



The Bar Tribunals
& Adjudication
Service

The Council of the Inns of Court

Sanctions Guidance Review

Second Consultation

September 2021

About this consultation

This is the second and final consultation arising from the Bar Tribunal and Adjudications Service (BTAS) review of the Sanctions Guidance. The first consultation was carried out in the period 29 April to 14 June 2021. The results of that consultation were reported in a Consultation Response paper issued on 30 July 2021, which can be read here: [BTAS-Consultation-Response-Paper.pdf \(tbtas.org.uk\)](#). The responses to the first consultation were detailed and extremely helpful: they have been used to shape the contents of the draft full Guidance which can be found here: [BTAS-Sanctions-Guidance-2022-Draft-for-Consultation](#), which is now the subject of this second consultation.

Who is it for?

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

BTAS considers it essential that a wide range of interested parties are able to contribute to the contents of the full Guidance. In particular, BTAS wants to ensure that the Guidance properly reflects equality issues and would welcome comments from those representing equality groups as well as individuals who have an interest in, or may be affected by, the Guidance.

What is its purpose?

BTAS is seeking views on the content of the full revised Sanctions Guidance [[BTAS-Sanctions-Guidance-2022-Draft-for-Consultation](#)]. The Guidance will be used to assist the Bar's Disciplinary Tribunals and the Bar Standards Board's Independent Decision-Making Body¹ when deciding the appropriate sanctions to impose following findings of professional misconduct against barristers.

¹ Under the Determination by Consent Procedure

Responses to this consultation will allow BTAS to refine the final terms of the Guidance, which is scheduled to be issued in late December 2021 and will come into force on 1 January 2022. BTAS will consider how the main messages from the revised Guidance can be publicised to the public and the profession when it comes into force.

How long will the consultation run for?

The consultation will run for just over six weeks from **9 September to 21 October 2021**.

We will not be able to grant extensions to the submission deadline given the shortness of time between receiving the responses and the planned implementation date.

How to respond to the consultation

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

By email to consultation@tbtas.org.uk

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

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

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

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

Introduction

1. The Bar of England and Wales comprises approximately 17,000 practising barristers and approximately 54,000 unregistered (non-practising) barristers. It is regulated by the Bar Standards Board (BSB) and all those who are called to the Bar are expected to act in accordance with the provisions of the BSB Handbook (the Handbook) and the Code of Conduct set out in the Handbook. The responsibility for enforcement of the Handbook lies with the BSB as the regulator of the profession. This includes taking disciplinary action where a breach of the Handbook provisions is so serious as to amount to professional misconduct.
2. The average number of barristers subject to disciplinary action for professional misconduct each year is very small. Over the last three years, there were on average only 28² barristers subject to disciplinary action³ each year which resulted in sanctions being imposed. This represents 0.04% of the total number of barristers called to the Bar and 0.16% of the practising Bar. These extremely low numbers are, to a large extent, a reflection of the high standards of the profession, but conversely may also be a reflection of the underreporting of incidents of potential misconduct, particularly in areas such as sexual misconduct, harassment, and discrimination.
3. The BSB's role in enforcing the terms of the Handbook is central to maintaining public confidence in the profession and maintenance of the expected standards. It is also important in helping to deter others from engaging in similar conduct and encouraging reporting of incidents of potential breaches. Therefore, where the BSB has evidence of potential serious breaches of the Handbook, and considers disciplinary action for professional misconduct is necessary, disciplinary charges will be brought for determination by independent tribunals or a panel of the Independent Decision-Making body.

² The average number of cases subject to sanctions was 32 per year because some barristers were the subject of more than one disciplinary case.

³ This includes barristers subject to the sanctions under the Determination by Consent procedure

4. The Bar Tribunals and Adjudication Service (BTAS) is responsible for appointing and administering the independent Disciplinary Tribunals tasked with adjudicating on charges of professional misconduct brought by the BSB. These services have been provided by BTAS since 2013 under a Services Agreement between the BSB and the Council of the Inns of Court.
5. Since its inception, BTAS has provided guidance to Disciplinary Tribunal members on the appropriate sanctions to impose where findings of professional misconduct are made: the “BTAS Sanctions Guidance” (the Guidance). The first version of the Guidance was issued in 2009, prior to the creation of BTAS, and was adopted by BTAS in 2014. The Guidance has since been updated on a number of occasions and has incorporated changes in the BSB’s regulatory arrangements; it is now in its fifth edition. Its substantive contents, including the recommended sanctions, have not been subject to public consultation since 2014. A copy of the current Guidance can be found at <https://www.tbts.org.uk/wp-content/uploads/2019/10/BTAS-Sanctions-Guidance-2019.pdf>
6. BTAS and the BSB recognised in 2019 that a substantive review of the Guidance was required to ensure that it remains relevant and reflects societal views of behaviour by professionals. A review project was therefore set up in April 2020 to take this work forward.
7. The current Guidance is divided into two main parts. Part 1 provides general guidance on the principles related to sanctioning, while Part 2 provides detailed guidance on the indicative sanctions for particular types of misconduct. We indicated in the first consultation that we intended to retain this format and this was generally supported.
8. **The first consultation** (April – June 2021) - The focus of the first consultation was on the contents of Part 2 of the Guidance – indicative sanctions. The areas on which views were sought were:
 - Levels for fines and suspensions

- A clearer structured approach to deciding sanctions
- New “Misconduct Groups” for the indicative sanctions
- Revised approach to recommended indicative sanctions
- Proposed sanction ranges for five of 13 “Misconduct Groups”
- Equality Impacts

9. BTAS received 41 responses, some of which were very detailed. We are very grateful to all those who took their time to express their views. As indicated in the Consultation Response paper, the majority of respondents agreed with the majority of proposals contained in the first consultation. BTAS has therefore proceeded in line with those proposals, retaining the overall structure and the proposed sanctioning methodology. Nevertheless, the consultation responses provided a rich seam of suggestions for adding to and adapting the Guidance. A summary of changes made as a result of the first consultation can be found in Section 1 of this consultation paper.

10. Many responses commented on and supported the BTAS proposal to raise to 12 months suspension the lower end of the indictive sanctions ranges for misconduct of a sexual nature and discrimination, non-sexual harassment and bullying. These ranges now appear in the draft Guidance.

11. **This second consultation** - This consultation builds on the responses received to the first consultation and the full Guidance has been compiled taking into account those responses. The areas on which views are sought in this second consultation are as follows:

- a. Changes made as a result of the first consultation (see Section 1 of this paper);
- b. Contents of the full Guidance (see Section 2 of this paper):
 - i. Contents of Part 1 – General Guidance - particularly the section on “Approach to particular types of misconduct”;
 - ii. Contents of the Part 2 – Misconduct Groups - particularly the eight Groups not covered in the first consultation; and
 - iii. The length of the Guidance;
- c. Equalities issues (see Section 3 of this paper).

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

13. The questions are:

Question 1: Do you consider the specific factors for the 13 Misconduct Groups in Part 2 are appropriate and do you have any suggestions for change?

Question 2: Do you consider that the general factors set out at Part 3 Annex 2 are appropriate and do you have any suggestions for change?

Question 3: Do you consider the sanctions ranges for the additional groups listed above are appropriate and proportionate?

Question 4: Is the length and detail of the Guidance appropriate to support effective and consistent sanctioning decisions?

Question 5: Are there any areas of the Guidance where the content could be reduced, or maybe added to, without impacting on its overall effectiveness?

Question 6: Do you think overall the Guidance as drafted will be beneficial in promoting effective and consistent sanctioning? If not, what areas of the Guidance do you consider should be adapted, amended or deleted to achieve these aims?

Question 7: Are there any issues not covered in the Guidance that you consider should be covered?

Question 8: Do you consider there are adverse implications arising from the Guidance as drafted for any of the protected groups, as defined by the Equality Act 2010, and what do you consider they are?

Question 9: Do you have suggestions about how the terms of the Guidance could address any adverse impacts or better advance equality of opportunity and foster better relationships between the protected groups and others?

Section 1 – Changes made arising from the first consultation

14. The full detail of the changes BTAS proposed to make in light of the first consultation can be found in the Consultation Response paper [[BTAS-Consultation-Response-Paper.pdf \(tbta.org.uk\)](https://www.tbta.org.uk/consultation-response-paper).] and they are not rehearsed here. Set out in the paragraphs below are the main changes that are now included in the full Guidance. At the end of this section, we have also addressed changes that were originally envisaged, and included in the Consultation Response paper, but where on further consideration we now no longer consider they would be beneficial to the overall efficacy of the Guidance.

15. **General: across the Guidance** – detailed changes to the drafting have been made throughout the areas covered in the first consultation. This includes removing text, adjusting it, and making additions. The changes are too numerous and detailed to set out here, but some are outlined in the paragraphs below.

16. **Part 1 Guidance – suggested inclusions:** we have included further information in Part 1 in the following areas:

- How to apply the sanctioning methodology including: application of the culpability, harm, aggravating and mitigating factors; use of factors outside those listed; types of harm; misconduct spanning more than one Group (see Section 3);
- Further guidance on specific issues such as:
 - i. Meaning of vulnerability (see paragraphs 4.1-4.3);

- ii. Making CPD orders and imposing conditions alongside other sanctions (see paragraphs 6.10-6.13 & 6.29-6.33);
- Further guidance on particular types of misconduct:
 - i. Dishonesty and exceptional circumstances (see paragraphs 5.1 – 5.6);
 - ii. Sexual misconduct, discrimination, non-sexual harassment, and bullying (see paragraphs 5.7-5.14).

17. Guidance on sanctioning entities – as originally proposed the Guidance is focussed on sanctioning individuals but we have included, to address consultation responses, a separate section in Part 1 covering BSB-regulated entities.

18. Misconduct Groups – adaptations have been made to specific Groups in Part 2 as follows:

- **General** – we have included in the relevant Groups information on other Groups that might be applicable and the interplay between them;
- **Misconduct of sexual nature** – the relevant factors have been extended, amended, and adjusted to reflect comments and the lower end of the indicative sanctions range has been raised to 12 months suspension;
- **Discrimination and non-sexual harassment** - this Group now specifically includes bullying and the relevant factors have been extended, amended, and adjusted to reflect comments and the lower end of the indicative sanctions range has been raised to 12 months suspension;
- **Use of social media and other digital communications** – the reference to “digital” has been removed from the title so that it is now clear that the Group extends to all forms of communications through which inappropriate content is shared or intended to be shared with another or others.

19. General and specific factors (culpability, harm, aggravating and mitigating)

Numerous comments were received about additions and amendments to both the general (Annex 2 of Part 3) and the specific factors (Part 2 – Misconduct Groups). This included where factors might be transferred from one heading to another e.g. from culpability factors to aggravating factors and vice versa. We have therefore extended and amended the factors in many of these areas. In particular the general factors included in Annex 2, are considerably longer and more detailed, as are the specific factors included under the Groups: “Misconduct of a sexual nature” and “Discrimination, non-sexual harassment and bullying”.

Areas where changes have not been made contrary to BTAS’ response to the first consultation.

20. There were areas where we indicated in the Consultation Response paper that we would make changes to the proposed Guidance in light of responses but, on further detailed consideration, we have decided not to do so. These areas are:

- a. Providing further guidance on where in the fine levels sanctions should be pitched;
- b. How the factors should be used to move a sanction from one sanction level to another; and
- c. More general guidance on where within the ranges, and bands, sanctions should be pitched.

21. The reasons for not making these changes arise from detailed consideration of how we might best address these issues. Consideration was given to adding indicative behaviours that might fall into the ranges and bands. However, it was recognised that it could not be achieved without adding complexity and a level of detail that could result in prescription that would fetter the discretion panels should rightly have to impose the sanctions appropriate in the circumstances of any particular case. Indeed, providing indicative behaviour in each of the bands could undermine the concept that

seriousness is based on an assessment of culpability and harm rather than relying on broad headline descriptions of types of misconduct.

22. The revised Guidance is already more detailed than that provided by other regulators. Our view is that the level of detail provided is sufficient to allow expert and informed professional disciplinary panels to make decisions that are proportionate and appropriate. In particular the additional guidance provided on the application of the general and specific culpability, harm, aggravating and mitigating factors combined with the sanctions ranges and bands and levels of fines, should be sufficient for trained panels to make appropriate decisions.

Section 2 – Contents of the full Guidance

23. The structure of the revised Guidance is based broadly on the structure of the current Guidance as indicated in the first consultation and supported by nearly all those who responded. It is divided into three main Parts: Part 1 – General Guidance; Part 2 – Misconduct Groups; and Part 3 – Annexes.

24. The revised draft Guidance is attached to this paper. Three of the proposed five Annexes in Part 3 have not been included for consultation: Annex 3 - Guidance on writing the 'Report of Finding and Sanction', Annex 4 - Wording of Sanctions, and Annex 5 - Glossary of terms. These will be added when the final Guidance is issued in December 2021.

25. **Part 1 – General Guidance** - This Part is an updated version of Part 1 of the current Guidance incorporating numerous changes and additions arising from the review and suggested in response to the first consultation (see Section 1 above). A new "Section 3: Approach to taking sanctioning decisions" has been added. This section provides guidance on how to apply the more structured methodology, which was supported in the first consultation. "Section 5: Approach to particular types of misconduct", is also new and provides further guidance on issues related to sanctioning for: dishonesty; misconduct of a sexual nature; and discrimination, harassment, and bullying.

26. **Part 2 - The Misconduct Groups** – Part 2 now includes all 13 of the Misconduct Groups proposed in the first consultation. The five Groups covered in the first consultation have been adapted in light of responses (see above Section 1 of this paper). The detailed responses received from the first consultation have been used to inform the contents of the additional eight Groups, which are:

- D: Financial matters
- E: Criminal convictions
- F: Misleading
- G: Administration of Justice
- H: Formal orders
- K: Formal obligations to clients
- L: Obligations to the regulator
- M: Conduct related to status

27. The Indicative Sanctions Ranges for the Groups have been adjusted slightly as follows:

- D: Financial matters – the lower end of the range has been moved down from high level fine to medium level fine;
- G: Administration of Justice - the lower end of the range has been moved down from medium level fine to low level fine;
- H: Formal Orders - the lower end of the range has been moved down from medium level fine to low level fine.

Question 1: Do you consider the specific factors for the 13 Misconduct Groups in Part 2 are appropriate and do you have any suggestions for change?

Question 2: Do you consider that the general factors set out at Part 3 Annex 2 are appropriate and do you have any suggestions for change?

Question 3: Do you consider the sanctions ranges for the additional groups listed above are appropriate and proportionate?

28. **Part 3 – Annexes** – the final version of the Guidance will include five Annexes, but only two are included with this consultation paper: Annex 1: Graph of sanctions ranges and Annex 2: General factors. The former is in same format as set out in the first consultation but, in response to comments, now identifies CPD orders and conditions and restrictions on practice as orders that could be combined with sanctions for misconduct of a sexual nature and discrimination, non-sexual harassment and bullying. Annex 2: General Factors has been revised to include numerous additional factors suggested in response to the first consultation.

29. **Length of the Guidance:** the responses to the first consultation included many detailed suggestions for further guidance that should be included to aid effective decision making. As this paper indicates, we have taken many of these comments on board. However, this has resulted in the full Guidance being much longer than the current version. BTAS is satisfied that all that is included in the proposed full Guidance is necessary and reflects what stakeholders have indicated they consider is required. However, we are conscious that we do not wish to issue Guidance that is unnecessarily lengthy and/or includes detail that may be seen as making it unwieldy. Views on this would be welcome.

Question 4: Is the length and detail of the Guidance appropriate to support effective and consistent sanctioning decisions?

Question 5: Are there any areas of the Guidance where the content could be reduced, or maybe added to, without impacting on its overall effectiveness?

30. BTAS would appreciate any comments about any aspect of the full Guidance but, in particular, answers to the following general questions would be welcome.

Question 6: Do you think overall the Guidance as drafted will be beneficial in promoting effective and consistent sanctioning? If not, what areas of the Guidance do you consider should be adapted, amended, or deleted to achieve these aims?

Question 7: Are there any issues not covered in the Guidance that you consider should be covered?

Section 3 – Equalities Issues

31. In developing the full Guidance, BTAS has taken into account, as far as it is possible, the potential equalities impacts of its terms. It is, however, difficult to make an assessment of what the impacts might be given the relatively small number of cases of professional misconduct that fall to be considered under the Bar’s disciplinary regime each year. As indicated above, over the last three years there were on average only 28 barristers subject to disciplinary action each year that resulted in sanctions being imposed.

32. We have, since the first consultation, and at the suggestion of the Bar Council, looked at whether it is possible to extract data about the protected characteristics⁴ of those who are “victims” of misconduct, such as misconduct of a sexual nature and discrimination, non-sexual harassment, and bullying. However, the BSB only gathers data on the original source of the reported concern. The source could be a chambers, somebody other than the victim (such as a barrister making a report of serious misconduct under their reporting obligations), a member of the public, a solicitor or another source such as a media article.

33. BTAS has been informed by the BSB that the source of a report in relation to sexual misconduct, harassment or bullying is in most cases not the victim and therefore and in such circumstances, it would not hold data on the

⁴ Age, disability, gender reassignment, marriage or civil partnership, pregnancy and maternity, race, religion or belief, sex, sexual orientation

characteristics of victims of proved misconduct. The limited data available would not provide any reliable information and indeed the numbers are so small that there is a risk of identifying the victim.

34. The Bar Council also suggested that we look at the impact on wider society of the impact of sanctions, specifically in relation to sexual misconduct and bullying and harassment. As indicated in the Consultation Response, we have not been able to establish a viable and proportionate way of doing this.

35. Nevertheless, we consider both this and the impact on victims of the revised Guidance are important issues. We therefore intend to ask relevant representative organisations to give their views on potential equality impacts and would appreciate it if those responding to this consultation could respond to questions 8 and 9 in this section. We also intend to hold at least one round table meeting during the consultation period to discuss equality impacts.

Question 8: Do you consider there are adverse implications arising from the Guidance as drafted for any the protected groups, as defined by the Equality Act 2010, and what do you consider they are?

Question 9: Do you have suggestions about how the terms of the Guidance could address any adverse impacts or better advance equality of opportunity and foster better relationships between the protected groups and others?