Response to Bar Standards Board consultation by the South Eastern Circuit

1. This is a response on behalf of the South Eastern Circuit ("SEC") to the Consultation by the Bar Standard Board ("BSB") on proposed amendments to the BSB's Enforcement Regulations in Part 5 of the BSB Handbook.

2. The South Eastern Circuit is the largest of the six geographical Circuits that make up the Bar of England and Wales and represents over 2,000 employed and self-employed members of the Bar with experience in all areas of practice. The South Eastern Circuit stretches from Canterbury and Lewes in the South to Norwich in the North and from Ipswich in the East to Reading and Oxford in the West. The Circuit is a representative, educational and social organisation. Members of Circuit include those who are in employed practice, but the majority of Circuit members are self-employed barristers.

3. This consultation response strives to reflect the experience and concerns of barristers. Whilst it is recognised that many will not find themselves needing to trouble themselves with the enforcement regulations, it is important nonetheless that all regulations, rules and practices are fair. Whilst we support the aims that the BSB seeks, namely to enhance the effectiveness and efficiency of enforcement, we consider that some of the proposals are founded in a misplaced drive for efficiency, without proper thought as to other steps that could be taken to achieve improved efficiency without compromising on fairness. We encourage the BSB to strive to ensure that resolution for those subject to action before the BSB is far swifter than it currently is.

4. Our approach:

    a. Where we agree with the proposal and adopt the rationale for the proposal as set out by the BSB, we have simply answered "yes".

    b. Where we agree with the proposal in principle but consider that there should be further thought given as to how that proposal is brought into effect, we have answered yes and then provided further commentary.

    c. Where we disagree with the proposal, we have answered no, and explained the rationale of our disagreement

5. For ease of reference we have adopted the numbering of the questions at the close of the consultation document.

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1. Do you agree with our proposal to defer the point at which detailed, written allegations are formulated and sent to the barrister for comment to later in the investigation when relevant information has been gathered? If not, why not?

   Yes. We note that the barrister will still receive correspondence which will notify them of the fact of an investigation, together with a broad summary of the potential breaches that have been identified and the relevant underlying facts. Whilst they will be informed that no response is required at that stage and that the potential breaches currently identified by the BSB may develop or change as the investigation progresses, we suggest that the barrister should be entitled to voluntarily provide a response at that stage, if they wish.

2. Do you envisage any issue (legal or practical) with our proposal to introduce the new approach to the communication of detailed, written allegations, before any change to the regulations?

   No.

3. Do you agree with our proposal to introduce powers to add to, or amend, the written allegation(s), without an opportunity for further comment from the barrister, in the circumstances described in Proposal 2? If not, why not?

   No. There is no good reason why the barrister cannot be asked for their views prior to any amendment, irrespective of whether it is considered minor or a mere technicality. The solution for any purported delay is to provide a strict timeframe for any response.

4. Do you agree with the introduction of a power to add allegations of non-cooperation during an investigation, without requiring an opportunity for further comment from the barrister? If not, why not?

No, as above, there is no good reason why the barrister cannot be asked for their views prior to any amendment or additional allegation being added. The solution for any purported delay is to provide a strict timeframe for any response.

5. Do you agree that staff should be given the power to refer all types of criminal convictions cases directly for disciplinary action? If not, why not?

   Yes.

6. Do you agree with the proposal to allow a single member of the Independent Decision-Making Body the power to determine whether a request for reconsideration meets the criteria? If not, why not?

   No. In our view, having a single member of the IDB decide whether the reconsideration grounds are met is unjust especially where there appears no right of appeal from that single decision maker. The decision should be taken by a Panel comprising at least three individuals to ensure balance and to avoid any unconscious bias or the like.

7. Do you agree with our proposal to amend the exceptions to the general duty of confidentiality imposed on the BSB to clarify the BSB's ability to make disclosures where necessary to further an investigation? If not, why not?

   No. We consider that disclosure being necessary to "further an investigation" is non-specific and too broad in scope. There may be legitimate investigative steps that are needed, but in our judgment, there should be the safeguard of a proper process where either the barrister consents to the disclosure or permission is obtained from an independent decision maker. We note that on any view this is intended to be a "*clarification*" of the existing policy, and therefore any reform should not lead to a derogation from the duty of confidentiality.

8. Do you agree with our proposal to introduce an overriding objective into the Disciplinary Tribunals Regulations? If not, why not?

   Yes.

9. Do you have any observations on our proposed formulation for an overriding objective?

   No.

10. Do you agree with our proposal to introduce a power for BTAS to regulate its own procedure in individual cases, strictly in accordance with the Disciplinary Tribunals Regulations and the proposed new overriding objective? If not, why not?

    Yes. We consider that being able to be proactive and flexible will be to the benefit of all parties. It would also align with other disciplinary tribunals that have comparable powers embedded in their regulatory frameworks (e.g. SDT, CILEX, GMC). However, as noted there would need to be careful guidance given to ensure consistency.

11. Do you agree with our proposal to give BTAS responsibility for case management, including the setting of case management directions and the power to list a case management hearing at any time? If not, why not?

    Yes, subject to the barrister being able to seek to vary the date.

12. Do you agree that certain case management decisions can be delegated to the BTAS executive? If not, why not?

    Yes.

13. Do you agree with our proposal to clarify the timing of when a sanction imposed by the Disciplinary Tribunal comes into effect and that this is at the conclusion of any appeal period? If not, why not?

    Yes.

14. Do you agree with our proposal to widen the Disciplinary Tribunal's power to impose an immediate suspension or conditions, pending any appeal?

Yes

15. Do you agree with our proposal to amend the Disciplinary Tribunals Regulations to clarify that the Disciplinary Tribunal may hear representations from the BSB on the issue of sanction? If not, why not?

Yes, but with two caveats. First, our experience is that other regulators do not properly consider the appropriate sanction available and regularly seek the most serious sanction possible. The BSB should therefore carefully consider the appropriate sanction with a view to assisting the tribunal. Second, we would suggest that the BSB should be required to provide a written note on sanction in advance of the hearing so that the barrister has fair warning of the BSB's position.

16. Do you agree with our proposal to allow service by email where a barrister's email address is known to the BSB, without requiring the consent of the barrister? If not, why not?

No. Consent should be required before email is used. There is a risk of email being quarantined or being too large to be delivered. There may be GDPR risks where clerks or other members of staff such as IT technicians have access to email addresses of Counsel on servers. A barrister may have been suspended from chambers without access to the relevant email address. The BSB should therefore obtain consent.

17. Do you agree with our proposal to clarify the Disciplinary Tribunal Regulations relating to the BSB's entitlement to claim costs relating to the conduct of disciplinary proceedings? If not, why not?

Yes, and we strongly agree with the proposed policy which is set out in the consultation document that the BSB will not seek to recover costs against a barrister where they could have been incurred internally in comparable circumstances. All costs should of course be reasonable and proportionate irrespective of the stage at which they are incurred.

18. Do you agree with our proposal to clarify the BSB's right to appeal in cases where a charge is only partially dismissed? If not, why not?

Yes.

19. Do you agree with our proposal to introduce a presumption in favour of anonymity in disciplinary proceedings for any witness making an allegation of a sexual or violent nature? If not, why not?

No, we agree with a presumption in favour of anonymity for witnesses who make allegations of a sexual nature, but we are unclear why the scope needs to be broader than the same. We suggest that anonymity follows Parliament's determination on this by aligning presumption with the Sexual Offences (Amendment) Act 1992 and that the BSB is provided with a power to apply for restrictions in other serious cases by application of s.46 of the Youth Justice and Criminal Evidence Act 1999.

20. Do you agree with our proposal to simplify the grounds for referral to an interim panel and the imposition of interim orders? If not, why not?

Yes.

21. Do you agree with our proposal to broaden the power of the Chair of the Independent Decision-Making Body to impose an immediate interim suspension? If not, why not?

Yes.

22. Do you agree with our proposal to streamline and simplify the listing process for hearings? If not, why not?

Yes.

23. Do you agree with our proposal to remove the power given to panels under the ISDRs to refer cases directly to a Disciplinary Tribunal? If not, why not?

Yes.

24. Do you agree with our proposal to allow the BSB the right to request a review of an interim order? If not, why not?

Yes.

25. Do you agree with our proposal to allow both parties to make representations in relation to an interim order review request? If not, why not?

Yes.

26. Do you agree with our proposal to allow Disciplinary Tribunal panel to consider requests to review an interim order as part of the substantive hearing? If not, why not?

Yes.

27. Do you agree with our proposal to re-brand the fitness to practise regime to a "health" regime and to make consequential amendments to the regulations to align with that re-branding? If not, why not?

No. This "re-branding" appears unnecessary and a waste of time and expense. 'Health regime' sounds like a gym membership. 'Fitness to Practice' or 'Fitness to Practice on health grounds' is more appropriate.

28. Do you agree with our proposal to amend the threshold for referral into the health process by removing the requirement for incapacitation? If not, why not?

Yes.

29. Do you agree with our proposal to introduce an explicit duty for BTAS to convene a panel, fix a hearing date and notify both parties of the meeting date, following the referral of a barrister to a health panel by the BSB? If not, why not?

Yes.

30. Do you agree with our proposal to give the BSB the power to agree undertakings before and instead of a referral being made to a health panel? If not, why not?

Yes.

31. Do you agree that six months is no longer an appropriate time limit to impose on fixed term suspensions or disqualifications that may be imposed by health panels? If not, why not?

No. We see no good reason to extend the period beyond six months, or indeed, making it without restriction. A six-month period provides for a sufficient period for review and provides focus to all concerned.

32. Do you prefer Option 1 or Option 2 and why? If you prefer neither option, please let us have your views on any alternative formulations that we should consider.

We would merge the options, with 36 months being the maximum that can be imposed, but the panel adopts the test in Option 1 when determining length.

33. Do you agree with our proposal to introduce powers for health panels to review a barrister's health and ability to practise before they resume practice, to ensure there are no ongoing public protection or public interest concerns? If not, why not?

Yes.

34. Do you agree with our proposal to introduce a power for health panels to impose interim conditions (in addition to the existing power to impose an interim suspension or disqualification) at a preliminary meeting to protect the public or in the public interest? If not, why not?

Yes.

35. Do you agree with our proposal to simplify the rights to review and the review process under the regulations? If not, why not?

Yes.

36. Do you agree with the introduction of a three-person panels for all disciplinary tribunals? If not, why not?

No. In our view there should be five person panels for appropriate cases where suspension of more than 12 months and disbarment are realistic possibilities, or the case involves factual and/or legal complexities. The cases that often appear before these tribunal are sensitive and factually complex. The panel should be as broad as possible. We do not accept that practical difficulties and delays are a sufficient cause to cut panel numbers. The answer is to recruit more panel members. Further, with a larger decision-making body, the impact of any one person's unconscious bias can be diluted and checked by other members.

37. Do you agree with our proposal for panels to have a legal (not necessarily barrister) majority, rather than a lay majority? If not, why not?

No. Panels need to have not only the public's confidence but also the profession's confidence. See above.

38. Do you agree with altering the composition of IDB panels considering enforcement cases from five to three-person panels, with a lay majority? If not, why not?

No, please see above in respect to answer 36.

39. Do you agree with our proposal to change the existing requirements for a panel chair to a requirement for a legally qualified chair with at least 15 years' practising experience? If not, please indicate why this criteria is insufficient?

No. With respect, the number of years one has been practising is not an indicator of merit or ability. Length of service should not be seen as a sufficiently good or reliable indicator for suitability as a chair. We recognise that by removing the requirement to have a Chair who is a Judge or King's Counsel may provide a greater equality of opportunity, including for women and those from minority ethnic group, but that proper desire should not come at the expense of having a King's Counsel or Judge as the chair. King's Counsel has the kitemark of excellence having been through a rigorous and demanding selection process. A chair should have suitable and sufficient experience of chairing hearings. They should be able to command the confidence of both the public and the profession. For example, should a senior barrister with greater experience than the Chair, or a King's Counsel find themselves before a tribunal both the barrister and the public would perceive this as perverse, namely a junior member of the profession trying a senior member of the profession. The public may believe that the tribunal chair is susceptible to influence by the more senior barrister/King's Counsel, and it is only fair that a senior member of the profession's fate is determined by at least their equivalent in seniority to achieve fairness and respect. One of His Majesty's Counsel (King's Counsel) and/or a member of the Judiciary achieves that aim. Unsuitable candidates chairing important hearings lacking in experience and seniority within the profession would inevitably lead to more appeals by both barristers and the BSB which causes delay, uncertainty and additional expense.

40. Do you agree with our proposal to replace the role of a clerk in disciplinary tribunals with that of a Panel Secretary who will be a BTAS employee? If not, why not?

Yes.

41. Do you agree with our proposal to change the composition of panels in health proceedings? If not, why not? If you do, do you prefer option 1 or option 2?

Yes, on balance, given the unique nature of health proceedings, we can see the force in having only three members on a panel, and a smaller tribunal may be more comforting for a barrister when considering sensitive issues related to their health.

We consider option 1 is appropriate as there should remain a legally qualified chair and we agree that a medical advisor to support and assist the panel in health cases is a proportionate and helpful addition.

42. Do you agree in principle that the point of publication of the fact that disciplinary proceedings are underway should be brought forward? If not, why not?

No. We are not persuaded that bringing forward the point of publication promotes transparency and ensures that the public is informed earlier about disciplinary cases. The comparator with crime is misguided. The CPS do not as a matter of course publish charging decisions. The present course of a convening order being issued 14 days before the Tribunal hearing and, once it is issued, details of the hearing being posted on the BTAS website is proportionate and sufficient.

43. If the point of publication is brought forward, do you prefer option 1 or 2 and why? Please explain why.

The benefit of option 2 is that it would allow BTAS and the parties to engage in initial case management in private, during which any preliminary issues which may also be relevant to the issue of publication, may be considered before setting directions.

44. What are the circumstances in which you think the rights of a barrister will outweigh the principles of transparency such that publication will not be appropriate?

a) In all circumstances where the health or personal safety of the registrant is at risk; otherwise

b) Circumstances where publication would amount to a disproportionate infringement on the rights of the registrant, having regard to:

i. The impact on the personal and professional life of the registrant;
ii. The nature and severity of the allegation; and
iii. The intention of the registrant to remain on the register.

45. Do you agree with our approach to holding administrative sanctions and appeals in private? If not, why not?

Yes.

46. Do you agree that determinations by consent should continue to be held in private? If not, why not?

Yes.

47. Do you agree that interim suspension hearings should continue to be held in private (unless the barrister requests a public hearing)? If not, why not?

Yes.

48. Do you prefer Option 1 (that all case management and interlocutory application hearings are generally held in public) or (Option 2 (that the first case management hearing is in private but generally all further hearings will be in public unless the Tribunal orders otherwise)? Please explain why.

Option 2 – as at the first case management hearing, sensitive and personal matters may need to be raised.

49. Do you agree that substantive disciplinary tribunal proceedings should remain in public? If not, why not?

Yes, although there should be a power for a properly made application for any hearing or hearings to be held in private.

50. Do you agree with our approach to holding all fitness to practise hearings in private, subject to the barrister's right to request a public hearing? If not, why not?

Yes.

51. In what circumstances should the outcome of fitness to practise/health decisions be published?

None.

52. Do you agree with our proposal not to amend the regulations to address the issue of the media and non-party access to documents, but to work with BTAS in the future to produce guidance on the approach to such issues? If not, why not?

Yes.

53. Do you have any comments or views in relation to our assessment of the equality impacts of our proposals? Where possible, please provide evidence.

We have no comments to make.

54. Do you have any comments or views on the potential data protection and privacy issues raised by the proposals? Where possible please provide evidence.

We have no comments to make.

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