused if the public knew that a barrister was practising while still subject to a criminal sentence.

### Findings of other regulators

- 4.21. Where a barrister is dual registered and subject to regulation by another professional body, they can be subject to professional misconduct findings by the other regulator in relation to misconduct committed under the rules of that regulator. Such findings will normally result in disciplinary proceedings in their role

as a barrister as they are likely to diminish the trust and confidence placed by the public in the Bar and/or the individual.

- 4.22. In bringing associated proceedings, the purpose is not to punish the barrister for a second time but to protect the public and maintain confidence in the Bar. Accordingly, panels should impose the least restrictive sanction which is sufficient to achieve these objectives, as set out above at paragraph 2.4.
- 4.23. When determining which Misconduct Group to use to sanction the misconduct which has already been subject to sanctions by another regulator, panels should focus on the nature of the behaviour to determine which Group it most appropriately fits within.
- 4.24. Panels should note that a sanction imposed by another regulator should not be taken as a definitive guide to the seriousness of the offence. The range of sanctions which were available under the other regulator's enforcement procedures and the approach taken to determining the sanction may be different to those which are available and relevant to BTAS/BSB panels. For example, relevant considerations concerning the risk posed by different types of misconduct within different professions, the approach taken to mitigation and aggravating features, the guidance and case law as to the appropriate severity of sanctions in different professions, and other factors, may mean that different regulators can rightly impose significantly different sanctions for the same conduct. Therefore, panels should always look to the nature of the misconduct and the factors relevant in the context of the Bar, in order to determine the appropriate sanction, rather than focusing on the sanction imposed by another regulator.

## **Impact on sanction of delay in bringing proceedings**

- 4.25. Delays by the BSB in bringing proceedings, sometimes lengthy, can occur. In general, such delays should not be taken into account in determining the sanction to be imposed as sanctions are intended to further the purposes of applying sanctions and to reflect the conduct of the respondent and not that of the regulator. It is more appropriate to consider delays by the BSB when determining whether a costs application made by the BSB should be granted and in what amount.

- 4.26. However, delays as a result of the behaviour of the respondent may be relevant, particularly where they have exacerbated the harm caused by the misconduct, and can be treated as an aggravating factor.

## Impact of interim suspensions

- 4.27. It may be that the barrister has been subject to an interim suspension from practice or restrictions on their practice prior to the disciplinary hearing. Panels are entitled to take into account the impact on the respondent of interim orders when assessing the proportionality of the disciplinary sanction to be imposed. Panels have the discretion to adjust the indicated sanction to avoid disproportionality caused by the impact of interim orders. However, care should be taken when considering such issues and it would not be appropriate to treat interim orders as though they automatically created a right to a direct “discount” to reflect the period of interim suspension. Nevertheless, the length of an interim suspension may be relevant to the period of a disciplinary suspension or whether a suspension of any length is necessary to protect the public.
- 4.28. In order to maintain public confidence in the sanctioning regime and consistency in the approach to sanctions, panels should decide what sanction is indicated for the misconduct in question absent the interim order and then apply whatever adjustment to the sanction is considered appropriate to take into account the impact of the order. Both decisions, and the reasons for them, should be recorded in the written reasons. This will allow the public to understand why a sanction, that may be perceived to be lenient for the misconduct in question, has been imposed. This is particularly important where the adjusted sanction falls below the normal range indicated for the type of misconduct.

## Section 5: Approach to particular types of misconduct

### Dishonesty

- 5.1. A finding of dishonesty will almost invariably lead to disbarment in all but the most exceptional circumstances.<sup>2</sup> Barristers are required to discharge their professional duties with integrity, probity and the utmost trustworthiness. The most serious lapse from these required high standards is proven dishonesty, whether or not leading to criminal penalties. No matter how strong the mitigation, a disbarment will normally be the appropriate sanction for dishonesty in whatever circumstances the dishonesty occurs. The primary issues for a Tribunal panel will be the need to maintain public trust and confidence in the profession and address the risk of harm to the public – these factors outweigh the interests of the individual barrister.
- 5.2. Nevertheless, there is a residual category of cases where a sanction less than disbarment may be appropriate in “exceptional circumstances”.
- 5.3. **Exceptional circumstances** – what amounts to exceptional circumstances is not prescribed and depends upon the various factors and circumstances of each individual case. However, caselaw indicates that the most significant factors carrying the most weight, and which therefore must be the primary focus of any evaluation of exceptional circumstances, are the nature and extent of the dishonesty and the degree of culpability<sup>3</sup>. That is, the exceptional circumstances must relate in some way to the dishonesty. Factors such as the length of time the dishonesty was perpetrated, whether it was repeated and the harm which it caused are more significant in the balancing exercise in determining exceptional circumstances than personal mitigation. Exceptional circumstances are more likely to be found where the dishonesty was momentary, isolated and occurred on the spur of the moment.<sup>4</sup>

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<sup>2</sup> Bolton v Law Society [1994] 1 WLR 512

<sup>3</sup> Solicitors Regulatory Authority v Sharma [2010] EWHC 2022 (Admin) and R (Solicitors Regulatory Authority) v Imram [2015] EWHC 2572 (Admin)

<sup>4</sup> SRA v James, SRA v MacGregor, SRA v Naylor [2018] EWHC 3058 (Admin)

- 5.4. While mental health issues, such as stress and depression due to workplace conditions (as well as other personal mitigation), should be taken into account in assessing whether there are exceptional circumstances, these issues, without more, are unlikely to amount to exceptional circumstances.
- 5.5. A panel must only sanction the respondent in relation to the charges currently before it and if dishonesty has not been specifically alleged by the BSB, panels should not base their sanctioning decision on an assessment that the misconduct is dishonest. This does not preclude a panel from assessing the culpability of the respondent, along with any aggravating factors, as warranting an order to disbar but such an order should not be based on dishonesty or a lack of honesty.
- 5.6. Where the barrister has been, or may have been, dishonest during the course of proceedings, the panel may refer the matter to the BSB to consider raising a fresh allegation but should not take this into account as part of the sanctioning decision.

## **Sexual misconduct and Discrimination**

- 5.7. Numerous studies have shown that incidents of sexual misconduct, discrimination, harassment and bullying are prevalent in the professions, including the Bar. Such behaviour seriously undermines public trust and confidence in the Bar and has a negative impact on diversity, recruitment, and retention at the Bar. It is therefore important that misconduct of these types is marked by serious sanctions in order to maintain public confidence, act as a deterrent and encourage the reporting of such misconduct.
- 5.8. Misconduct of a sexual nature encompasses a wide range of conduct from criminal convictions for sexual offences to misconduct, that may or may not amount to a criminal offence, that may involve colleagues, clients or others. It is particularly serious where there has been an abuse of trust by the barrister, the misconduct involves a vulnerable person or there has been an abuse of their professional position.

- 5.9. The starting point for proved misconduct of these types is a suspension from practice of over 12 months. However, panels may form the view that disbarment is appropriate given the particular circumstances of the misconduct, for example the nature of an abuse of trust or professional position by the barrister or misconduct involving a vulnerable person.
- 5.10. When deciding on sanctions for sexual misconduct, discrimination, harassment and bullying, panels should be mindful not only of the serious harm that can be caused to the recipient's emotional and mental well-being but also the impact on others at the Bar, those considering entering the profession and wider society. A single incident can have a significant harmful impact and misconduct of this nature should not be regarded as less serious because it did not form part of a course of conduct.
- 5.11. Mitigation based on the respondent's personal circumstances, health, good character /references need to be treated with caution in the context of sexual misconduct, discrimination and harassment. The nature of such misconduct means that serious sanctions are required to protect others and promote standards regardless, in most instances, of the respondent's own circumstances. Many practitioners will face personal challenges, such as ill health, bereavement and divorce, but do not resort to committing misconduct.
- 5.12. Where a respondent has been convicted of a criminal offence, they should generally not be allowed to return to practice until the criminal sentence has been satisfactorily completed, or whilst the respondent remains on the Sex Offenders Register.
- 5.13. When deciding on sanctions, panels should consider the risk to the public of the respondent returning to practise and consider placing conditions or restrictions on practice, including ordering training to address the offending behaviour. Panels should also always consider, where applicable, notifying the BSB of any concerns about the respondent's suitability to be a pupil supervisor. (For further information see Section 6, paragraphs 6.46-6.48).

5.14. Where there is evidence of unlawful discrimination, the BSB will invariably bring charges for discrimination, which if proved, should be sanctioned in accordance with 'C: Misconduct Group – Discrimination, non-sexual harassment and bullying'. However, there will be cases where there is discriminatory element to the misconduct that does not amount to unlawful discrimination, such as the motivation for the conduct arising from animosity or hostility to a person from a protected characteristic group. In such circumstances, panels should refer to the relevant Misconduct Group and treat the discriminatory element as a factor that would indicate higher culpability.

## Section 6: Sanctions and orders available to panels – individuals

- 6.1. This section of the Guidance sets out the various sanctions available for breaches of the Handbook and gives broad indications of the circumstances where they might be appropriate to use.
- 6.2. The sanctions available to Disciplinary Tribunal panels are set out in the BSB Handbook, Part 5, Section B3: The Disciplinary Tribunal Regulations 2014, Annex 1. The sanctions available to IDB panels making findings under the Determination by Consent procedure are set out at Part 5, Section A4: the Enforcement Decision Regulations, Professional Misconduct Proceedings, regulation E41.
- 6.3. Annex 4 to this Guidance provides the wording that Disciplinary Tribunal panels should use in their written reasons when imposing the relevant sanctions.
- 6.4. Disciplinary Tribunals also have the power to impose orders that that are not strictly sanctions but form part of the sanctioning phase of proceedings. These are covered below at paragraphs 6.40-6.48 “Other orders and actions”.

### Available sanctions

#### Advice as to future conduct and reprimands

- 6.5. **Advice as to future conduct ('advice')**: such advice can be given by either a panel or a person nominated by a panel to give it. It is a forward-looking sanction intended to guide the respondent as to what behaviour would be appropriate in the future. It can be imposed as a stand-alone sanction or in combination with other sanctions. Giving formal advice is normally appropriate where the respondent has demonstrated a lack of insight into the impact or import of their behaviour. As a stand-alone sanction, it would be appropriate where the misconduct is at low level, little or no harm has been caused and the respondent does not pose an ongoing risk.

- 6.6. While the option is available to a panel to order that the respondent attend on a nominated person to be given the advice, it will rarely if ever be appropriate to make such an order. This is because the panel, having heard all the evidence and assessed the need for advice, will be in the best position to frame the terms of the advice and give it. Further there will be no opportunity to consult with a nominated person in advance of making such an order and the person may have concerns about performing the function.
- 6.7. **Reprimands:** as with advice, reprimands can be imposed by panels or by attendance on a nominated person to be reprimanded. A reprimand is a backward-looking sanction and can be imposed as stand-alone sanction or in combination with other sanctions. A reprimand would be appropriate in cases where the breach of the Handbook is at the lower end of the professional misconduct scale, there is no continuing risk to the public and the behaviour is unlikely to be repeated in the future. It is designed to mark formally that the misconduct in question was unacceptable and should not occur again.
- 6.8. In nearly all cases, a reprimand will be made orally at the Tribunal and its terms included in the written reasons.
- 6.9. As with advice about future conduct, orders to attend on a nominated person to be reprimanded will rarely if ever be appropriate for the same reasons (see paragraph 6.6 above).

### Order to complete continuing professional development

- 6.10. This sanction is mainly designed to address misconduct arising from non-compliance with the BSB's Continuing Professional Development (CPD) requirements. It would also be appropriate to make an order to complete CPD where the misconduct indicates that the respondent is lacking in knowledge in a particular area of law in which they are practising or where the respondent has demonstrated a lack of skills that would be expected of a competent barrister.

- 6.11. Where a panel considers that an order to undertake training is necessary to address other types of misconduct, such as sexual misconduct, it will probably be more appropriate to make an order that relevant conditions be imposed on the respondent's practising certificate (see paragraphs 6.29-6.33 below).
- 6.12. Panels should avoid making a general order to complete further CPD but instead specify the nature and duration of the training required. Further, the order should stipulate a specific date by which the CPD should be completed, and the completion reported to the BSB.
- 6.13. Where an order is made to complete CPD, it is good practice for a panel to state what the consequences will be of the respondent failing to comply with the order. This may merely be referring to the fact that further disciplinary action is likely to be taken if they do not comply. However, it is open to a panel to include in the order that the respondent will be suspended from practise if the relevant CPD is not completed by the specified date. The effect of this is that, if the respondent does not comply by the due date, the BSB will be compelled to suspend the respondent's practising certificate on the due date if the terms of the CPD order have not been met.

## Fines

- 6.14. Annex 1 to the Disciplinary Tribunal Regulations sets out the level of fines that panels can impose on individual barristers, which are:
- i. A fine of up to £50,000 (for acts or omissions that took place on or after 6th January 2014) or
  - ii. A fine of up to £5,000,000 if the charges relate to the respondent's time as an employee or manager of a licensed body.
- 6.15. Due to changes in the terms of the BSB Handbook introduced in 2014, and to versions of the previous Code of Conduct that applied before January 2014, panels need to be mindful of the date on which the conduct occurred because different levels of maximum fine will apply as follows:
- i. For conducting occurring on or after 31 March 2009 and up to 5 January 2014, the maximum fine is £15,000; and

ii. For conduct occurring before 31 March 2009, the maximum fine is £5,000.

6.16. There are three levels of fine as set out in the table below:

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

6.17. The table above should be used as a guide and is not designed to fetter the discretion of panels. The level of fine will be dependent on the assessment of both the seriousness of the misconduct (culpability of the respondent and the harm caused or potentially could have been caused) and the application of aggravating and mitigating circumstances. As with the imposition of any sanction, deciding on the level of fine will be influenced by a range of factors applicable in the individual circumstances of a case.

6.18. The imposition of a fine is not intended to be punitive because punishment is not a purpose of professional regulatory sanctioning. Fines are designed to mark serious misconduct and prevent, through deterrence, a reoccurrence of the conduct. The imposition of a fine would be appropriate where the conduct is serious but where the circumstances of the respondent, or the facts of the misconduct in question, do not indicate an ongoing risk to the public and/or a likelihood of repetition that requires the respondent to be prevented from practising for a period or permanently as a protection measure.

- 6.19. A fine can be combined with other sanctions such as advice as to future conduct/a reprimand or conditions on practice. Conditions, such as undergoing stipulated training should be considered as a combination sanction where it is considered that the barrister needs to have greater insight and understanding of their behaviour.
- 6.20. However, it is normally not appropriate to combine a fine with a period of suspension in relation to one charge as both sanctions have a detrimental impact on the respondent's financial position and are likely to have a disproportionate impact. However, consideration can be given to imposing a fine and suspension where there are multiple proved charges that relate to different forms of misconduct as long as the totality of the sanctions are proportionate.
- 6.21. When considering the imposition of a fine, panels must take into account the financial means of the respondent. For more information on this, see paragraphs 4.10-4.12 above.
- 6.22. **Payment of fines:** orders to pay a fine technically become due for payment immediately after the appeal period has expired or, in the case of Determination by Consent, when the finding is accepted by the barrister. There is generally no need to specify a date on which the fine should be paid as this will be dictated by the appeal period or the outcome of any appeal. It is open to panels to order that a fine be paid in instalments where a fine is the appropriate sanction but the current means of the respondent indicate a disproportionate impact of immediate payment. However, in most cases, the issue of payment by instalments is better left to the BSB to agree with the respondent after the hearing as the BSB will be able to make more detailed enquiries regarding the barrister's financial situation and will have time to time to agree a mutually acceptable payment plan.
- 6.23. If a panel considers it appropriate to order a payment plan rather than leave this to the BSB, it should take into account the cost to the BSB of administering the plan. It is helpful to limit any payment plan to a maximum period of twelve months because small instalments over a lengthy period of time can be expensive to administer and involve costs to the profession far in excess of the original fine. Additionally, lengthy payment plans can lead to substantial delay in it becoming

apparent that action needs to be taken for non-compliance. The panel should set the commencement of the payment schedule by reference to the expiration of the appeal period or the conclusion of a substantive appeal rather than a specified date.

### **Orders in relation to conduct of litigation and accepting public access instructions**

- 6.24. The BSB is able to authorise barristers to provide additional legal services that are not covered by a standard practising certificate. Such authorisations cover the ability to conduct litigation and to provide legal services direct to the public under a public access authorisation. Barristers wanting to provide these services need to complete mandatory training before they can be authorised. Such authorisations are usually interconnected and allow barristers to provide services direct to clients without the need for the client to instruct a solicitor. However, it is more common for a barrister to be authorised to provide legal services under public access without also being authorised to conduct litigation.
- 6.25. Members of the public receiving services direct from barristers are generally more vulnerable, regardless of their circumstances, than clients who have the benefit of advice and assistance from a solicitor. Panels should take this into account when assessing the seriousness of the misconduct, particularly the harm involved.
- 6.26. Disciplinary Tribunal panels have the power to order removal of both types of authorisation, either indefinitely or for a specified period, or place conditions on the authorisations, where it is considered appropriate to do so in light of the proved misconduct. Such orders can be imposed as stand-alone sanctions or combined with other sanctions.
- 6.27. Such orders will normally be most appropriate where the proved misconduct directly relates to the services provided under the authorisations and/or the misconduct is not directly associated with the authorisations but is of a nature that demonstrates a risk to the public of the respondent continuing to provide services under the given authorisations, particularly having direct contact and access to clients.

6.28. Non-compliance with requirements for authorisation can seem technical and, in some cases, may be, but panels should always consider the extent of the harm to the client. A time-limited prohibition would be appropriate where the barrister's behaviour indicates a level of risk that could be addressed via a period of contemplation and a review of his/her practices which would mitigate the potential risk to clients (this may apply to situations where the barrister has not recognised the seriousness of the effect of his or her conduct). A permanent prohibition would be appropriate where there is evidence that the barrister has intentionally exploited the relationship, has persistently provided a poor service to clients, has charged unreasonable rates, has taken on instructions with no chance of success and/or has acted inappropriately with clients or others.

### Order that conditions be imposed on a practising certificate

6.29. This sanction allows for a wide range of orders to be imposed by panels in relation to a respondent's practising certificate. Such orders are not limited to direct issues related to practice but cover "*matters [panels] may consider appropriate for the purpose of protecting the public and/or preventing a repetition of the conduct in question*" (see E224.4 of the BSB Handbook).

6.30. Conditions on a practising certificate overlap with other sanctions and also cover:

- a. limiting the scope of the respondent's practice (including following a period of suspension);
- b. requiring that the respondent undergo further training as the panel sees fit; and
- c. prohibiting the respondent from accepting or carrying out public access instructions.

6.31. Ordering conditions on a practising certificate is a serious sanction as technically it prevents the respondent practising unless they comply with the conditions. However, it is a very flexible public protection sanction that can be used to impose conditions as a stand-alone sanction, combine conditions with other sanctions or impose them at the expiration of another sanction.

- 6.32. Panels should always consider whether the risk posed by the proved misconduct warrants some form of condition based on an assessment of the risk the respondent presents. Technically there is no limit or limit on the conditions that can be imposed on a practising certificate via an order by a Tribunal as long the conditions are in accordance with the provisions of the regulations set out above and can be justified under them. However, panels should be mindful of the practical implications for both the respondent and the BSB in setting any conditions. They need to be specific and capable of being monitored for compliance by the BSB without undue resource implications, whether staff or financial.
- 6.33. Conditions on practising certificates may be particularly effective in relation to misconduct of a sexual nature and other forms of misconduct that may require the respondent to address the reasons for their behaviour or gain greater insight. A period of suspension might be appropriately combined with conditions to ensure that when the respondent returns to practice issues of concern have been addressed or will be addressed before they can practise. It should be noted that once a suspension is concluded, the BSB currently has no power to refuse to grant a practising certificate if a respondent is entitled to one and pays the stipulated fee. However, once a practising certificate is granted, any conditions imposed by a Tribunal following a suspension will come into operation and prevent the barrister practising until the conditions are met.

### **Suspension from practice (or order that practising certificate should not be renewed)**

- 6.34. Suspensions from practice will normally be imposed on those holding practising certificates. However, Tribunals also have the power to order that the BSB does not issue a practising certificate to a barrister who is unregistered at the time of the finding. This in effect amounts to a suspension and the principles for imposing such a sanction are the same as those for a suspension of practising barrister.
- 6.35. A suspension is a public protection sanction that should only be imposed where there is ongoing risk to the public, which includes clients and/or professional colleagues. It must be imposed for a specified period of time and the power to

impose suspensions differs according to the size of the Disciplinary Tribunal panel and the date on which the misconduct occurred as set out below:

- a. A three-person panel can only impose a suspension of up to twelve months for acts or omissions that took place after 6th January 2014 (if a three-person panel considers the misconduct warrants a longer period of suspension, it can make a formal referral to the five-person panel for sanctioning only);
- b. For acts or omissions that took place before 6th January 2014 a three-person panel can only order a suspension of up to 3 months;
- c. There is no limit on the period of suspension a five-person panel can impose although three years is generally considered to be the maximum as anything more is tantamount to disbarment and runs a high risk of the barrister being deskilled to such an extent on return to practice that the risks to the public will be too high. Suspensions over three years should rarely be imposed and reasons for doing so should be given.

6.36. It is good practice to impose conditions on a practising certificate following the end of a lengthy suspension to ensure that the respondent is properly equipped to recommence practice (see also paragraphs 6.29-6.33 above – Conditions on practising certificates). Such conditions could include specific types of training that should be completed within a stipulated period before returning to practise with a requirement to provide evidence to the BSB of the satisfactory completion. This does not mean that the stipulated training cannot take place during a period towards the end of the suspension, but if the training remains outstanding at the end of the suspension period, any practising certificate will be endorsed with the relevant conditions and the barrister will be prevented from practising if the conditions are not met.

## Disbarment

- 6.37. Disbarment is the most serious sanction that can be imposed and is reserved for cases where the need to protect the public or the need to maintain public confidence in the profession is of such a level that the only reasonable option is to remove the respondent from the profession.
- 6.38. Disbarment can be appropriate for a first offence and will be so in cases of dishonesty and criminal convictions attracting a custodial sentence. It will also be appropriate in serious cases of misconduct of a sexual nature, discrimination, harassment or misleading the court.
- 6.39. It may also be that the cumulative impact of repeated misconduct at a lower level is such that the risk to the public of a barrister who does not meet the professional standards expected, despite previous sanctions, is so great that only disbarment can meet that risk. It all depends on the facts of the misconduct, the nature of the previous history and the individual circumstances of the barrister.

## Other Orders and actions

### Referral to the BSB for consideration of an administrative sanction

- 6.40. A Disciplinary Tribunal panel has the option to decide that the evidence presented in relation to the misconduct charges is not sufficiently serious to amount to professional misconduct but nevertheless decide, on the balance of probabilities, that the evidence shows a breach of the BSB Handbook requirements has occurred. In such circumstances the Tribunal has the power, under regulation E209, to direct that the matter be referred to the BSB for the BSB to consider whether an administrative sanction should be imposed for the breach. Such a direction is discretionary and can only be made where the Tribunal is satisfied that it is proportionate and in the public interest to do so.

## No further action

- 6.41. The option is available to Tribunals, under regulation E208 of the Disciplinary Tribunal Regulations, not to impose a sanction for proved professional misconduct and instead decide that no further action should be taken. Such a decision is likely to be rare and would be appropriate in circumstances where none of the purposes of sanctioning would be met by imposing a substantive sanction and there is no risk to the public. A decision to take no further action is most likely to be appropriate in circumstances of terminal illness or permanent mental incapacity.

## Advice as to future conduct

- 6.42. Where a Tribunal has dismissed charges of professional misconduct it has the power, under regulation rE202 of the Disciplinary Tribunal Regulations, to give the respondent advice as to their future conduct. Such advice would be appropriate where the Tribunal has concerns about the respondent's behaviour although it falls short of amounting to professional misconduct and where the respondent appears to lack an appreciation or understanding that the conduct could be considered to be inappropriate. Advice may also be appropriate where a Tribunal is satisfied that a breach has occurred but does not consider it proportionate or in the public interest to refer the breach to the BSB (see paragraph 6.41 above).

## Suspension of practising rights pending appeal

- 6.43. Where a Disciplinary Tribunal imposes a sanction of over 12 months suspension from practise, restrictions on accepting public access instructions for the same period or orders that the barrister should be disbarred, the Disciplinary Tribunal Regulations require that the Tribunal must make certain orders to protect the public during the period that the Tribunal's findings and sanctions are open to appeal and therefore the sanctions imposed have not yet come into effect.<sup>5</sup>
- 6.44. Regulation E227 requires that one of the following orders should be made unless, after hearing representations from the respondent, the Tribunal decides that it is inappropriate to make an order:

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<sup>5</sup> Disciplinary sanctions do not come into effect until after the appeal period has expired and no appeal has been lodged, or, where an appeal is lodged, until after the outcome of the appeal is known.

- a. Where the barrister holds a practising certificate, order that the respondent suspend their practice immediately and the BSB suspend the respondents practising certificate with immediate effect (E227.1); or
- b. Where the sanction is one of prohibition on accepting public access instructions and/or conducting litigation, that the prohibition takes effect immediately (E227.2); or
- c. Where the barrister does not hold a current practising certificate barrister, require the BSB not to issue a practising certificate (E227.3).

6.45. The Tribunal has the power to decide that one of the relevant orders referred to above should not be imposed immediately but from a future specified date. This power is most likely to be used where the barrister can demonstrate that the immediate imposition of an order will have an undue detrimental impact on a client, for example because an important hearing is due to take place in the days after the disciplinary hearing. A short delay to the imposition of an order may be appropriate to protect the interests of clients and allow for alternative arrangements to be made.

### **Referral to BSB regarding the respondent's role as a pupil supervisor**

- 6.46. A Disciplinary Tribunal panel has the ability, under regulation E218, to notify the BSB or a relevant Authorised Training Provider, of any concerns it has about a barrister's suitability to be a pupil supervisor. This power is available whether or not the charges of professional misconduct have been found proved.
- 6.47. Where charges of professional misconduct have been proved, a notification should always be considered where the conduct involved could pose a risk to current or future pupils either in relation to the quality of their training or the environment in which the training is conducted. In particular, a notification should always seriously be considered where the misconduct is of a sexual nature or involves discrimination or harassment. In such cases, where the status of the barrister as a

pupil supervisor is known, Tribunals should give clear reasons if a notification was not considered appropriate in the circumstances.

- 6.48. A decision to make a notification where charges have been dismissed is more difficult given the impact it could have on the barrister's reputation and career. Nevertheless, consideration should be given to a notification where there are concerns about the barrister's insight into the impact of their behaviour on pupils and their training. Reasons for the notification should be given in the written reasons.

## **Fitness to Practise**

- 6.49. Within the BSB's regulatory arrangements, the term "fitness to practise" is only used when considering whether a barrister in possession of a current practising certificate is unfit to practise due to health reasons such as addiction. The Disciplinary Tribunal Regulations do not contain a formal power for Tribunals to refer concerns about a respondent's health to the Fitness to Practise procedure. Nevertheless, a Tribunal can, at any stage of disciplinary proceedings, decide to adjourn the proceedings and ask the BSB to consider taking action under the Fitness to Practise procedure.
- 6.50. The Fitness to Practise Regulations are set out in the BSB Handbook at Part 5, Section D. Fitness to Practise proceedings are not disciplinary in nature and are run entirely separately from any disciplinary proceedings. The primary purpose is to ensure the protection of the public, and the barrister, by considering whether a barrister is medically fit to practise and if not, imposing restrictions. There is no power to disbar a barrister under the Fitness to Practise procedure and any restrictions will be time limited, usually based on the barrister being able to demonstrate that the health issues have been addressed through treatment.
- 6.51. Some disciplinary cases may give rise to concern about a barrister's fitness to practise as a result of material submitted as part of the barrister's defence and/or mitigation, or as a result of their behaviour during the proceedings. The concerns will usually relate to information indicating an on-going or recurring addiction or mental health problem. If a Tribunal panel, or a Chair of the Tribunal dealing with

directions in a case, considers that the information presented indicates a real concern about a barrister's fitness to practise that may also impact on the barrister's ability to cope with the proceedings, serious consideration should be given to adjourning the disciplinary proceedings pending consideration by the BSB of Fitness to Practise proceedings. Before doing so, the Tribunal should enquire of the BSB whether such consideration has already been given and the reasons why such action has not been taken.

- 6.52. If a consideration of Fitness to Practise proceedings by the BSB is considered appropriate, the Tribunal should record the reasons for this at the relevant stage of the disciplinary process. Consideration of Fitness to Practise proceedings, in the course of disciplinary proceedings, do not bring disciplinary proceedings to an end but will normally cause them to be adjourned pending the outcome. However, it is possible for both sets of proceeding to be carried out in parallel where the charges are serious and it would not be appropriate, in the public interest to delay the progress of the disciplinary matters.
- 6.53. Where proceedings have been adjourned, it will be a matter for the BSB to decide whether the disciplinary proceedings should be resumed at a later date. It may be that the actions taken under the Fitness to Practise process are considered sufficient to address the gravity and risks associated with the original disciplinary charges and the charges are ultimately withdrawn. It is good practice, when adjourning disciplinary proceedings, for the Tribunal panel to give clear directions for the provision of update reports from the BSB and also a date for a formal review regarding the future progress of the disciplinary proceedings.
- 6.54. In some cases, it may be appropriate to conclude the disciplinary proceedings and impose a sanction but ask that the BSB consider a referral under the Fitness to Practise regulations. Such a recommendation would not be appropriate where a period of suspension is imposed as Fitness to Practise proceedings can only be taken against those with a practising certificate. However, there may be circumstances where the conduct in question is of a level that a suspension from/restrictions on practise would be disproportionate but concerns about fitness to practise are still a cause for concern that warrant a recommendation that the BSB consider taking action.

6.55. Any issues in relation to Fitness to Practise should be recorded and the reasons for a recommendation to the BSB to consider action under the process should be documented along with the evidence to support the recommendation. Recommendations should not be made based solely on supposition as to the barrister's state of health.

## Section 7: Guidance on sanctioning entities

- 7.1. This section provides guidance on sanctioning BSB entities. “Entities” include BSB Authorised Bodies and BSB Licensed Bodies (Alternative Business Structures). Since the BSB commenced regulating entities back in 2014<sup>6</sup>, as opposed only to individual barristers, no cases involving allegations of professional misconduct by a BSB entity have been subject to disciplinary proceedings. Therefore, the guidance in this section is at a high level and it will be for relevant panels to determine what sanctions are appropriate when the first case comes to be considered.
- 7.2. All the previous guidance included in the sections above applies equally to entities, albeit adjusted to take into account the proved misconduct will be in relation to the responsibilities of a body as opposed to an individual.
- 7.3. The sanctioning methodology, as set out at section 3 above, will be the same in relation to entities. However, the assessment of seriousness (culpability and harm) and the application of aggravating and mitigating circumstances will need to be adjusted to the context of the proved misconduct relating to the activities of an entity.

### Sanctions available to panels – entities

- 7.4. The sanctions available to panels in relation to entities, on the whole, mirror those available for individual barristers but are slightly different in terms of the nature of the restrictions that can be imposed e.g. suspensions from practice and disbarment are not available sanctions but are replaced respectively with suspensions of the entity’s authorisation and removal of the authorisation. The option to impose a fine is still available but the maximum limits for doing so are significantly higher than for individuals. Further CPD orders, for obvious reasons, are not an available sanction for entities.
- 7.5. The sanctions available are set out below. Subsequent paragraphs provide guidance on the applicability of the sanctions, but only where they differ significantly to the application of sanctions against individual barristers as set out

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<sup>6</sup> [insert dates when the BSB first started regulating the various entities]

in section 6 of this Guidance. Where there is no specific guidance cited below, panels should refer to the relevant sections above of this Guidance and apply those sections, as adjusted to the relevant circumstances.

### **BSB Authorised Bodies**

- 7.6. The sanctions available for professional misconduct by BSB “legal services bodies” are set out at Annex 2 of the Disciplinary Tribunal Regulations, Part 5, Section B3 and are:
- Order for the Head of Legal Practice (or other person identified in the order) or a nominated person to be given advice as to the future conduct
  - Advice as to future conduct
  - Reprimand
  - An order that its managers or employees complete continuing professional development of such nature and duration as the Tribunal may direct
  - A fine of up to £250,000
  - Withdrawal, or suspension of its authorisation to conduct litigation or imposition of conditions on it
  - Order that it, as a licensed body, be re-classified (either unconditionally or with conditions imposed on its licence to practise as a licensed body)
  - Suspension of its authorisation to practise for a prescribed period (either unconditionally or subject to conditions)
  - Conditions on its authorisation to practise
  - Removal of its authorisation to practise

### **BSB Licensed Bodies**

- 7.7. The sanctions available for professional misconduct by “BSB licensed bodies” are set out at Annex 3 of the Disciplinary Tribunal Regulations, Part 5, Section B3 and are as follows:
- Order for the Head of Legal Practice (or other person identified in the order) on a nominated person to be given advice as to the future conduct
  - Advice as to future conduct
  - Reprimand

- An order that its managers or employees complete continuing professional development of such nature and duration as the Tribunal may direct
- A fine of up to £250,000,000
- Withdrawal, or suspension of its right to conduct litigation or imposition of conditions on it
- Conditions on its licence to practise
- Suspension of its licence to practise for a prescribed period (either unconditionally or subject to conditions)
- Revocation of its licence to practise

## Application of sanctions

7.8. When deciding what sanctions to impose, panels should take account of the guidance included above at section 6 in relation to the application of the individual sanctions. The applicable ranges in the Misconduct Groups also remain relevant. The only significant difference in the sanctioning regime for entities, as opposed to individual barristers is the level of fines that can be imposed. These differ according to the status of the entity and are prescribed in the Legal Services Act 2007. The maximum limits are therefore designed to encompass not only BSB entities but also those authorised by other regulators, such as the Solicitors Regulatory Authority, which include very large international legal firms with multimillion pound turnovers. In contrast, BSB entities, as at September 2021, are mainly individual barristers who have chosen to operate their practice as an entity and small entities with fewer than 10 employees. Turnovers of all types of BSB entities are comparatively low as compared to the maximum fine limits. Therefore, the limits are unlikely to be relevant or proportionate in relation to sanctioning BSB authorised entities.

7.9. For this reason, BTAS has decided not to set brackets of levels of fines for sanctioning BSB entities and decisions on what fines to impose are a matter of discretion for panels. However, panels should take into account the following factors, which are in addition to the general factors listed in Annex 2 and under the individual Misconduct Groups in Part 2:

- a. The level of responsibility of the entity for the proved misconduct, particularly how its management and internal systems contributed to the misconduct occurring (culpability), e.g.: the nature, extent and efficacy of internal policies/procedures, training, monitoring and supervision; and
- b. The extent of the financial, or other benefit, to the entity of the misconduct.

7.10. Any fines imposed should act as deterrent to the entity engaging in the conduct in future and therefore be sufficient to have an impact on the entity. This will depend on means which for entities will relate to the turnover and profits of the entity. However, panels should be mindful of the totality of sanctions. In relation to BSB entities, it is likely that individual barristers operating in the entity will also be subject to proven misconduct arising from the same facts. Panels therefore need to be careful about ensuring proportionality in sanctioning.

## Section 8: Costs

- 8.1. Disciplinary Tribunals have the power to award costs to either party but there is no such power under the Determination by Consent procedure. A costs order is not a sanction and therefore not covered in detail in this Guidance. However, general guidance on how to approach applications for costs, where findings of professional misconduct have been made, is set out below.
- 8.2. **Information to inform costs decisions:** under regulation E245 of the Disciplinary Tribunal Regulations, costs schedules are required to be served on parties, and filed with the Tribunal, 24 hours in advance of a scheduled hearing. The respondent should also have been given an opportunity to submit evidence of means prior to the hearing (see also paragraphs 4.10-4.12 above). The Tribunal should therefore have the information it needs to be able to make a decision on whether to grant a costs application by the BSB.
- 8.3. **Process:** the decision on whether the charges are proved will be taken before sanctions and costs applications from the respondent are considered. Following any charges being found proved, Tribunals should give both parties the opportunity to make submissions on sanction and to make any applications for costs. It will be at this stage that any evidence of the means of the respondent will be presented (see paragraphs 4.10-4.12 above). Means will be relevant to both the decision on sanction and the decision on granting a costs application to the BSB, whether in whole or in part.
- 8.4. Tribunal panels should impose a sanction that reflects the seriousness of the misconduct in line with this Guidance. Where a fine is considered an appropriate sanction and a cost order against the respondent is under consideration, panels must take into account the financial means of the respondent and the overall financial liability of the combined financial orders, both costs and fine.
- 8.5. A fine(s) appropriate to the gravity of the misconduct, taking into account means, should be imposed even if this is to the detriment of being able to order that the respondent pays the costs claimed by the BSB. This is because it is important, in

the public interest, that the sanction adequately reflects the proved misconduct taking into account means.

- 8.6. Where the means of the respondent allow, or no submissions have been made in relation to means then, absent any other reason to reduce the claim by the BSB (such as inordinate delay on behalf of the BSB in bringing the case), the BSB's costs should generally be granted.

# **Part 2**

## **Misconduct Groups**

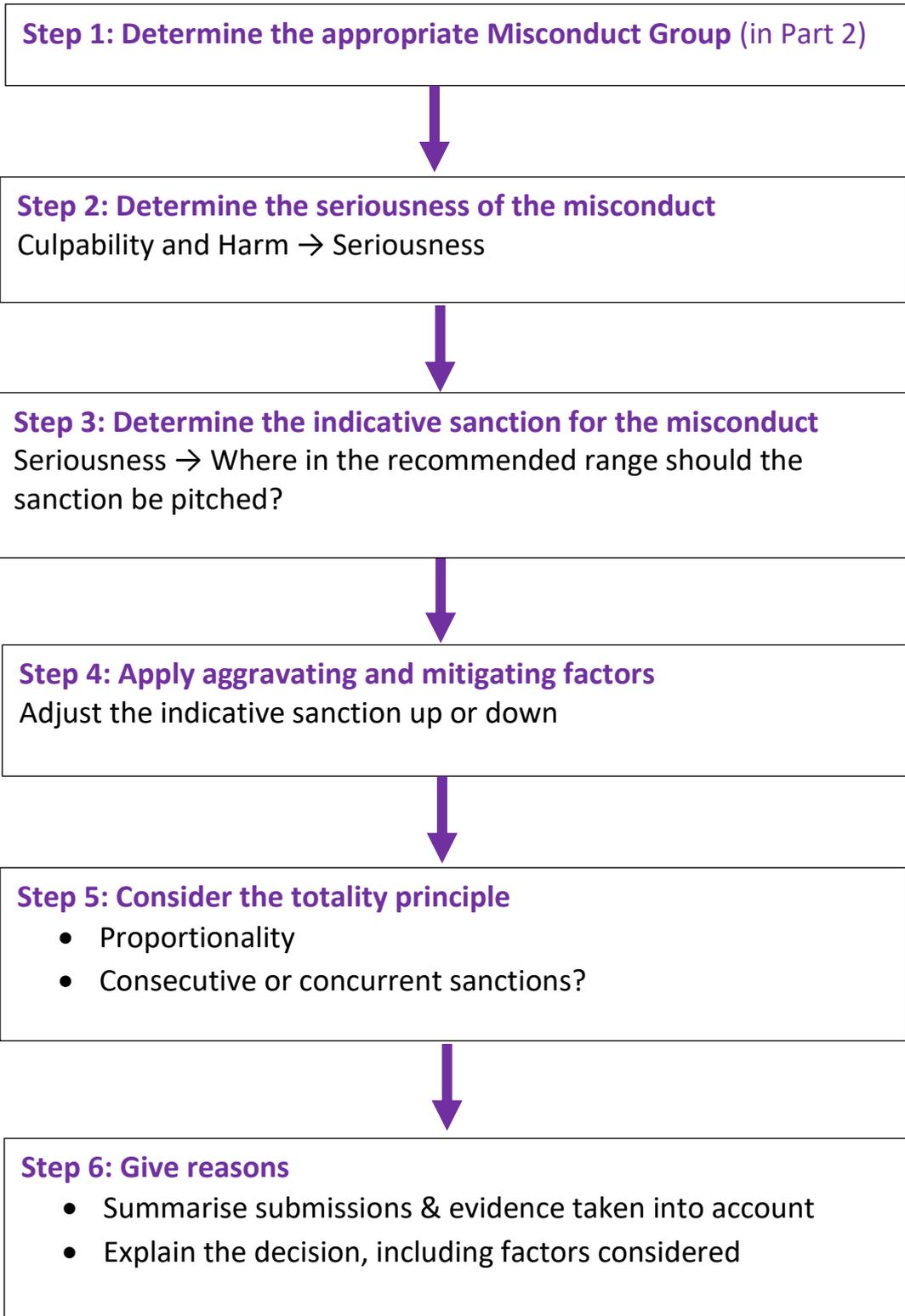
## Contents of Part 2

This section contains a summary flow diagram of the sanctioning methodology and the Misconduct Groups. For more detailed information on the methodology please refer to Part 1, section 4 'Approaches to taking sanctioning decisions'.

The thirteen Misconduct Groups are:

- A: Dishonesty
- B: Misconduct of a sexual nature
- C: Discrimination and non-sexual harassment and bullying
- D: Financial matters
- E: Criminal Convictions
- F: Misleading
- G: Administration of Justice
- H: Formal Orders
- I: Behaviour towards others
- J: The use of social media and other published communications
- K: Obligations to clients
- L: Obligations to the regulator
- M: Conduct relating to status

# Methodology Flowchart



## A: Misconduct Group – Dishonesty

### Description of Group (Step 1)

This Group covers findings of misconduct which involve dishonesty. As has been outlined in Part 1 of this Guidance, any dishonesty on the part of a member of the Bar is inherently serious. Public interest requires, and the general public expects that members of the Bar are completely honest and are of the highest integrity. Dishonesty is incompatible with the duties placed on barristers to safeguard the interests of clients and their overriding duty to the court.

Misconduct within this group covers a range of dishonest behaviours. The examples below are not exhaustive:

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

### Seriousness (Step 2)

Case law indicates that, for legal professionals, proved findings of dishonesty should result in disbarment except where there are exceptional circumstances. In determining whether such circumstances apply, panels should take into account the general factors set out at Annex 2 and the factors listed below, which are particularly relevant in the context of dishonesty.

In deciding whether there are exceptional circumstances that would not result in disbarment the most important factor to be given most weight in determining sanction is the nature and extent of the dishonesty and degree of culpability.<sup>7</sup>

Culpability	Harm
<ul style="list-style-type: none"> <li>• The nature, scope and extent of the dishonest misconduct</li> <li>• Whether the misconduct was a fleeting or momentary act/lapse of judgement or over a period of time</li> <li>• Whether the dishonesty was calculated</li> <li>• Whether the dishonesty was sophisticated and/or involved significant planning</li> </ul>	<ul style="list-style-type: none"> <li>• Whether the dishonesty had an adverse effect on others including any client</li> <li>• The extent to which public confidence in the profession is undermined</li> <li>• Whether the dishonesty had an adverse impact on the administration of justice</li> </ul>

<sup>7</sup> SRA v James EWHC Admin [2018] 2058

<ul style="list-style-type: none"> <li>• Whether, and to what extent, the respondent benefited from, or intended to benefit from, the dishonesty</li> <li>• Whether the dishonesty was targeted at vulnerable persons</li> </ul>	
<b>Indicative Sanctions Range (Step 3)</b>	
<b>Seriousness</b>	<b>Indicative Sanctions</b>
<b>Upper range</b> (significant culpability and significant harm)	Disbarment
<b>Middle range</b> (moderate culpability and moderate harm or significant culpability and limited harm or low culpability and significant harm)	Disbarment
<b>Lower range</b> (low culpability, limited or no harm)	Disbarment
<b>Apply aggravating and mitigating factors (Step 4)</b> <p>Given that disbarment is indicated for all forms of dishonesty, no specific aggravating factors are listed below. Where the assessment of seriousness (Step 2) indicates that exceptional circumstances may apply, panels should take into account the general factors set out at Annex 2 and the factors listed below.</p>	
<b>Aggravating factors</b>	<b>Mitigating factors</b>
	<ul style="list-style-type: none"> <li>• Misconduct was a result of direct or indirect pressure and/or coercion from a third party</li> </ul>
<b>Totality (Step 5)</b>	
<p>Where there are multiple charges arising from one incident, separate incidents, or multiple examples of the same misconduct on different occasions over a period of time panels should ensure that the totality of the sanctions is warranted based on the cumulative seriousness of the charges. Panels will need to decide, where applicable, whether the sanction on each charge should run concurrently or consecutively.</p>	
<b>Reasons (Step 6)</b>	
<p>Panels must give full reasons for the sanction imposed in accordance with the guidance at Annex 3.</p>	

## B: Misconduct Group – Misconduct of a sexual nature

### Description of Group (Step 1)

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

Misconduct within this Group covers a range of behaviours, many of which could amount to criminal offences, whether or not there has been a criminal conviction. The examples below are not exhaustive:

- Unwanted behaviour of a sexual nature, of any kind, that violates a person’s dignity or creates a hostile working environment
- Sexual assault
- Sexual bullying
- Victimising an individual for refusing to engage in activities of a sexual nature
- Sexual misconduct involving the abuse of children

### Seriousness (Step 2)

As well as the general factors affecting culpability and harm set out at Annex 2, panels should also consider the following specific factors which may go towards determining the seriousness of the misconduct within this Group:

Culpability	Harm
<ul style="list-style-type: none"> <li>• Misconduct took place in a professional context</li> <li>• Abuse of trust/power/authority/seniority in a professional context</li> <li>• Misconduct took place in front of others</li> <li>• Specific targeting of an individual</li> <li>• Abuse or exploitation of a vulnerable person or child</li> <li>• Using position to pursue inappropriate relationship</li> <li>• Misconduct directed at a person in a vulnerable situation or place</li> <li>• Misconduct occurred against a background of requests to stop</li> <li>• Intention to humiliate</li> </ul>	<ul style="list-style-type: none"> <li>• Causing fear, humiliation and/or anxiety</li> <li>• Impact on working life/career of those affected by the misconduct</li> <li>• Impact on mental health/wellbeing, whether physical or psychological, of those affected by the misconduct</li> <li>• Injury to feelings</li> <li>• whether the conduct had an adverse impact on the administration of justice</li> </ul>

<ul style="list-style-type: none"> <li>• Administration of, or intention to administer, drugs to the victim</li> <li>• Removal or moving aside of clothes (actual or attempted)</li> <li>• Penetration by body part or other object</li> <li>• Contact with bare skin</li> <li>• Sexual touching (over or under clothing)</li> <li>• Grooming of the victim</li> <li>• Use of violence or threats of violence including use of a weapon</li> <li>• Other degradation, for example recording or photographing the misconduct</li> </ul>	
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### Indicative Sanctions Range (Step 3)

The indicative sanctions range for this group is from over 12 months suspension to disbarment. Panels should consider whether it is appropriate to impose restrictions/conditions on practice in order to protect the public in combination with other sanctions.

Panels have discretion to impose sanctions outside the ranges where there are substantial reasons for doing so and written reasons should be given for such a decision.

Seriousness	Indicative Sanctions
<b>Upper range</b> (significant culpability and significant harm)	Disbarment
<b>Middle range</b> (moderate culpability and moderate harm or significant culpability and limited harm or low culpability and significant harm)	Over 24 months suspension up to 36 months <sup>8</sup>
<b>Lower range</b> (low culpability, limited or no harm)	Over 12 months suspension up to 24 months

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

As well as the general aggravating and mitigating factors set out at Annex 2, panels should note the following specific factors that may be applicable to this group:

<b>Aggravating factors</b>	<b>Mitigating factors</b>
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<sup>8</sup> Where a suspension of more than three years is contemplated, serious consideration should be given to imposing a disbarment

- Placed on Sexual Offenders Register
- Behaviour includes breach of any relevant order (such as restraining order)
- Sharing images/recording of the misconduct
- Misconduct is part of a pattern of behaviour

### Totality (Step 5)

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

### Reasons (Step 6)

Panels must give full reasons for the sanction imposed in accordance with the guidance at Annex 3.

### Notes

Where the respondent is a pupil supervisor, panels should consider whether to notify the BSB or the relevant Authorised Training Provider of any concerns about the respondent's suitability to be a pupil supervisor.

Panels should also consider whether or not it is appropriate for the respondent to be able to practice during any period of registration on the Sex Offenders Register.

## C: Misconduct Group – Discrimination, non-sexual harassment and bullying

### Description of group (Step 1)

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

Misconduct in this Group covers a wide range of behaviours. The examples below are not exhaustive:

- Discrimination, whether direct or indirect, against individuals or groups in the provision of services/allocation of work/treatment of colleagues/employment/recruit
- Failure to make reasonable adjustments
- Complicity in discrimination by others
- Unwanted conduct, which has the purpose or effect of violating an individual’s dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for an individual
- Bullying – offensive, intimidating, malicious or insulting behaviour that undermines, humiliates, denigrates or injures the recipient
- Persistent, unwanted attention to a person
- Behaviour that amounts to stalking e.g. following a person, watching or spying on them or forcing contact with them through any means, including social media.

### Seriousness (Step 2)

As well as the general factors affecting culpability and harm set out at Annex 2, panels should also consider the following specific factors which may go towards determining the seriousness of the misconduct within this Group:

Culpability	Harm
<ul style="list-style-type: none"> <li>• Misconduct took place in a professional context</li> <li>• Abuse of trust/power/authority/seniority in a professional context</li> <li>• Course of conduct over a period of time</li> <li>• Misconduct occurred against a background of requests to stop</li> <li>• Misconduct directed at a vulnerable person</li> </ul>	<ul style="list-style-type: none"> <li>• Causing fear, humiliation and/or anxiety</li> <li>• Impact on working life/career of those affected by the misconduct</li> <li>• Impact on mental health/wellbeing, whether physical or psychological of those affected by the misconduct</li> <li>• Injury to feelings</li> </ul>

<ul style="list-style-type: none"> <li>• Misconduct directed at a person in a vulnerable situation or place</li> <li>• Misconduct took place in front of others</li> <li>• Intention to humiliate</li> <li>• Misconduct motivated by the protected characteristic(s) of the victim</li> </ul>	<ul style="list-style-type: none"> <li>• whether the conduct had an adverse impact on the administration of justice</li> </ul>
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### Indicative Sanctions Range (Step 3)

The indicative sanctions range for this group is from over 12 months suspension to disbarment. Panels should consider whether it is appropriate to impose restrictions/conditions on practice in order to protect the public in combination with other sanctions.

Panels have discretion to impose sanctions outside the ranges where there are substantial reasons for doing so and written reasons should be given for such a decision.

Seriousness	Indicative Sanctions
<b>Upper range</b> (significant culpability and significant harm)	Disbarment
<b>Middle range</b> (moderate culpability and moderate harm or significant culpability and limited harm or low culpability and significant harm)	Over 24 months suspension up to 26 months <sup>9</sup>
<b>Lower range</b> (low culpability, limited or no harm)	Over 12 months suspension up to 24 months

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

As well as the general aggravating and mitigating factors set out at Annex 2, panels should note the following specific factors that may be applicable in this group:

Aggravating factors	Mitigating factors
<ul style="list-style-type: none"> <li>• Misconduct includes breach of any order</li> <li>• Deliberate behaviour for personal gain</li> <li>• Includes element of incitement to others to discriminate against another</li> <li>• Intention to humiliate</li> </ul>	<ul style="list-style-type: none"> <li>• Immediate apology and attempts to remedy harm</li> <li>• Single incident of short duration with low risk of repetition</li> </ul>

<sup>9</sup> Where a suspension of more than three years is contemplated, serious consideration should be given to imposing a disbarment

### **Totality (Step 5)**

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

### **Reasons (Step 6)**

Panels must give full reasons for the sanction imposed in accordance with the guidance at Annex 3.

### **Notes**

Where the respondent is a pupil supervisor, panels should consider whether to notify the BSB or the relevant Authorised Training Provider of any concerns about the respondent's suitability to be a pupil supervisor.

## D: Misconduct Group – Financial matters

### Description of group (Step 1)

This Group covers misconduct arising from barristers’ handling of financial matters, without an element of dishonesty or where dishonesty did not form part of the disciplinary charges. If misconduct in relation to financial matters has been charged as dishonesty, panels should refer to A: Dishonesty. Financial misconduct in non-professional life is likely to fall under H: Formal Orders.

Misconduct within this Group covers, but is not limited to, the examples listed below:

- Handling of client money
- Misconduct relating to fees including overcharging
- Acceptance of referral fees
- Breaches of financial regulations such as money laundering regulations (absent dishonesty)

### Seriousness (Step 2)

As well as the general factors affecting culpability and harm as set out at Annex 2, panels should note the following specific factors which may go towards determining seriousness of misconduct falling in this group.

Culpability	Harm
<ul style="list-style-type: none"> <li>• The respondent was in a position of trust for financial matters</li> <li>• Whether the misconduct was a one-off incident or part of a course of conduct</li> <li>• The misconduct enabled the misuse or misappropriation of funds by others</li> <li>• Whether, and to what extent, the respondent benefited from, or intended to benefit from, the misconduct</li> </ul>	<ul style="list-style-type: none"> <li>• The harm or risk of harm to a vulnerable individual including a financially vulnerable individual</li> <li>• The extent of action required to remedy the consequences of the misconduct</li> <li>• Whether the misconduct had an adverse impact on the administration of justice</li> </ul>

### Indicative Sanctions Range (Step 3)

The indicative sanctions range for this Group starts at a medium level fine and goes up to disbarment in the most serious cases. Panels should consider whether it is appropriate to impose restrictions/conditions on practice in order to protect the public either in combination with other sanctions or as a stand-alone sanction.

Panels have discretion to impose sanctions outside the ranges where there are substantial reasons for doing so and written reasons should be given for such a decision.

### Seriousness

### Indicative Sanctions

<b>Upper range</b> (significant culpability and significant harm)	Suspension of over 12 months to disbarment
<b>Middle range</b> (moderate culpability and moderate harm or significant culpability and limited harm or low culpability and significant harm)	High level fine to suspension of less than 12 months
<b>Lower range</b> (low culpability, limited or no harm)	Medium level fine

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

As well as the general aggravating and mitigating factors set out in Annex 2, panels should note the following specific factors that may be applicable in this group:

Aggravating factors	Mitigating factors
<ul style="list-style-type: none"> <li>• Public funds were involved</li> <li>• Misconduct involved a deliberate disregard of applicable regulations/guidance</li> </ul>	<ul style="list-style-type: none"> <li>• Immediate apology and attempts to remedy harm</li> <li>• Isolated incident with low risk of repetition</li> <li>• Misconduct was a result of direct or indirect pressure and/or coercion from a third party</li> </ul>

#### Totality (Step 5)

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

#### Reasons (Step 6)

Panels must give full reasons for the sanction imposed in accordance with the guidance at Annex 3.

#### Notes

Panels should consider, if the misconduct is related to the provision of public access services, ordering a period of prohibition from accepting public access instructions.

## E: Misconduct Group – Criminal Convictions

### Description of group (Step 1)

This Group covers criminal convictions that do not fall under any other Misconduct Group.

The paramount consideration for the panel when considering cases in this Group is what sanction is necessary for the maintenance of public confidence and trust in the profession, in the light of the offending behaviour and conviction. The sanction should not be a second punishment for the actual criminal offence which has been committed.

Generally, a barrister should not be permitted to resume practice until the satisfactory completion of the criminal sentence.

Misconduct within this group covers, but is not limited to, the examples listed below: In relation to individuals:

- Drink driving
- Dangerous driving
- Drunk and disorderly
- Drug possession and supply

### Seriousness (Step 2)

As well as the general factors affecting culpability and harm as set out at Annex 2, panels should note the following specific factors which may go towards determining seriousness of the misconduct falling in this group.

Culpability	Harm
<ul style="list-style-type: none"> <li>● The seriousness of the offence leading to the conviction</li> <li>● Whether the offence included conspiring with others</li> <li>● Whether the offence involved a victim</li> <li>● Whether the offence was motivated by the protected characteristics of the recipient</li> </ul>	<ul style="list-style-type: none"> <li>● The numbers of people directly affected by the offence</li> </ul>

### Indicative Sanctions Range (Step 3)

The indicative sanctions range for this Group covers a medium level fine through to disbarment. Panels should consider whether it is appropriate to impose restrictions/conditions on practise in order to protect the public either in combination with other sanctions or as a stand-alone sanction.

Panels have discretion to impose sanctions outside the ranges where there are substantial reasons for doing so and written reasons should be given for such a decision.

Seriousness	Indicative Sanctions
<b>Upper range</b> (significant culpability and harm and aggravating factors)	Suspension of over 12 months to disbarment
<b>Middle range</b> (moderate culpability and harm, some aggravating factors)	Suspension of 12 months or less
<b>Lower range</b> (low culpability, limited or no harm and mitigating factors)	Medium to high level fine

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

As well as the general aggravating and mitigating factors set out in Annex 2, panels should note the following specific factors that may be applicable in this group:

Aggravating factors	Mitigating factors
<ul style="list-style-type: none"><li>• Whether the offence was a one off or there is a history of such behaviour</li><li>• Little or no insight into conduct leading to conviction</li><li>• Respondent failed to report the conviction promptly</li></ul>	<ul style="list-style-type: none"><li>• Conviction is spent</li><li>• Evidence of rehabilitation or associated treatment</li></ul>

### Totality (Step 5)

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

## Reasons (Step 6)

Panels must give full reasons for the sanction imposed in accordance with the guidance set out at Annex 3.

## F: Misconduct Group – Misleading

### Description of group (Step 1)

This Group covers all forms of misleading, whether in relation to the court or an individual, and whether in relation to legal proceedings or otherwise. It is intended to cover misleading statements or behaviours which fall short of dishonesty or have not been charged as dishonesty. Where an incidence of misleading is charged as dishonest, panels should refer to A: Misconduct Group – Dishonesty.

Misconduct within this group covers, but is not limited to, the examples listed below:

- Misleading the court
- Making misleading statements to clients
- Withholding information so as to mislead a client
- Misleading clients, or potential clients, about the nature, scope and/or terms on which legal services are provided
- Failing to correct an earlier incorrect statement

### Seriousness (Step 2)

As well as the general factors affecting culpability and harm as set out at Annex 2, panels should note the following specific factors which may go towards determining seriousness of the misconduct within this group.

Culpability	Harm
<ul style="list-style-type: none"> <li>• The nature, scope and extent of the misleading</li> <li>• The misleading was in a professional context</li> <li>• The misleading with a view to gain, whether financial or otherwise</li> <li>• The misleading occurred despite prior warning as to the potential for the matter to be misleading</li> </ul>	<ul style="list-style-type: none"> <li>• The effect of the misleading on any proceedings and/or the administration of justice</li> <li>• The extent to which any misleading has impacted on a client’s choices</li> </ul>

### Indicative Sanctions Range (Step 3)

The indicative sanctions range for this Group starts at a medium level fine and goes up to disbarment in the most serious cases. Panels should consider whether it is appropriate to impose restrictions/conditions on practice in order to protect the public either in combination with other sanctions or as a stand-alone sanction.

Panels have discretion to impose sanctions outside the ranges where there are substantial reasons for doing so and written reasons should be given for such a decision.

### Seriousness

### Indicative Sanctions

<b>Upper range</b> (significant culpability and significant harm)	Suspension of over 12 months - disbarment
<b>Middle range</b> (moderate culpability and moderate harm or significant culpability and limited harm or low culpability and significant harm)	Suspension of 12 months or less
<b>Lower range</b> (low culpability, limited or no harm)	Medium to high level fine

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

As well as the general aggravating and mitigating factors set out at Annex 2, panels should note the following specific factors that may be applicable in this group:

Aggravating factors	Mitigating factors
<ul style="list-style-type: none"> <li>The respondent or their client benefitted, whether financial or otherwise, from the misleading</li> <li>Attempts to conceal the misleading</li> </ul>	<ul style="list-style-type: none"> <li>Immediate apology and attempt to correct a misleading impression</li> </ul>

#### Totality (Step 5)

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

#### Reasons (Step 6)

Panels must give full reasons for the sanction imposed in accordance with the guidance set out at Annex 3.

#### Notes

Acting on a client's instructions should not be considered as a mitigating factor as this runs contrary to the overriding duty to the court.

## G: Misconduct Group – Administration of Justice

### Description of group (Step 1)

This Group is intended to cover barristers’ general duties to the courts and misconduct that impacts on the course of any proceedings including witness handling. If the misconduct relates to dishonesty or misleading, panels should refer to A: Misconduct Group – Dishonesty and F: Misconduct Group – Misleading respectively.

Misconduct within this Group covers, but is not limited to, the examples listed below:

- Failing to comply with directions including timetables for progress of cases
- Wasting the court’s time
- Failing to ensure the court has before it all relevant decisions and legislative provisions
- Failing to observe duties of confidentiality
- Failing to comply with duties of disclosure

### Seriousness (Step 2)

As well as the general factors affecting culpability and harm as set out at Annex 2, panels should note the following specific factors which may go towards determining seriousness of misconduct falling in this group.

Culpability	Harm
<ul style="list-style-type: none"> <li>• Whether the breach of the respondent’s duty to the court was planned or inadvertent</li> <li>• The extent to which the respondent had control over the circumstances giving rise to the misconduct</li> <li>• The degree to which the misconduct was planned</li> </ul>	<ul style="list-style-type: none"> <li>• The impact on proceedings and the extent of any action required to remedy the misconduct</li> <li>• Impact on clients and any loss sustained</li> </ul>

### Indicative Sanctions Range (Step 3)

The indicative sanctions range for this Group covers the range of sanctions from fines to suspension. Panels should consider whether it is appropriate to impose restrictions/conditions on practice in order to protect the public either in combination with other sanctions or as a stand-alone sanction.

Panels have discretion to impose sanctions outside the ranges where there are substantial reasons for doing so and written reasons should be given for such a decision.

### Seriousness

### Indicative Sanctions

<b>Upper range</b> (significant culpability and significant harm)	Suspension of over 12 months
<b>Middle range</b> (moderate culpability and moderate harm or significant culpability and limited harm or low culpability and significant harm)	High level fine to suspension of less than 12 months
<b>Lower range</b> (low culpability, limited or no harm)	Low to medium level fine

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

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

Aggravating factors	Mitigating factors
<ul style="list-style-type: none"> <li>• Misconduct was part of a pattern of behaviour</li> <li>• Failure to engage in action required to remedy the harm caused by the misconduct</li> </ul>	<ul style="list-style-type: none"> <li>• Immediate apology and attempts to remedy harm</li> <li>• Isolated incident in difficult or unusual circumstances</li> </ul>

#### Totality (Step 5)

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

#### Reasons (Step 6)

Panels must give full reasons for the sanction imposed in accordance with the guidance set out Annex 3.

## H: Misconduct Group – Formal Orders

### Description of group (Step 1)

This Group is intended to cover failures to comply with formal orders made at the end of proceedings by any body, tribunal or court which place a personal obligation on a barrister. Where the failure is to comply with directions and orders in the course of proceedings, panels should refer to G: Misconduct Group – Administration of Justice.

Examples of breaches within this group include, but are not limited to, failures to comply with:

- Judgment orders of courts
- Sanction imposed by BTAS Disciplinary Tribunals or the BSB Independent Decision-making Body
- Formal determinations of the Legal Ombudsman

### Seriousness (Step 2)

As well as the general factors affecting culpability and harm as set out at Annex 2, panels should note the following specific factors which may go towards determining seriousness of the misconduct falling in this group.

Culpability	Harm
<ul style="list-style-type: none"> <li>• Whether the misconduct occurred due to a mistake or misunderstanding</li> <li>• Whether the non-compliance with the order or determination was for personal or other advantage</li> <li>• The extent of the non-compliance with the order or determination</li> <li>• The extent of the attempts to comply with the order</li> <li>• Whether the misconduct is due to an inability to comply for good reason</li> </ul>	<ul style="list-style-type: none"> <li>• The extent to which the non-compliance impacts on clients or other individuals</li> <li>• The cost and inconvenience caused to any individual of attempting to enforce compliance</li> <li>• Financial loss caused to any individual</li> </ul>

### Indicative Sanctions Range (Step 3)

The indicative sanctions for this Group range from low level fines through to a suspension of over 12 months. Panels should consider whether it is appropriate to impose restrictions/conditions on practice in order to protect the public either in combination with other sanctions or as a stand-alone sanction.

Panels have discretion to impose sanctions outside the ranges where there are substantial reasons for doing so and written reasons should be given for such a decision.

Seriousness	Indicative Sanctions
<b>Upper range</b> (significant culpability and significant harm and aggravating factors)	Suspension of over 12 months
<b>Middle range</b> (moderate culpability and moderate harm or significant culpability and limited harm or low culpability and significant harm)	High level fine to suspension of 12 months or less
<b>Lower range</b> (low culpability, limited or no harm)	Low to medium level fine
<p><b>Apply aggravating and mitigating factors (Step 4)</b></p> <p>As well as the general aggravating and mitigating factors set out in Annex 2, the panel should note the following specific factors that may be applicable in this group:</p>	
Aggravating factors	Mitigating factors
<ul style="list-style-type: none"> <li>• The order or determination was intended to protect the public</li> <li>• Compliance remains outstanding in whole or in part</li> </ul>	<ul style="list-style-type: none"> <li>• Attempts to remedy harm</li> </ul>
<p><b>Totality (Step 5)</b></p>	
<p>Where there are multiple charges arising from one incident, separate incidents, or multiple examples of the same misconduct on different occasions over a period of time, panels should ensure that the totality of the sanctions is warranted based on the cumulative seriousness of the charges. Panels will need to decide, where applicable, whether the sanction on each charge should run concurrently or consecutively.</p>	
<p><b>Reasons (Step 6)</b></p>	
<p>Panels must give full reasons for the sanction imposed in accordance with the guidance at Annex 3.</p>	

## I: Misconduct Group – Behaviour towards others

### Description of group (Step 1)

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

Misconduct within this Group covers a wide range of behaviours, which will vary in gravity. The examples below are not exhaustive:

- Serious discourtesy and/or rudeness in professional life
- Inappropriately aggressive or threatening behaviour in professional life
- Violent behaviour (non-sexual) towards others, whether or not resulting in a criminal conviction

### Seriousness (Step 2)

As well as the general factors affecting culpability and harm set out at Annex 2, panels should also consider the following specific factors which may go towards determining the seriousness of the misconduct within this Group:

Culpability	Harm
<ul style="list-style-type: none"> <li>• Abuse of trust/power/authority/seniority in a professional context</li> <li>• Misconduct directed at a person in a vulnerable situation or place</li> <li>• Course of misconduct over a sustained period of time</li> <li>• Misconduct directed towards a vulnerable person</li> <li>• Misconduct occurred against a background of requests to stop</li> <li>• Misconduct motivated by the protected characteristic(s) of the victim</li> <li>• Intention to humiliate</li> <li>• Use of weapon</li> </ul>	<ul style="list-style-type: none"> <li>• Misconduct caused humiliation and/or fear</li> <li>• Impact on working life/career of those affected by the misconduct</li> <li>• Injury caused to victim whether physical or psychological</li> <li>• Injury to feelings</li> </ul>

### Indicative Sanctions Range (Step 3)

The indicative sanctions range for this Group covers the full range of sanctions from reprimand through to disbarment. Panels should consider whether it is appropriate to impose

restrictions/conditions on practice in order to protect the public either in combination with other sanctions or as a stand-alone sanction.

Panels have discretion to impose sanctions outside the ranges where there are substantial reasons for doing so and written reasons should be given for such a decision.

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

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

As well as the general aggravating and mitigating factors set out at Annex 2, panels should note the following specific factors that may be applicable in this group:

Aggravating factors	Mitigating factors
<ul style="list-style-type: none"> <li>• Misconduct resulted in a criminal conviction or court order</li> <li>• Previous criminal convictions for similar behaviour</li> <li>• Misconduct includes breach of any order</li> <li>• Lack of co-operation with the police</li> <li>• Conduct directed to public sector workers such as court staff</li> </ul>	<ul style="list-style-type: none"> <li>• Immediate apology and attempts to remedy harm</li> <li>• Response to extreme or sustained provocation</li> <li>• Isolated incident in difficult or unusual circumstances</li> <li>• Element of self-protection or protection of others/property</li> </ul>

#### Totality (Step 5)

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

## Reasons (Step 6)

Panels must give full reasons for the sanction imposed in accordance with the guidance at Annex 3.

## J: Misconduct Group – Use of social media and other communications

### Description of group (Step 1)

This Group covers misconduct arising from inappropriate communications, the content of which is shared, intended to be shared or it was reasonably foreseeable would be shared with a third party. This Group primarily covers inappropriate use of any type of social media e.g. social network and media sharing sites. However, it is not limited to use of such media and covers all forms of communications, e.g. email and text, where the content is shared. The misconduct can occur in communications made by a barrister in both their professional and non-professional life.

Inappropriate communications to one individual which is not shared will fall under other Misconduct Groups depending on the nature of the content, for example: B: Misconduct of a sexual nature; C: Discrimination, non-sexual harassment and bullying or I: Behaviour towards others.

Where the misconduct is of a sexual nature, panels should refer to B: Misconduct of a sexual nature. Where the misconduct amounts to harassment or unlawful discrimination, panels should refer to C: Discrimination, non-sexual harassment and bullying.

Misconduct within this Group may occur within a range of contexts. The examples below are not exhaustive:

- Posting or sharing gratuitously offensive material online
- Making abusive remarks to or about others on social media
- Breaching confidentiality in communications of any kind, including sharing images
- Inappropriate use of social media to approach client/professional colleague outside professional relationship

### Seriousness (Step 2)

As well as the general factors affecting culpability and harm set out at Annex 2 panels should also consider the following specific factors which may go towards determining the seriousness of the misconduct within this Group:

Culpability	Harm
<ul style="list-style-type: none"> <li>• The degree to which the content is abusive/offensive</li> <li>• Extent to which the material is disseminated</li> <li>• Role in escalation of arguments online</li> </ul>	<ul style="list-style-type: none"> <li>• Offence, humiliation or fear caused to a named individual(s) or persons otherwise identifiable</li> </ul>

<ul style="list-style-type: none"> <li>• Deliberate, calculated attempts to offend or being reckless as to whether offence is caused</li> <li>• Content involves a child or other vulnerable person</li> <li>• Persisting in inappropriate use of social media/digital communications even when requested or warned to stop</li> <li>• Repetition or escalation of abusive/offensive comments including in response to others</li> <li>• Misconduct across multiple platforms or means of communication</li> <li>• Misconduct motivated by the protected characteristic(s) of the victim</li> <li>• Intention to humiliate</li> </ul>	<ul style="list-style-type: none"> <li>• Impact on working life/career of those affected by the misconduct</li> <li>• Impact on mental health/wellbeing, whether physical or psychological, of those affected by the misconduct</li> <li>• Potential for damage to a person's reputation</li> <li>• Intrusion into another's private life</li> <li>• Potential for serious damage to public confidence in the profession</li> </ul>
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### Indicative Sanctions Range (Step 3)

The indicative sanctions range for this Group covers the full range of sanctions from reprimand through to disbarment. Panels should consider whether it is appropriate to impose restrictions/conditions on practice in order to protect the public either in combination with other sanctions or as a stand-alone sanction.

Panels have discretion to impose sanctions outside the ranges where there are substantial reasons for doing so and written reasons should be given for such a decision.

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

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

As well as the general aggravating and mitigating factors set out at Annex 2, panels should note the following specific factors that may be applicable in this group:

Aggravating factors	Mitigating factors
<ul style="list-style-type: none"> <li>• Behaviour resulted in a criminal conviction or court order</li> <li>• Behaviour includes breach of any order</li> <li>• Deliberate behaviour for personal gain</li> </ul>	<ul style="list-style-type: none"> <li>• Early recognition of harm caused and efforts to remedy it, e.g. removal/deletion/retraction of content or the issuing of a public apology</li> <li>• Ill health causing confusion or disinhibition</li> <li>• Response to extreme or sustained provocation</li> <li>• Isolated incident of short duration with low risk of repetition</li> </ul>
<h3>Totality (Step 5)</h3>	
<p>Where there are multiple charges arising from one incident, separate incidents, or multiple examples of the same misconduct on different occasions over a period of time panels should ensure that the totality of the sanctions is warranted based on the cumulative seriousness of the charges. Panels will need to decide, where applicable, whether the sanction on each charge should run concurrently or consecutively.</p>	
<h3>Reasons (Step 6)</h3>	
<p>Panels must give full reasons for the sanction imposed in accordance with the guidance set out at Annex 3.</p>	

## K: Misconduct Group – Obligations to Clients

### Description of group (Step 1)

This Group is intended to cover breaches of obligations placed on barristers under the BSB Handbook in relation to their clients. Panels should consider sanctions for other types of misconduct involving interactions with clients by reference to the relevant applicable Group, for example, B: Misconduct Group - Misconduct of a Sexual Nature or F: Misconduct Group - Misleading.

Misconduct within this Group covers, but is not limited to, the examples listed below:

- Failing to comply with client confidentiality obligations
- Late withdrawal
- Accepting instructions when professionally embarrassed e.g. where there is a conflict of interest or the barrister is likely to be witness in the case
- Breach of the public access rules
- Breach of the cab rank rule
- Taking on cases where the barrister lacks competence in the relevant area
- Incompetence
- Delay

### Seriousness (Step 2)

As well as the general factors affecting culpability and harm as set out at Annex 2, panels should note the following specific factors which may go towards determining seriousness of the misconduct falling in this group.

Culpability	Harm
<ul style="list-style-type: none"> <li>• Whether the breach of the obligation to the client was calculated and/or reckless as to the consequences</li> <li>• Whether the motivation for the breach was financial or for other personal gain</li> <li>• Whether the misconduct was motivated by the protected characteristic(s) of the client</li> <li>• Whether the breach involved a level of exploitation of the client</li> <li>• The extent of the risk posed to the client</li> <li>• Whether inadequate administration systems contributed to the misconduct</li> </ul>	<ul style="list-style-type: none"> <li>• The level of distress and worry caused to the client</li> <li>• Inability of the client to find suitable alternative representation</li> <li>• The impact on the client’s case</li> <li>• The impact on any proceedings and/or the administration of justice</li> <li>• The extent of action required to remedy the consequences of the misconduct</li> </ul>

### Indicative Sanctions Range (Step 3)

The indicative sanctions range for this Group covers nearly the full range of sanctions from advice as to future conduct through to suspension over 12 months. Panels should consider whether it is appropriate to impose restrictions/conditions on practice in order to protect the public either in combination with other sanctions or as a stand-alone sanction.

Panels have discretion to impose sanctions outside the ranges where there are substantial reasons for doing so and written reasons should be given for such a decision.

Seriousness	Indicative Sanctions
<b>Upper range</b> (significant culpability and significant harm)	Suspension of over 12 months
<b>Middle range</b> (moderate culpability and moderate harm or significant culpability and limited harm or low culpability and significant harm)	Medium level fine – suspension of less than 12 months
<b>Lower range</b> (low culpability, limited or no harm)	Advice as to future conduct/reprimand – low level fine

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

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

Aggravating factors	Mitigating factors
<ul style="list-style-type: none"> <li>• Seniority of barrister</li> <li>• Length of any delay in carrying out work</li> <li>• Failure to respond to communications</li> <li>• Significant or repeated acts of incompetence affecting proceedings</li> <li>• Lack of co-operation with attempts to remedy the breach</li> <li>• The client was particularly vulnerable</li> <li>• Failure to take responsibility for actions</li> </ul>	<ul style="list-style-type: none"> <li>• Immediate apology to client or others and attempts to remedy harm</li> <li>• Isolated act of inexperienced barrister</li> </ul>

### Totality (Step 5)

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

### Reasons (Step 6)

Panels must give full reasons for the sanction imposed in accordance with the guidance at Annex 3.

### Notes

The workload of the respondent is not a relevant factor to take into account as barristers are required under the BSB Handbook to refuse instructions if they do not have adequate time or opportunity to prepare.

## L: Misconduct Group – Obligations to the Regulator

### Description of group (Step 1)

This Group is intended to cover non-compliance with the formal obligations to the BSB as the regulator. It applies to entities as well as individuals. It is also intended cover co-operation with the Legal Ombudsman which is a requirement under the BSB Handbook. Where “holding out” is charged as misleading panels should refer to F: Misconduct Group – Misleading.

Misconduct within this Group covers, but is not limited to, the examples listed below:

- Holding out as a barrister when not entitled to do so
- Any failure to report information as required by the BSB Handbook e.g. bankruptcy and criminal convictions
- Failure to report misconduct by self or other barristers
- Failure to co-operate with the Regulator including the Legal Ombudsman
- Breach of public access rules
- Failure to report misconduct by self or other barristers
- Breach of practising requirements e.g. failure to obtain a practising certificate, insurance or comply with Continuing Professional Development requirements
- Poor practice administration/management
- Breaches of pupillage advertising/registration/funding requirements

### Seriousness (Step 2)

As well as the general factors affecting culpability and harm as set out at Annex 2, panels should note the following specific factors which may go towards determining seriousness of the misconduct falling in this group.

Culpability	Harm
<ul style="list-style-type: none"> <li>• Deliberate concealment or attempted concealment of misconduct</li> <li>• The duration and scope of non-engagement with the Regulator</li> <li>• Whether there was a foreseeable risk to the public or consumer interest</li> <li>• Whether the conduct was for financial gain</li> <li>• The extent of the delay in making a report and/or providing information</li> <li>• Extent of failures of practice administration/poor management</li> </ul>	<ul style="list-style-type: none"> <li>• Whether the breach harmed or risked harming the public</li> <li>• Whether the misconduct had an adverse impact on a third party</li> <li>• The extent to which the misconduct has caused delay in the Regulator taking action</li> <li>• The extent to which the BSB has had to expend resources on trying to make the respondent meet their obligations</li> </ul>

<ul style="list-style-type: none"> <li>• Whether the misconduct was motivated by the protected characteristic(s) of prospective pupils</li> <li>• Whether pupils were exploited</li> </ul>	
<p><b>Indicative Sanctions Range (Step 3)</b></p> <p>The indicative sanctions range for this Group covers the full range of sanctions from advice as to future conduct/reprimand through to suspensions of less than 12 months. Panels should consider whether it is appropriate to impose restrictions/conditions on practice in order to protect the public either in combination with other sanctions or as a stand-alone sanction.</p> <p>Panels have discretion to impose sanctions outside the ranges where there are substantial reasons for doing so and written reasons should be given for such a decision.</p>	
<p><b>Seriousness</b></p>	<p><b>Indicative Sanctions</b></p>
<p><b>Upper range</b> (significant culpability and significant harm)</p>	<p>Suspension of less than 12 months</p>
<p><b>Middle range</b> (moderate culpability and moderate harm or significant culpability and limited harm or low culpability and significant harm)</p>	<p>Medium – high level fine</p>
<p><b>Lower range</b> (low culpability, limited or no harm)</p>	<p>Advice as to future conduct/reprimand - low level fine</p>
<p><b>Apply aggravating and mitigating factors (Step 4)</b></p> <p>As well as the general aggravating and mitigating factors set out in Annex 2, the panel should note the following specific factors that may be applicable in this group:</p>	
<p><b>Aggravating factors</b></p>	<p><b>Mitigating factors</b></p>
<ul style="list-style-type: none"> <li>• Repeated non-compliance with obligations</li> <li>• Failure to take remedial action when asked by the Regulator to do so</li> <li>• Lack of response to warnings</li> </ul>	<ul style="list-style-type: none"> <li>• The misconduct was unintentional</li> <li>• Attempts made by the respondent to comply</li> <li>• Misconduct occurred some time ago and has not been repeated since</li> <li>• Immediate apology and attempts to remedy harm</li> <li>• Misconduct arose as a result of technology failures outside the respondent’s control</li> <li>• Misconduct due to problems in staffing outside the respondent’s control</li> </ul>

### **Totality (Step 5)**

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

### **Reasons (Step 6)**

Panels must give full reasons for the sanction imposed in accordance with the guidance at Annex 3.

### **Notes**

Failures to report or respond will normally be accompanied by other disciplinary charges and these should be sanctioned under the relevant Misconduct Group.

“Holding out” is the shorthand term to describe a barrister who is not entitled to practise presenting themselves to others in a way that would lead people to believe that they are entitled to practise and offer legal services as a barrister.

## M: Misconduct Group – Conduct related to status

### Description of group (Step 1)

This Group is intended to cover misconduct that relates to barristers using their status inappropriately to influence others.

Misconduct within this Group covers, but is not limited to, the examples listed below:

- Inappropriate mention of a barrister’s professional status or use of Chamber’s letterhead in order to pressurise another
- Using status in non-professional context to intimidate

### Seriousness (Step 2)

As well as the general factors affecting culpability and harm as set out at Annex 2, panels should note the following specific factors which may go towards determining seriousness of the misconduct falling in this group.

Culpability	Harm
<ul style="list-style-type: none"> <li>• Whether the misconduct was planned or inadvertent</li> <li>• Whether the motivation for the misconduct was for financial or other personal gain</li> </ul>	<ul style="list-style-type: none"> <li>• The actual harm caused, including intimidation or financial loss</li> <li>• The misconduct affected the course of action by the other person</li> <li>• The impact on any proceedings and/or the administration of justice</li> </ul>

### Indicative Sanctions Range (Step 3)

The indicative sanctions range for this Group covers the full range of sanctions from advice as to future conduct/reprimand through to high level fines. Panels should consider whether it is appropriate to impose restrictions/conditions on practice in order to protect the public either in combination with other sanctions or as a stand-alone sanction.

Panels have discretion to impose sanctions outside the ranges where there are substantial reasons for doing so and written reasons should be given for such a decision.

Seriousness	Indicative Sanctions
<b>Upper range</b> (significant culpability and significant harm)	High level fine and/or conditions on practising certificate
<b>Middle range</b> (moderate culpability and moderate harm or significant culpability and limited harm or low culpability and significant harm)	Medium level fine and/or conditions on practising certificate

<b>Lower range</b> (low culpability, limited or no harm)	Advice as to future conduct/reprimand to low level fine
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**Apply aggravating and mitigating factors (Step 4)**

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

<b>Aggravating factors</b>	<b>Mitigating factors</b>
<ul style="list-style-type: none"> <li>Lack of response to warnings</li> </ul>	<ul style="list-style-type: none"> <li>Isolated incident in difficult or unusual circumstances</li> <li>Immediate apology</li> </ul>

**Totality (Step 5)**

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

**Reasons (Step 6)**

Panels must give full reasons for the sanction imposed in accordance with the guidance at Annex 3.

# **Part 3**

# **Annexes**

## Contents of Part 3

The annexes are:

- 1: Table of Misconduct Group Sanction Ranges
- 2: General Factors: culpability and harm, aggravating and mitigating factors
- 3: Guidance on writing the 'Report of Finding and Sanction' [to be included in the final Guidance]
- 4: Example wording for sanctions [to be included in the final Guidance]
- 5: Glossary of terms [to be included in the final Guidance]

### Annex 1: Table of Misconduct Group Sanction Ranges

	CPD	Advice as to future conduct / Reprimand	Fine (low)	Fine (medium)	Fine (high)	Conduct of litigation – removal/suspension	Prohibition on accepting public access instructions	Conditions on practising certificate	Suspension or non-renewal of practising certificate – 12 months or less	Suspension or non-renewal of practising certificate – over 12 months	Disbarment
<b>A: Dishonesty</b>											
<b>B: Misconduct of a sexual nature</b>	●					●	●	●			
<b>C: Discrimination, non-sexual harassment and bullying</b>	●					●	●	●			
<b>D: Financial matters</b>	●										
<b>E: Criminal convictions</b>	●										
<b>F: Misleading</b>	●										
<b>G: Administration of Justice</b>	●										
<b>H: Formal orders</b>	●										
<b>I: Behaviour towards others</b>	●										
<b>J: Use of social media and other digital communications</b>	●										
<b>K: Obligations to clients</b>	●										
<b>L: Obligations to the regulator</b>	●										
<b>M: Conduct related to status</b>	●										

## **Annex 2: General Factors**

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

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

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

The factors are not set out in priority order; the importance of any one factor will vary from case to case.

#### **Culpability**

- Whether the misconduct was intentional or reckless
- The respondent's motivation for the misconduct
- Whether the misconduct involved elements of planning
- Whether the respondent attempted to conceal the misconduct and/or lay blame elsewhere
- The extent to which the respondent acted in breach of a position of trust/power/authority
- The extent to which the respondent had control over and/or responsibility for the circumstances giving rise to the misconduct
- The extent to which there was a disparity in seniority or experience between the respondent and the victim
- The extent to which the misconduct occurred due to lack of effective supervision
- Whether the misconduct was sustained/repeated or attempted to be repeated
- Whether the misconduct involved taking advantage, or exploitation, of a vulnerable person
- Whether the respondent caused, encouraged and/or coerced others to be complicit
- Whether the misconduct involved acting in combination with others
- Whether the respondent took a leading role in group conduct
- Whether the respondent put their own interests above that of the client

- Whether the actions of others contributed to the misconduct
- Whether the victim was targeted
- Whether the harm could have reasonably been foreseen
- Extent of the respondent's involvement (if conduct undertaken with others)
- Whether the respondent attempted to prevent reporting of the conduct
- Whether the misconduct involved using a position of actual or perceived power, authority or seniority
- Whether the misconduct involved the commission of a criminal offence (whether or not there has been a conviction)
- Whether the Misconduct was committed inadvertently or through misunderstanding
- Whether the misconduct amounted to, or could have amounted to, the commission of a criminal offence

## **Harm**

- The extent of the actual harm caused
- The risk that further harm could have been caused
- The risk of harm where no actual harm occurred
- The number of people/organisations adversely affected or potentially affected
- The impact on the public confidence in the legal profession
- The harm caused to vulnerable individual(s)
- Whether the misconduct involved, or resulted in, adverse impact on the administration of justice
- The extent of the remedial work required as result of the misconduct
- The duration of the harm

## **Aggravating factors**

- Previous disciplinary finding(s)/criminal conviction(s) for similar offences
- Previous disciplinary findings of any type particularly where the breaches show an unwillingness to comply with the Handbook
- Lack of remorse

- Lack of insight
- Failure to cooperate or engage or act in any other way that frustrates the administration of the disciplinary processes (but see also personal circumstances and health issues mitigation below)
- Failure to attend a Tribunal without a reasonable explanation
- Failure to self-report
- The likelihood of repetition
- Whether drug or alcohol misuse was linked to the misconduct (where linked to the respondent's health this could be a mitigating factor)
- The respondent's level of professional experience
- Misconduct motivated by, or demonstrating, hostility based on a protected characteristic

### **Mitigating factors**

- Whether the respondent admitted the misconduct, particularly at an early opportunity
- Whether the respondent promptly self-reported the misconduct
- Whether the respondent demonstrated genuine remorse
- The extent to which the respondent co-operated with investigation
- Whether voluntary steps were taken, or attempted, to remedy or rectify the breach
- Whether the respondent attempted to prevent recurrence
- Whether the respondent acted having taken professional or expert advice on the conduct
- The respondent's level of professional experience
- Whether the misconduct is unlikely to be repeated
- The respondent's personal circumstances, or health issues, that may have influenced the behaviour e.g. physical or mental health issues, bereavement, relationship breakdown\*
- Previous good character/absence of regulatory findings \*
- Good references (only of limited applicability and very much dependent on the nature of the offence and the role and identity of the referee)\*

*\*These areas of mitigation, particularly in relation to sexual misconduct, discrimination and harassment and the use of violence, need to be treated with caution in the regulatory context.*