The Bar Tribunals & Adjudication Service

The Council of the Inns of Court

BTAS Sanctions Guidance Review

Response to the Second Consultation

December 2021

Introduction

1. The second stage of the public consultation on the review of the BTAS Sanctions Guidance ran for six weeks, from 9 September 2021 to 21 October 2021. This report summarises the responses received and the action which BTAS will be taking in response.

Background

2. The Bar Tribunals and Adjudication Service (BTAS) is responsible for appointing and administering the independent Disciplinary Tribunals tasked with adjudicating on charges of professional misconduct brought by the BSB. These services have been provided by BTAS since 2013 under a Services Agreement between the BSB and the Council of the Inns of Court.

3. Since its inception, BTAS has provided guidance to Disciplinary Tribunal members on the appropriate sanctions to impose where findings of professional misconduct are made: the "BTAS Sanctions Guidance" (the Guidance). The first version of the Guidance was issued in 2009, prior to the creation of BTAS and was adopted by BTAS in 2014. The Guidance has been updated on multiple occasions and is now in its fifth edition. The current Guidance can be found at: https://www.tbtas.org.uk/wp-content/uploads/2019/10/BTAS-Sanctions-Guidance-2019.pdf.

4. 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.

5. BTAS and the BSB recognised in 2019 that a substantive review of the Guidance was required to ensure that it remains relevant and reflects societal views of behaviour by professionals. A review project was therefore set up in April 2020 to take this work forward. Progress on this project was unfortunately delayed due to the coronavirus pandemic. It is now intended that the final revised Guidance will be issued in December 2021 and will come into effect at the beginning of 2022.

6. The first public consultation on the review of the Sanctions Guidance ran from 29 April 2021 to 14 June 2021. It focused on the guidance relating to indicative sanctions in Part 2 of the current Guidance.

7. The areas on which views were sought in the first consultation 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

8. The feedback received in the first stage of consultation was detailed and extensive and is summarised in the first consultation response paper. The first consultation paper can be read here: https://www.tbtas.org.uk/wp-content/uploads/2021/04/Sanctions-Guidance-review-Consultation-paper-April-21-FINAL.pdf. The response paper can be read here: https://www.tbtas.org.uk/wp-content/uploads/2021/07/BTAS-Consultation-Response-Paper.pdf.

This Second Stage of Consultation

9. This second stage of public consultation built on the responses received to the first consultation, and the full draft Guidance released with the consultation paper was compiled taking into account those responses.

10. The second consultation paper can be found here: https://www.tbtas.org.uk/wp-content/uploads/2021/09/Sanctions-Guidance-review-Second-Consultation-paper-Sept-21-For-Publication-2.pdf.

11. The draft Guidance released with the consultation paper can be read here: https://www.tbtas.org.uk/wp-content/uploads/2021/09/BTAS-Sanctions-Guidance-2022-Draft-for-Consultation-For-Publication.pdf.

12. The areas on which views were sought in this second consultation are as follows:

- Changes made as a result of the first consultation (Section 1 of the consultation paper);
- Contents of the full Guidance (Section 2 of the consultation 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;

- Equalities issues (Section 3 of the consultation paper).

13. Nine questions were asked in this second consultation. These were:

    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?

14. We received 10 responses and are very grateful to all those who took their time to express their views.

15. The responses received came from:

- One BTAS panel member;
- Two regulators:
    - General Medical Council;

    - Solicitors Regulation Authority;
- Six Bar representative or campaigning groups:
    - Association of Regulatory and Disciplinary Lawyers;
    - Bar Council;
    - Behind the Gown;
    - Black Barristers Network;
    - Chancery Bar Association;
    - Family Law Bar Association;
- One legal community support charity: LawCare.

16. Not all respondents answered all questions.

17. Some responses provided general comments rather than (or in addition to) direct replies to the nine consultation questions. Where such comments are relevant to specific questions, they have been included in the summary of responses to those questions.

Overview

18. The majority of respondents gave wholly or mostly positive feedback on the Guidance in response to all questions which they answered. Most respondents suggested some additions or amendments to one or more aspects of the Guidance.

19. This paper groups the feedback received under five themes:

    - Culpability, harm, aggravating and mitigating factors (questions 1 and 2)
    - Sanction ranges (question 3)
    - Length and detail of the Sanctions Guidance (questions 4 and 5)
    - Efficiency, consistency, and suggested changes to the Guidance as a whole (questions 6 and 7)
    - Equality impacts (questions 8 and 9)

20. BTAS's response to the comments is also grouped by theme and set out at the end of each section.

Culpability, harm, aggravating and mitigating factors (questions 1 and 2)

21. Respondents who expressed opinions in response to questions 1 and 2 generally agreed with both the general factors in Annex 3 to the draft Guidance and the group-specific factors in Part 2. Some suggestions were made that additional factors should be added or that existing factors should be amended or removed.

Suggested additional factors (specific and general)

22. An additional mitigating factor for Group J: "Use of social media and other communications" was suggested by the Bar Council: "*The public interest in freedom of expression and the right to receive and impart information, including whether the material highlighted is a matter of public interest*." The Bar Council's response explained that this factor should be included to take into account the right to freedom of expression under Article 10 of the European Convention on Human Rights, and that the Guidance should address how the balancing of competing rights should be approached.

23. It was also suggested that "*planning*" should be included as a culpability factor in Group B: "Misconduct of a sexual nature". While acknowledging that the factor already features in the list of general culpability factors, Behind the Gown argued that its inclusion as a group-specific factor for misconduct of this nature would increase the likelihood of panels taking into account premeditation in a way that affects the sanction given.

24. LawCare stressed that culpability, harm, aggravating and mitigating factors should be considered not only in relation to the respondent themselves, but also with regard to the entity and environment in which they were working at the relevant time. For example, factors that should be considered included whether the environment was toxic, whether the respondent was subjected to bullying, discrimination or harassment, and whether there was effective supervision and measures to mitigate the negative effects of the type of work on the respondent.

25. LawCare also noted that, while there are factors in the Guidance referring to the vulnerability of those affected by misconduct, the respondent themselves may also be vulnerable (e.g. a pupil who is overloaded and has poor supervision arrangements may be vulnerable and this situation may lead them to cover up a mistake for fear of the consequences).

Comments relating to specific factors

26. The Association of Regulatory and Disciplinary Lawyers (ARDL) queried the meaning of the harm factor "*adverse impact on the administration of justice*" in Group B: "Misconduct of a sexual nature" and Group C: "Discrimination, non-sexual harassment and bullying". It was said that it was unclear from the Guidance what circumstances might lead to this factor being applicable in this context.

27. Further, the Family Law Bar Association (FLBA) expressed the view that the culpability factor *"the extent to which the content is abusive/offensive*" in relation to Group J: "Use of social media and other communications" is problematic, as it involves a subjective element. It said that it would be difficult for panels to determine how abusive or offensive content is across various cases on a consistent basis. The FLBA in fact suggested that the whole of Group J should be removed from the Guidance, as it would seem all misconduct falling under this group would also come under another group. It also considered that the description and examples provided for this group could place an inappropriate fetter on respectful debate and dialogue on controversial topics. This was said to be due to the level of emphasis placed in the Guidance on whether offence is caused.

28. In another comment relating to Group J: "Use of social media and other communications", the General Medical Council (GMC) suggested that the group-specific harm factor "*potential for serious damage to public confidence in the profession"* should be amended to "*the impact on the reputation of the profession of the conduct on social media*". It was said that this would then be relevant to the consideration of the effect on public confidence in the profession, the protection of which is part of the overarching objective of the Guidance.

29. The GMC queried whether contextual factors such as staffing problems and technology failures – which are listed as specific mitigating factors in Group L: "Obligations to the Regulator" – should be potentially applicable to all types of misconduct.

30. It was also suggested by the GMC that it would be helpful for a specific section to be included in the Guidance which deals with how to consider remediation and insight ("*lack of insight"* is a general aggravating factor in the Guidance). This section would include guidance on how cultural differences and personal factors such as health may affect how insight is demonstrated. The response also emphasised the difference between a professional demonstrating "*genuine insight*" and simply stating that their conduct was wrong. The GMC agreed that insight, remediation and personal mitigation will have less impact in certain types of cases (such as sexual misconduct, discrimination and harassment, and violent misconduct).

31. The ChBA said that the third-from-last bullet point in the list of general culpability factors (i.e. "*Whether the misconduct involved the commission of a criminal offence (whether or not there has been a conviction)"*) could be deleted, and instead the final bullet point could be amended to read, "*Whether the misconduct amounted to, or could have amounted to, the commission of a criminal offence (whether or not there has been a conviction)*". It also suggested that the harm factor "*The duration of the harm*" should include "*the potential for further harm to be sustained*".

General comments about factors

32. More generally, concerns were expressed by the GMC that there was some duplication between the group-specific factors for one or more groups and the general factors, albeit with different wording being used. The examples given included factors on the themes of "*abuse of trust/power/ authority/seniority*", "*whether the misconduct involved a vulnerable individual*", and "*whether the misconduct was planned, repeated or sustained or an isolated incident/momentary lapse of judgment*". It said that this created a risk of the same factors being weighed twice in decision making, affecting the proportionality of the resulting sanctions.

BTAS response

33. BTAS acknowledges that Article 10 rights of freedom of expression are an essential factor when considering issues of inappropriate use of social media. However, we do not consider this needs to be covered in the Guidance. The balancing exercise referred to by the Bar Council and FLBA would have been carried out at the findings stage when determining whether there has been a breach of the BSB Handbook sufficiently serious to amount to professional misconduct. A minor change to the Introduction has been made to emphasise that the Guidance is not concerned with the decisions at the findings stage (when determinations are made as to whether the professional misconduct charges have been proved).

34. A wider theme that came out of consultation responses was the repetition of some general factors in the specific Group factors (as covered under responses to other questions below and by the Bar Council and GMC in relation to these questions). Views on whether this is appropriate were mixed, with some accepting the need for emphasis of certain general factors within the Groups but with more suggesting that this is confusing and could run the risk of double counting of factors. On balance we consider the risks highlighted by the latter view are real and outweigh the original intention of adding emphasis to some general factors by including them as specific factors albeit slightly reworded. We have therefore amended, in relevant places, the

specific factors to avoid this repetition and will not be including "planning" in Group B: "Misconduct of a sexual nature".

35. *We have noted the points made by LawCare about ensuring that the respondent's work environment and personal vulnerability are included in the factors. An amendment has been made to the general mitigating factors to reflect the former and reference to the latter has been included in Section 4: "Meaning of vulnerability".*

36. *We note ARDL's comment about including the impact on the administration of justice as specific factor in Groups B and C. While we consider there could be circumstances where this is relevant, in line with the approach outlined above we have removed this from the two Groups as it appears under the list of general harm factors.*

37. *The issue of whether there should be a separate Group to cover the misuse of social media was considered in detail as part of the first consultation process and the decision was taken to retain it. The responses to the second consultation covering this issue have not added any additional points that would lead us to revisit this decision. We will monitor how the Group is used in practice (see paragraph 93) and consider whether this decision needs to be reviewed in the future. FLBA are concerned that the description of this Group may fetter debate and dialogue, however, as indicated at paragraph 33 above, these are matters that would have been considered at the findings stage when weighing the evidence. We have removed the reference to "serious damage to public confidence" as a specific harm factor in this Group as it is included in the general harm factors (see paragraph 34).*

38. *We agree with the GMC that issues of technology failure and staffing problems as mitigating factors have a wider applicability than just "Obligations to the Regulator" but do not agree that such factors are relevant to all Groups. We have amalgamated these two factors and included the revised factor, where appropriate, in other Group sections. We have also adopted the suggested change to the general factors regarding commission of criminal offences and made a small change to the "duration of harm" factor.*

39. *We note the comments made by the GMC regarding further guidance on remediation and insight, but we consider given the extensive length of the Guidance and the information already included, a further detailed section covering this area is not necessary. However, it will be covered in training, and we will consider, as part of our monitoring exercise, whether more detailed guidance is needed in the future (see paragraph 93).*

Sanction ranges for the additional misconduct groups (question 3)

40. Almost all responses to this question indicated broad agreement with the sanction ranges for the additional groups (i.e. Groups 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"; and M: "Conduct related to status"). Some respondents also made observations or suggestions about the sanctions ranges for other misconduct groups, which have been summarised below.

Comments on sanction ranges for the additional misconduct groups

41. The Chancery Bar Association (ChBA) argued that, in relation to Group H: "Formal Orders", disbarment might be warranted in the most serious cases (such as deliberate refusal to pay a £20,000 fine from a Disciplinary Tribunal), even where there is no proven dishonesty. Expanding the sanction range for this group to include disbarment was said to be justified because such serious cases of misconduct of this kind would bring the profession into disrepute. Additionally, the response from ARDL raised a query over whether disbarment should be an available sanction for breaches of rules relating to client confidentiality or conflicts (in Group K: "Obligations to clients") if such breaches are intentional, repeated, or carried out for gain.

42. ARDL also commented that the sanctions range for some groups, including Group K: "Obligations to clients" (which ranges from advice as to future conduct to suspension of over 12 months), might be too wide to be helpful to panels. Similarly, the GMC observed that Group J: "Use of social media and other communications" has a very wide sanctions range (starting at advice as to future conduct and ending at disbarment). It suggested that this might be remedied by narrowing the scope of the misconduct group and queried whether "*misconduct motivated by the protected characteristic(s) of the victim*" should lead to the behaviour being dealt with under Group C: "Discrimination, non-sexual harassment and bullying" instead.

43. The starting point of the sanctions range for Group E: "Criminal convictions" is a medium level fine. The Solicitors Regulation Authority (SRA) explained that its current approach to certain criminal convictions differs from this starting point, as a first-time drink driving conviction with no aggravating factors and appropriate mitigating factors would result in a lesser sanction than a fine (such as a warning or rebuke). This approach was adopted following the results of its 2015 public consultation, "A

Question of Trust", which showed that the public were "*less concerned about cautions or convictions for certain types of conduct outside of practice such as driving with excess alcohol*". The SRA noted this in light of the reference in the Guidance to disciplinary sanctions being necessary for the maintenance of public confidence and trust, rather than being intended as a second punishment.

44. The range of sanctions for criminal conviction cases was also commented on by ARDL. It said that whether a custodial sentence was imposed should be a relevant consideration affecting the disciplinary sanction in criminal convictions cases. Reference was made to the judgment in *SRA v Farrimond* [2018] EWHC 321 (Admin) where Sir Brian Leveson stated: "*In my judgment, it is beyond argument that a solicitor sentenced to any substantial term of imprisonment should not be permitted to remain on the Roll even if suspended indefinitely*". Behind the Gown argued that, further, any criminal conviction should result in a suspension for the barrister receiving it. Allowing a barrister to continue to practise (e.g. by imposing only a fine) was felt to raise justified concerns about public trust and accountability, especially for barristers practising criminal law. An analogy was implied between this and job application forms which require applicants to declare any criminal convictions they may have, potentially preventing applications from those with convictions from progressing.

Comments about the sanction ranges for other groups

45. While the range for misconduct group B: "Misconduct of a sexual nature" begins at suspension of over 12 months, the GMC considers that that the inherent seriousness of the behaviour in most sexual misconduct cases means that the most serious sanction is usually appropriate (being erasure in the case of GMC registrants). However, it acknowledged that there are some cases where suspension may be appropriate. Similarly, the Bar Council indicated that disbarment should be an indicative sanction included in the middle range for this misconduct group – it suggested that the middle range should read, "from 24 months' suspension to disbarment".

46. The Bar Council also said that the indicative sanction for the middle range within Group C: "Discrimination, non-sexual harassment and bullying" should read "from 24 months' suspension to disbarment".

47. The Bar Council suggested that it may be better for Group I: "Behaviour towards others" not to include violent behaviour, and that violent behaviour could be placed in a separate misconduct group of its own. The GMC suggested that the wide sanction range for Group I: "Behaviour towards others" could mean that violent or abusive

behaviours which would currently fall within this group could result in too low a sanction. It was proposed that this might be avoided by putting violent and abusive conduct in a separate group of its own, for which one might expect the usual sanction to be suspension or disbarment.

General comments about sanction ranges

48. ARDL expressed concerns about the possibility of disproportionality between the sanctions imposed under different misconduct groups. The examples given were a 12-month suspension as a starting point for sexual misconduct involving low culpability and limited harm, in contrast with lower indicative sanctions for other types of conduct traditionally considered "very serious", e.g. in the context of barristers' dealings with their clients and the Court.

BTAS response

49. *We have considered the suggestions for changing the ranges for the additional Groups that were not covered in the first consultation. In relation to Group H: "Formal Orders", we accept that there may be egregious examples of conduct falling within this Group. However, most incidents are unlikely to warrant a sanction greater than the current upper end and the Guidance allows for panels to sentence outside the range where there is good reason to do so. In contrast, we are persuaded that the range for Group K: "Obligations to Clients" should extend to include disbarment as we can see that such a sanction may be the appropriate where, for example, there has been a breach of client confidentiality for financial gain. While the range now covers the full extent of sanctions available, this is reflective of the wide spectrum of conduct that could fall within this Group. We recognise that this is the position with several of the Groups but believe panels will be able to sanction effectively within the wide ranges by following the methodology set out in the Guidance.*

50. *We have also considered whether, as suggested by the SRA, the range for Group E: "Criminal Convictions" should include warnings and reprimands (noting that Behind the Gown was of the view that the range should start at a suspension from practise). Having reflected on the SRA's research, we remain of the view that the low end of the range should be a fine, but that it should start at a low level fine rather than a medium level.*

51. *In response to the comment by ARDL regarding the implications of custodial sentences for criminal offences on sanctioning, we have added this to the specific aggravating*

factors for Group E: “Criminal Convictions” and also included reference to it in the general guidance under “Criminal convictions/behaviours”.

52. *We have considered carefully the comments made by the Bar Council, and the allied comments from the GMC, regarding the extent of the middle range for Group B: “Misconduct of a sexual nature”. We accept that limiting the middle range to 36 months suspension from practise may not be appropriate where, for example, there is high culpability and low harm. We have therefore, as suggested, changed the middle range to 24 months suspension up to disbarment. We have also made the same change to the middle range of Group C: “Discrimination, non-sexual harassment and bullying” for the same reason.*

53. *We are not proposing to create a separate Group for violent or abusive behaviour. This issue was addressed under the first consultation in which we recognised the arguments are finely balanced. However, we acknowledge the use of violence is not explicitly referenced as a culpability factor in Group I: “Behaviour towards others” and we have remedied this.*

Length and detail of the Sanctions Guidance (questions 4 and 5)

54. Multiple respondents remarked on the length of the draft Sanctions Guidance. However, this was not necessarily considered to be negative. One respondent said that, while the draft Guidance is significantly longer and more detailed than previous versions, this is necessary in order to achieve the Sanctions Guidance’s purposes. The ChBA described the Guidance as “effective, if long”. Another respondent commented that they would not wish to see the Guidance become any longer, but that the necessary balance has been struck between providing guidance and being overly prescriptive.

55. However, ARDL raised concerns that the length of the Guidance could lead to extensive submissions at hearings, while Behind the Gown proposed some changes which would reduce the length of the document. Suggested amendments included: insert the flowchart from page 55 after page 19 as an illustration of the methodology set out in Section 3; annex Section 4 (which deals with “other important issues” such as the meaning of vulnerability, the use of character evidence, and special considerations in criminal convictions cases); and annex Section 8 (which deals with costs).

56. The FLBA considered that, while the Guidance would be helpful to panels determining sanction, its length and complexity would make it generally inaccessible for the public. Consequently, it recommended that a public summary of the Guidance should be produced, as well as documents setting out the purpose of the Guidance, what it is and is not for, how regulation of the profession works, and how the Guidance dovetails with the Code of Conduct in the BSB Handbook.

BTAS response

57. In light of the responses to this question, we do not propose to make any changes to the Guidance solely to reduce its length. We have considered whether to move some of the sections in the main Guidance to annexes. This would not reduce the overall length. Most respondents consider the proposed structure will be effective and we will therefore retain it. We will, however, keep this under review.

58. We do not consider separate summary Guidance should be produced for other audiences as this could be confusing. The new Guidance will be posted on the BTAS website, and we will consider what introductory information might be appropriate to place the Guidance in context.

Efficiency, consistency, and suggested changes to the Guidance as a whole (questions 6 and 7)

59. Respondents generally agreed that the Guidance would be beneficial in promoting effective and consistent sanctioning. There were also several positive comments about how feedback given in the first stage of consultation had been taken into account in the production of the draft Guidance; one respondent said that "*the document is comprehensive, it has been written in a way that has taken into account a large amount of feedback and should meet the desired objectives*". However, most respondents had at least one suggestion for an amendment or addition to the Guidance, and some of these are set out below. (Suggested changes which fit more appropriately under another heading in this paper have been included under that other heading instead of here.)

60. Some responses pointed out typographical or formatting errors – these observations have been gratefully noted.

Scope and titles of misconduct groups

61. The ChBA suggested that the Guidance should make clear that Group K: "Obligations to clients" would also cover breaches of obligations to potential clients (e.g. a breach of the cab rank rule).

62. The Black Barristers Network stressed that cases of discriminatory social media and other communications should be dealt with under Group C: "Discrimination, non-sexual harassment and bullying" (as opposed to Group J: "Use of social media and other communications").

63. The FLBA said the Guidance should make clear that encouraging another person (e.g. a clerk) to discriminate, harass or bully would fall within the scope of Group C: "Discrimination, non-sexual harassment and bullying".

64. Meanwhile, the SRA suggested that in some instances of bullying – currently included in Group C: "Discrimination, non-sexual harassment and bullying" – the 12-month starting point for that group might be considered disproportionate to the behaviour. It therefore proposed that bullying should be dealt with under Group I: "Behaviour towards others" instead.

65. The Bar Council expressed the view that the scope of Group I: "Behaviour towards others" should be clarified, specifically so that it is clear what types of conduct would fall within the definition of "discourteous" behaviour. It noted that the nature of a barrister's role is such that they may often have to be confrontational, direct or challenging, in a way which may make others uncomfortable (e.g. in cross-examination, in correspondence with opponents, etc).

66. The ChBA suggested clarifications to the titles of some misconduct groups to make clearer what types of conduct they cover. For instance: Group M: "Conduct related to <u>use of status as a barrister</u>" in place of Group M: "Conduct related to status"; Group H: "<u>Failure to comply with</u> formal orders" instead of Group H: "Formal orders"; and Group F: "Misleading <u>the Court and others</u>" rather than simply Group F: "Misleading". It was also said that the title of Group L: "Obligations to the Regulator" might be a slight misnomer, as some obligations to actual and potential clients, or potential pupils, also fall within the group.

Additional sanctions or ancillary actions to be considered

67. Behind the Gown suggested that the possibility of imposing continuing professional development (CPD) requirements and conditions on practice should be expressly referred to in the "notes" section of Group B: "Misconduct of a sexual nature". This is because they are new to the Sanctions Guidance and so should be made as visible as possible, to ensure panels harness their use effectively to mitigate risks surrounding a barrister's return to practice after a suspension. It was also suggested that examples of conditions on practice and CPD requirements should be included in the Guidance to "*add tangibility*" to these sanctions and increase transparency about how they may be used. Examples of conditions on practice which were given included removal of pupil supervisor status and removal from the rape and serious sexual offences (RASSO) CPS list.

68. The FLBA suggested that there should be greater emphasis in the Guidance on referrals regarding concerns about a respondent barrister's role as a pupil supervisor. Their suggestions for doing this covered: including Authorised Training Providers in the relevant title of the Guidance on this subject; referring to this power in all Misconduct Groups; referrals being made in relation to all respondents given that they may seek to become a pupil supervisor in the future; and a presumption of referrals in relation to Groups B, C and I as well as consideration of interim referrals for those Groups. They also suggested that when considering conditions on a respondent's practising certificate panels should take into account the nature of the work undertaken by the respondent and their contact with vulnerable people.

Additional considerations affecting sanctioning decisions

69. LawCare's response raised issues surrounding the effect of a toxic working environment on mental health, competence, and the ability to make ethical decisions. It referred to several recent cases, including *SRA v Sovani James*, in which toxic working environments significantly influenced the actions of the legal professionals involved. The response explained that LawCare's "Life in the Law" project shows that legal professionals who experience bullying, discrimination or harassment, who are Black, Asian or from another minority ethnic background, who identify as having a disability, or who are aged between 26 and 35, have a higher risk of burnout compared to other groups and may be more impacted by certain working practices in the profession.

70. The ChBA suggested that the impact upon a barrister's clients and court commitments may be a relevant consideration when a panel is contemplating a potential

suspension. This might apply where, for example, the administration of justice would be adversely affected by the barrister being prevented from fulfilling commitments in a particularly complex or long-running case, or for reasons relating to available time or client funds. It was acknowledged, however, that only in exceptional circumstances should court or client commitments act as an impediment to suspension.

71. The FLBA suggested that the Guidance should set out the need to consider the type of work carried out by the respondent in the context of imposing conditions on practice – for instance, in the context of family law work, it may sometimes be appropriate to impose a condition prohibiting direct contact with children.

Other comments

72. The ChBA noted that lists within the Guidance are described as being non-hierarchical in some instances but not in others. It suggested that it should be made clearer whether a hierarchy is intended in any of the lists or whether the non-hierarchical approach is to be taken throughout the Guidance.

73. Amendments to the Guidance proposed by ARDL included replacing reference to sanctions acting as a "*deterrent*" with more positive wording such as "*promoting high standards*", and altering the wording of paragraph 3.35, which says that sanctioning outside the recommended ranges should be exceptional. "Exceptional" was felt to be too high a threshold, potentially discouraging panels from departing from the recommended ranges even in appropriate cases. Instead, it was suggested that the Guidance should state that panels may only depart from the recommended ranges "for good reason". ARDL's response also noted that, while punishment is not the main purpose of disciplinary sanctions, Lord Bingham in *Bolton v The Law Society* [1994] 1 WLR 512 considered that it could be one of its purposes. Other comments included: inserting a reference to character evidence also being relevant to propensity in dishonesty cases; that sanctions can legitimately be imposed on the basis of a conviction; and that panels should be careful about not making findings that a criminal offence has occurred where there is no criminal conviction.

74. With regard to the descriptors for the different bands within each misconduct group, one respondent questioned whether "low culpability and significant harm" could legitimately be considered equivalent to "high culpability and low harm", since it may be purely through luck and circumstance that only a low level of harm was caused by the respondent's conduct.

75. Amendments suggested by the FLBA included changing the wording of paragraph 1.4 to clarify that reasons must be given for all sanctioning decisions (i.e. not only those where there is a departure from the Guidance).

76. Finally, it was suggested that a record should be kept of any lessons learned whilst the Guidance is being used by panels. This could then be referred to for the purpose of future reviews and revisions.

BTAS response

77. We note the suggested changes to the Guidance as summarised above and have made the following amendments:

- *General Guidance*
  - *i. made it clear that reasons should be given for all sanctioning decisions not just those where there is a departure from the Guidance*
  - *ii. made it clearer that the lists of factors in the Guidance are non-hierarchical*
  - *iii. made it clear that conditions can include restricting a respondent's ability to act as a pupil supervisor*
  - *iv. inserted a footnote in the character evidence section referring to such evidence also being relevant to propensity in dishonesty cases at the findings stage*
  - *v. included a caution for panels about not making findings that a criminal offence has occurred where there is no conviction*
- *Groups B, C and I – now include a note emphasising the powers to impose restrictions and conditions including on a respondent's ability to act as a pupil supervisor*
- *Group C – included encouraging another person to discriminate in the description of the conduct falling within the Group*
- *Group F – the title has been changed to "Misleading the Court and others"*
- *Group H – the title has been changed to "Failure to comply with formal orders"*
- *Group K – added reference to "potential clients"*
- *Group L – included impact on clients/potential clients as a harm factor*
- *Group M – the title has been changed to "Conduct related to use of status as a barrister"*

78. In relation to the Bar Council's comment about defining "discourteous", on reflection we have decided to remove reference to discourtesy in the Guidance given the overlap in meaning with "rudeness". We consider rudeness sufficiently covers the conduct intended to fall within Group I.

79. *We do not think there needs to be any amendments made in relation to discrimination in social media as it is made in clear in Group J: "Use of social media and other communications", that such conduct should be dealt with under Group C "Discrimination, non-sexual harassment and bullying". Nor are we persuaded that bullying should be removed from Group C and put in Group I; "Behaviour to towards others". We considered this issue as part of the first consultation and were of the view that the overlap with bullying and harassment warranted the behaviours being included in the same Group.*

80. *In relation to the points the FLBA made about the use of the power to refer concerns about pupil supervisors, we agree with the suggestion to change the section title and as indicated above (at paragraph 77) have emphasised the use of conditions in relation to pupil supervisors in Groups B, C and I. We also agree that the nature of the respondent's work should be taken into account when considering conditions on practising certificates. Relevant amendments have been made. The issue of whether an interim referral should be made is a matter for the BSB and is not a sanctions issue.*

81. *We note Law Care's important points and have where relevant amended the Guidance to reflect them (see paragraph 35 above).*

82. *In relation to the ChBA's concerns about the impact of suspensions on clients, we agree that client commitments should not act as an impediment to imposing suspensions. There may be circumstances where a delay in a suspension might be needed to protect client interests. However, we do not consider amendments need to be made to the Guidance to reflect this. Suspensions of under 12 months do not come into effect immediately and only do so after the appeal period has elapsed or an appeal concluded. Suspensions over 12 months will normally be subject to an order for the BSB to suspend the respondent's practising certificate immediately. The Tribunal has power to delay this action by a short period to take into account any undue prejudicial impact on clients.*

83. *We have considered ARDL's point about replacing the word "deterrent" with "promoting high standards". "High standards" are included in the purposes of sanctioning under "Maintaining high standards of behaviour and performance at the Bar" but we have amended this purpose to include "and promoting". We have, however, decided to retain the separate purpose of deterrence. We agree with ARDL that the threshold for departing from the recommended sanctions ranges, which is currently set at "exceptional", is too high and that "for good reason" would be more appropriate. We have therefore made relevant amendments to the Guidance.*

84. *We note the concern expressed by one respondent that "low culpability and significant harm" and "high culpability and low harm", may not be legitimate equivalents because*

the extent of harm may potentially be a matter of luck. We do not think this is the case because the general harm factors include the risk of harm where no actual harm has occurred. However, we have included in the factor related to the duration of harm, the additional words "or potential". We have also emphasised in the general Guidance that potential harm should be considered when assessing the level of harm.

85. The suggestion of keeping a record of lessons learnt is dealt with below at paragraph 93.

Equality impacts (questions 8 and 9)

86. Two respondents identified potential adverse implications arising from the draft Guidance. Those were: a possible tension between the rights of protected groups and other individuals' rights of free speech; that the indicative sanction of 24 to 36 months' suspension for the middle range in groups B: "Misconduct of a sexual nature" and C: "Discrimination, non-sexual harassment and bullying" is insufficiently punitive; and that it is not currently sufficiently clear that misconduct motivated by a protected characteristic of the victim is expected to attract a greater sanction than misconduct which is not motivated by a protected characteristic.

87. Additionally, the Bar Council said that discrimination based on other protected characteristics should not be treated differently to sexual misconduct.

88. Behind the Gown considered that question 8 (regarding any adverse implications of the Guidance for protected characteristic groups) may be better answered once the Sanctions Guidance is in effect, by collecting and analysing data to identify any discrepancies in the sanctions imposed. Action may then be taken to ensure the Guidance and its application are properly "calibrated", if the data shows differences on the basis of gender, age, race, disability or other protected characteristics.

89. Concerns about panels' understanding of discrimination, particularly in relation to race, were raised by the Black Barristers Network. It was said that issues surrounding discrimination and racial discrimination in particular may need to be spelled out more clearly in the Guidance, and that panels should also have training in dealing with these kinds of misconduct cases.

90. The FLBA emphasised the importance of ensuring that those who are vulnerable can properly participate in proceedings, with measures in place to facilitate this where

needed. It said that such measures are essential for the Guidance to be effective and achieve its underlying purpose.

BTAS response

91. *In relation to the issues of balancing rights of protected groups and rights of free speech, these are matters to be considered at the findings stage when determining whether professional misconduct has been proved. As indicated above (see paragraph 52), we have amended the middle range for both Groups B and C to include disbarment. We do not consider it is necessary to amend the Guidance in relation to conduct motivated by a protected characteristic of the victim as this is included, where relevant, in the specific culpability factors. If the factor is present, it would increase the seriousness of the conduct and thereby indicate a greater sanction.*

92. *We agree with Behind the Gown that any adverse implications arising from the Guidance must be monitored to identify any discrepancies in sanctions. For further details about this, see paragraph 93 below. We also agree with the Black Barristers Network that it is essential for panels to understand discrimination. However, this is not a matter to be covered in the Sanctions Guidance but is the subject matter of training and materials. We agree with the FLBA that ensuring those who may be vulnerable can properly participate in proceedings is essential. There are already measures in place to assist with this, such as BTAS' vulnerable witness policy and the provisions in the Disciplinary Tribunal Regulations for special measures. However, we will continue to work with the BSB to enhance and improve the arrangements.*

Monitoring

93. A theme across the responses to the second consultation was, rightly, the need to monitor the implementation and effectiveness of the revised Guidance. BTAS will be doing this via several different means. Feedback will be obtained from all panel members following each hearing where sanctions are imposed on the use of the Guidance and lessons to be learnt. We will also monitor sanctions imposed for consistency and we will work with the BSB, who hold respondents' equality data, to monitor the equality impacts of applying the revised Guidance. Revisions will be made to the Guidance as and when required and a formal review of the revised Guidance in light of the monitoring information will be carried out after two years. We consider this is a reasonable period given the number of Tribunal cases heard by BTAS.

Conclusion

94. BTAS is very grateful to all of those who have taken the time to comment in detail to both the first and second consultations. The production of the final version of the revised Guidance has truly been a collaborative effort and this has contributed enormously to developing what we hope is fair, robust and comprehensive Guidance.

95. The intention is that the Guidance will be published in December 2021 and come into force on 1 January 2022.