

Amendments to the Disciplinary Tribunal Regulations

For approval by the Legal Services Board

This application is made in accordance with the requirements set out in the Legal Services Board's (LSB) Rules for Rule Change applications. The Bar Standards Board (BSB) wishes to provide the information below to support its application.

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Details of proposed alteration

1. This application seeks the approval by the Legal Services Board (“LSB”) of amendments to the Disciplinary Tribunal Regulations, which feature at part 5 of the BSB Handbook (“The Handbook”) and consequential changes to the Complaints Regulations, Interim Suspension and Disqualification Regulations and the Definitions section.
2. The changes are designed to modernise and streamline the disciplinary procedure. These are intended to address various issues in the application of the current regulations that were identified as part of a comprehensive review.

Details of the current situation

3. Disciplinary matters are on the whole dealt with under the Disciplinary Tribunal Regulations (“The Regulations”). These regulations set out the powers and functions of the Disciplinary Tribunal (“The Tribunal”) and processes to be followed when dealing with allegations of professional misconduct.
4. The Regulations in their current form have been in place since 2009 and have not been subject to a comprehensive review since then. However, they have been amended in part on several occasions: in February 2012 to bring them in line with the provisions of the LSA; in January 2014 to incorporate minor changes arising from the introduction of the Handbook (which replaced the Code of Conduct 8th Edition); and more recently, in January 2015, to reflect our extended jurisdiction to regulate entities.
5. The Regulations and their application have not been subject to any general criticism from either the public, the profession or the courts and in practice work well. However, there has been comment in two recent court cases about specific aspects of the Regulations. The BSB also recognises that some aspects of the regulations contain some areas of unnecessary complexity and potentially inefficient procedures.
6. As part of the review of the existing regulations, a detailed analysis of the existing Regulations took place with those involved in, and affected by, the disciplinary system. The process also included a benchmarking exercise with other regulators. Over 60 issues were identified that have been discussed and, where appropriate, addressed in the revised Regulations. That said, the fundamental process of the Tribunal, along with much of the content, remains unaltered.

Outcomes achieved by the revised Regulations

7. The revised Regulations are designed to achieve the following outcomes:
 - Full clarity of process for those affected by the Disciplinary Tribunal Process;
 - Increased protection for vulnerable witnesses;
 - A more proportionate and streamlined approach to the steps before and after the hearing; and
 - Increased public protection and promotion of adherence to professional principles through the possibility of marking a breach of the BSB Handbook that does not amount to professional misconduct.

Rationale for the alterations

8. The existing Regulations have been in place since 2009 and have not been substantively revised since then. There are a number of points that have come to light, as part of the joint party working group review, the benchmarking exercise, day to day practice, cases considered by the High Court and the consultation process.
9. In particular, it was noted that:
 - The terminology did not reflect other regulatory practice or the reality of how decisions were exercised in the process;
 - The “Directions” stage was overly complex and caused delay in the progress of matters before the Tribunal;
 - The current Regulations did not reflect those of other regulators in relation to vulnerable witnesses, in that there is no provisions in relation to them;
 - With the increased possibility of persons without legal qualification being subject to disciplinary action, there was a need for greater clarity of process;
 - There was a gap in powers of disposal if a Tribunal considered that a matter breached the BSB Handbook but did not amount to professional misconduct;
 - The power to impose deferred sentences within the current Regulations was overly complex and disproportionate; and
 - The current procedures relating to the publication of findings and how sentences enacted was overly complex and disproportionate.

Nature and effect of proposed changes

10. The BSB has rewritten the Regulations for clarity. It therefore applies for the LSB to approve the entirety of Part 5, section B of the BSB Handbook along with the other consequential alterations to the other sections of the Handbook that arise in light of this. Given the number of alterations, these have not been set out individually. However, a copy of the Current Disciplinary Regulations is attached at Annex B, with the proposed revised Regulations at Annex A.
11. The consequential alterations are highlighted at Annex C.
12. Overall, the contents of the Regulations remain the same, save for a simplification of language. The more substantive changes have been summarised below. The references to any specific regulations below are those within the revised Regulations, except where specified.

Changes to terminology

13. As noted above, it is recognised that the terminology used within the existing Regulations is “criminal” in context for example “defendant” is not one used in the majority of professional regulators and has been replaced with “respondent”.
14. Additionally, where functions are purely administrative, the revised Regulations have addressed this, for example replacing references to the “President” [of the Council of the Inns of Court] with “BTAS” as the body responsible for carrying out these functions. Such alterations mean that the revised Regulations reflect the current practice, making the roles and responsibilities clearer to those involved in the disciplinary process.

“Directions Stage” (rE106-129)

15. It was recognised that this stage of the current Regulations was unnecessarily complicated, leading to delay and also that the Tribunal had little scope to address instances where parties had not complied with the directions.
16. As a result of this, the concept of “standard directions” which can be agreed has been retained, albeit with an alteration to require expressly the respondent to identify any matters in issue. However, where parties can agree a departure from these, the directions can still come into effect without the endorsement of a Directions Judge, save for certain instances which impact upon the powers conferred on BTAS (rE111). This serves to streamline the process so that the Tribunal can address its resources appropriately to cases where the directions cannot be agreed between parties. The rules have also been simplified by removing the need for such agreed directions to be approved, thereby simplifying the process.
17. In addition to the above, the revised Regulations now include the power for the Tribunal to exclude evidence or draw an adverse inference where there has been late or non-compliance (rE168). This will enable the Tribunal to be in a stronger position to ensure compliance and stricter progression of cases.

Panel appointment (rE132-138)

18. Following observations made by the Administrative Court¹, the process of appointing Tribunal members is codified, thereby increasing transparency.

Recommendations of the PCC (Current regulations rE134)

19. The requirement that the President of the Council of the Inns of Court have regard to any recommendation of the PCC that a Judge rather than a QC chair a three person panel has been removed. Given that the same is not afforded to the respondent, it is felt that this would be inappropriate. It does not prevent such representations being made should the PCC consider it appropriate.

Witnesses and vulnerable witnesses (rE176-179)

20. The Tribunal already employs good practice when dealing with the evidence of vulnerable witnesses, having used special measures in appropriate circumstances in previous cases. However, it was decided to include new additional sections to enshrine firmly this in the revised Regulations. (rE171 to 181). The inclusion of these regulations reflects similar provisions used by other regulators in their rules for disciplinary proceedings. Importantly, it also serves to highlight to both the witnesses and the respondent the possibility of measures being employed so that the Tribunal can hear the best evidence available. This not only increases the transparency of the process but also meets the public interest in enshrining the ability for the Tribunal to make just decisions.

Applications for a fresh hearing (rE150 of the current regulations, rE185-7 of the revised regulations)

¹ Insert ref for COIC panel case

21. A more proportionate approach has been included in the revised Regulations to encompass the ability for a Respondent to apply for a fresh hearing where they were not present at a Tribunal. These have been extended to include the ability for such an order where there is a legitimate reason (rE185 onwards). This removes the need for a Respondent with a legitimate reason for non-attendance to lodge an appeal with the High Court, streamlining the process, reducing expense and unnecessary use of the High Court system.

Procedure at a hearing (rE172 and rE188-197)

22. The review process highlighted that there is an increased scope for lay persons being the subject of proceedings. Such examples include disqualification proceedings against employees of BSB entities. Given this, the regulations now provide an outline of the procedure to be followed at hearings. (rE187-197). This improves the clarity and transparency of the process, as well as increasing the ability for the public to understand how decisions are reached.

Power of Tribunal to refer matters for consideration of Administrative Sanction (rE209-rE209A and rE66A of Complaints Regulations)

23. The current situation is that the power to impose Administrative Sanctions lies solely with the PCC. It covers all breaches of the Handbook that do not amount to professional misconduct. When referring a matter to a Tribunal this means that the imposition of such a sanction is not considered suitable. However, if a Tribunal considers that the alleged behaviour does not amount to professional misconduct but is satisfied, on the balance of probabilities that there has been a breach of the Handbook, it has no option but to dismiss the charge. This could result in a no action being taken against a respondent who has clearly breached the Handbook.
24. In order to address this gap, the new Regulations include a power for the Tribunal to direct that a matter be referred back to the BSB to consider the imposition of an administrative sanction. (rE209 of the revised Regulations). This has also necessitated an addition to the Complaints Regulations (rE66A). This addition provides the PCC with the power to reconsider complaints if they are referred back by a tribunal. Such an approach affords greater public protection and flexibility, allowing a breach to be marked. It also serves to remove inconsistency between sanctions imposed by a Tribunal and those imposed by the BSB.

Deferred Sentences (rE176-179 of current regulations, rE221 of the revised regulations)

25. The power to impose deferred sentences was imposed in 2009, with the aim of preventing further incidents of professional misconduct (rE176-9 of the current Regulations). It allows a Tribunal to defer the period before sentence comes into effect, where the sentence is a fine, conditions upon practice or suspension and can include that certain actions are undertaken in the deferment period. However, it has only been used five times since the introduction and not at all since 2012. The process is considered quite complex and considered to be resource intensive and expensive to impose. The review of the regulations and responses to the consultation mean that this has now been removed as a sentencing option. The effect of this is that the sentence is more certain and clearer for those involved in the Tribunal process.

26. Notwithstanding this, a new rule has been drafted to state that the Tribunal has discretionary powers, in exceptional circumstances, to postpone the start of a period of suspension. (rE221). This allows for greater public protection, for example by allowing for continuity of representation where a finding is made against a respondent that, although serious enough to warrant a short suspension, does not impact upon service delivery.

Appeals to the High Court (rE185 of the current regulations, rE237 of the revised regulations)

27. The prescriptive criteria within the current regulations as to when the BSB can appeal a Tribunal decision to the High Court have been removed. The Respondent's right of appeal remains unrestricted. It is felt that the overriding criterion on whether the BSB mount an appeal is centred on the public interest. This is more appropriately captured in a separate policy document rather than being enshrined in the regulations.

Pronouncement of sentence and the role of the Inns of Court (rE239 and Appendix 1)

28. The Inns of Court have a central role in carrying out the Bar's disciplinary system. Formally, they are responsible for "calling" prospective barristers to the Bar and disbarring them upon order of the Tribunal. However, the existing Regulations contain provisions that are anachronistic, including the "pronouncement" of all sentences and when they will come into effect as well as removal of rights and privileges as a member of the Inn (which is not a regulatory matter). Therefore, the new Regulations do not contain the provision for the Tribunal to remove these rights. Pronouncement by Inns is only now necessary in the case of disbarments (given the Inns' role). The revised Regulations therefore now reflect the current regulatory position.

Format of reports on decisions of the Tribunal and their publication (rE181-2 and 199-200 of the current regulations, rE243-243A of the revised regulations)

29. The current Regulations contain extensive regulations in relation to the publication and dissemination of reports of the Tribunal outcome. The revised Regulations streamline this process. They now provide for one publicly available decision and discretion is given to BTAS to send the report to other persons as he or she deems appropriate. This removes the current position where three different reports are distributed at three different stages and provides for a more proportionate process.
30. In addition to the above, the Tribunal now has an obligation to publish an anonymised summary where charges are dismissed (rE243A). This provides a greater transparency to the process, allowing the public to be aware of decisions that do not result in a finding of professional misconduct.

Action taken by the BSB/Bar Council

31. Sections rE196-7 and 239-40 of the existing regulations have been removed. These deal with the steps to be taken upon a sentence of disbarment or suspension. The removal of this detail serves to streamline the regulations and the points are, in any event, more appropriately addressed in internal policy and separate guidance. For the same reason, the current regulation rE215 (updating the complainant) has been removed. It is only applicable to the BSB and is more appropriate to be dealt with by guidance and policy.

Part 5, Section C “The Hearings Before the Visitors Rules”

32. As part of the wider amendments to the Handbook, it is noted that Section C of Part 5 is no longer applicable. These rules apply to decisions made by tribunals prior to 7 January 2014 where notice of appeal had been served before 18 April 2014. All such appeals have now been disposed of. In addition, the jurisdiction that the Visitors exercised in relation to appeals against qualification decisions has also expired. Therefore, the inclusion of these rules within the Handbook is not necessary. The LSB is therefore also asked to approve the removal of these Rules from the Handbook in their entirety.

Other Changes to the Handbook

33. In addition to the revised Regulations, there have been consequential changes to the other parts of the Handbook including the definitions section, in particular the following:

- The introduction of a definition for the terms BTAS, Respondent and judge;
- Removal of terms no longer within the Regulations (eg: Defendant);
- Removal of definitions relating to the Hearings before the Visitors Rules; and
- Alteration to numbers of relevant regulations.

34. It is also acknowledged that because the number of regulations is changing and the current Section C is being removed this will have a knock on effect for the numbering of the Section D and E of Part 5. Provided this application is approved, the numbering of these parts will be amended so that they are sequential.

Risk

35. The BSB aims to identify areas of risk to the regulatory objectives and take action to mitigate against any risk to the public or consumers in the provision of legal services. This includes taking disciplinary action where appropriate. The revised Regulations allow action to be taken in a fair, transparent and clear manner, thereby ensuring that a Tribunal can exercise its functions of public protection in a proportionate and more streamlined way than under the existing Regulations.

36. The effect of the revised Regulations is also such that there is an increased transparency in the process and that all parties involved in the system, including the public, have a clearer indication of how cases are decided. This in turn will serve to uphold public confidence in the BSB as a regulator and the standards in the profession.

Statement in light of the LSA regulatory objectives

37. The BSB has not identified any significant adverse impacts upon any of the regulatory objectives as a result of making these changes. We do not consider that there will be any impact upon the constitutional principles of the Rule of Law or access to justice. Nor do we consider that this will restrict the promotion of competition in the provision of services or the public’s understanding of the citizen’s legal rights and duties.

38. In particular, it is felt that the revised Regulations will support the regulatory objectives in the following ways:

Protecting and promoting the public interest

39. It is in the public interest that decisions of Tribunals are reached in a transparent, clear and efficient manner. The new Regulations improve this whilst maintaining the high levels of public protection present in the current system.
40. The inclusion of measures for vulnerable witnesses also serves to ensure that the needs of those who give evidence are enshrined and considered as part of the disciplinary process.

Encouraging an independent, strong, diverse and effective legal profession

41. It is not envisaged that the proposed changes will impact negatively upon the diversity of the Bar. The Regulations also serve to continue the maintenance of a strong legal profession by providing a clear framework of procedure to take disciplinary action where those who are accused of a breach of the Handbook and/or professional misconduct are dealt with in an effective, clear and proportionate manner.

Promoting and maintaining adherence to the professional principles

42. The revised Regulations will ensure that there is an effective process in place to sanction those who do not adhere to the standards required.

Statement in respect of the Better Regulation Principles

43. The BSB considers that the revised Regulations and consequential alterations to the Handbook fulfil its obligations to have regard to Better Regulation Principles. These are met in the following ways:

Transparent

44. The revised Regulations will be published and available on the BSB's website. The revised Regulations also allow for greater transparency in the setting out of procedure followed and through the new regulations covering publication of decisions.

Accountable

45. The written reasons for findings are to be published in the form of a single judgement, with anonymised summaries where appropriate. This gives a clear record for the Respondent, BSB and wider public. The publication of any restrictions and findings continues to be enshrined in the revised Regulations.

Proportionate

46. The revised Regulations provide for a proportionate approach to the issues identified through the review and consultation process. They have addressed risks that are present in the current framework with new processes (such as referrals for consideration of an administrative sanction) and streamlining (such as the directions stage). In addition the revised Regulations include provisions that remove the areas that were found to be disproportionate in their impact, namely deferred sentences and the new powers where a panel has proceeded in absence. This ensures that Panels can arrive at an outcome that is proportionate to the risk presented in an efficient manner.

Consistent

47. The BSB is satisfied that the amendments are consistent with the approach by other regulators, having undertaken a benchmarking process. The revised Regulations also create a strong basis for consistency in the approach taken to individual cases. Combined with the guidance and training planned this will create even more consistent approaches to cases as they pass through the Disciplinary Tribunal process.

Targeted

48. The revised Regulations ensure that where matters need to be considered by a Tribunal, they are done so in a focused and streamlined manner, removing the need for unnecessary steps that are in the current Regulations. They also mean that appropriate, proportionate action can be taken against any respondents who have breached the Handbook but not committed professional misconduct.

Statement in relation to Desired Outcomes

49. Through the review, the BSB has sought to improve and provide for a better regulatory practice. The redrafting of the Regulations, with the additional clarity, proportionality and efficiency should ensure that the outcomes set out in paragraph 7 are achieved. However, their application will be monitored to ensure that they are being applied consistently and effectively without difficulty or challenge.

Consultation process undertaken

50. It was considered best practice to consult on the proposed revised Regulations and to obtain the views of any party who has an interest in, or will be impacted by, the changes.

51. A consultation paper on the revisions was issued between July and October 2015. It was sent direct to some interested parties and published on the BSB website. It contained a number of questions, as well as an opportunity to comment generally. Written responses were received from the following:

- Institute of Barristers' Clerks (IBC);
- Professional Negligence Bar Association (PNBA);
- Bar Council;
- Council of the Inns of Court (COIC);
- Bar Mutual Indemnity Fund (BMIF);
- Chancery Bar Association (CHBA); and
- 4 individual barristers.

52. Two workshops were also held, where a verbal response was received from the Legal Ombudsman and a representative from Queen's Counsel Appointments attended in an observational capacity.

53. The responses were reviewed by the working group and, in some cases, put forward in recommendations that now form the basis of the revised Regulations. A full record of these can be seen in the consultation response paper, which can be found at Annex D. This sets

out an analysis of the responses received and identifies the areas where changes have been made to the proposed regulations because of the consultation.

Statement in relation to impact on other Approved Regulators

54. The revised Regulations are largely consistent with the approach to similar processes applied by other regulators. In particular, they consist of case management powers, clear guidance on the procedure that is followed at a hearing and provisions for vulnerable witnesses.
55. All approved regulators were invited to provide comments on the consultation paper. No responses were received. The BSB does not consider that the proposed changes will impact upon any of the Approved Regulators under the Legal Services Act 2007

Review of objectives

56. As noted in in paragraph 7 of this document, it is envisaged that the new regulations will achieve the following:
 - Full clarity of process for those affected by the Disciplinary Tribunal Process;
 - Increased protection for vulnerable witnesses;
 - A more proportionate and streamlined approach to the steps before and after the hearing; and
 - Increased public protection and promotion of adherence to professional principles through the possibility of marking a breach of the BSB Handbook that does not amount to professional misconduct.
57. In order to establish whether these have been met, the BSB will conduct a review of the process 12 months after the Regulations come into effect. In order to do so, data will be collected throughout the period, this will include:
 - The number of requests for special measures and how often these are used;
 - The number of cases referred to the Bar Standards Board for consideration of whether to impose an administrative sanction;
 - The use of internal monitoring and case management system to ascertain if there are any issues with the Regulations and that they are applied consistently;
 - Gathering feedback from stakeholders, including Respondents, Tribunal Members, BTAS and witnesses. This will focus particularly upon the clarity of the process and, in the case of vulnerable witnesses, the impact of the procedure.
58. This should enable the BSB to assess the effectiveness of the alterations to the Regulations on the points highlighted, as well as against the Regulatory Objectives generally. If the research gives rise to any areas of concern then further steps to address these, monitor them and review will be put in place beyond the 12 months period outlined.

Implementation timetable and operational readiness

59. The BSB would like to have the approved Regulations in place from February 2017. Should approval not be received by this date, the current Regulations can remain in place until approval is received, given that cases can still be processed and determined.

60. The BSB will, nonetheless, be operationally ready to implement the Regulations by February 2017. A full plan of implementation has been drafted. This includes the revision of current guidance documents and the drafting of new ones required in light of the changes. There will also be training to all staff, prosecutors and liaison with BTAS as to the provision of similar training to panel members. Arrangements are in hand to ensure that the revised Regulations, along with any public facing policies, will be available to the profession and the public on February 2017.
61. Communications plans to inform the profession and those effected by the new Regulations are also included within the plan.