

ANNEX E: Consultation Paper – Review of the Disciplinary Tribunal Regulations

Summary of Responses

Executive Summary

1. In July 2015, the Bar Standards Board ('BSB') conducted a consultation on changes to the Disciplinary Tribunal Regulations (Part 5 of the BSB Handbook).
2. A Review of the Regulations, conducted with the support of a Working Group, was carried out to ensure that the BSB continues to meet its obligations to promote the regulatory objectives under the Legal Services Act 2007. The Working Group consisted of representatives from: the Bar Tribunal and Adjudication Service (BTAS), the Disciplinary Tribunal panel, the Professional Conduct Committee (PCC), the Professional Conduct Department (PCD) and the BSB's Prosecution Panel.
3. The Regulations were amended with a view to ensuring the production of "a robust set of revised Regulations which address all identified concerns, are not superfluously prescriptive and reflect modern and best regulatory practice".
4. The consultation paper, published in July 2015, included questions on: changes to terminology and clarification of roles; straightforward changes to the disciplinary processes; more fundamental and/or complex changes to the disciplinary process and the powers of the Tribunal; and, issues of principle not covered in the proposed Regulations but on which views were sought to inform future considerations of other changes.
5. The changes to the Disciplinary Tribunal Regulations are, in some cases, considered controversial and, in other cases, are fairly straightforward. The BSB received 11 responses to the consultation spanning a range of differing viewpoints and opinions. The responses have been considered in accordance with the regulatory objectives as set out in the Legal Services Act 2007, alongside the regulatory principles.
6. This consultation response paper is issued by the BSB and summarises the main points raised by the consultation and the responses. It also sets out the BSB's analysis and

comments in relation to the responses received on each question. This paper identifies areas where the BSB has agreed to amend the Regulations - which will be actioned and included in the finalised version of the BSB Handbook – for submission to the LSB for approval.

7. The BSB's intention is to publish and implement the new Disciplinary Tribunal Regulations following approval by the LSB and the production of any relevant supporting policies and guidance.

Background

8. In January 2014, the new 'BSB Handbook' came into effect, replacing the Bar's Code of Conduct for England and Wales (the Code). The Handbook now consists of six parts and brings together all the BSB's regulations and guidance into one place, including the BSB's Enforcement Regulations at Part 5. Part 5, which was previously set out as Annexes to the Code, contains the regulations governing the procedures that must be followed when considering alleged breaches of the Handbook and subsequent enforcement action.
9. The Enforcement Regulations are further broken down into 5 sections, and include the Complaints Regulations and Disciplinary Tribunal Regulations (DTRs). The latter sets out the procedures for dealing with complaints referred to Disciplinary Tribunal.

The Current Review

10. The DTRs have not been substantively reviewed since 2009 (at which time the 'Directions' section was drafted), although they have been amended piecemeal since then. They were again amended in part in February 2012 to bring them into line with the provisions of the Legal Services Act 2007 (LSA) and to reflect the end of the BSB's jurisdiction over Inadequate Professional Service complaints. They were also amended in January 2014 to incorporate changes under the new Handbook; the amendments were limited to updating the reference numbering to accord with the numbering included in the new Handbook, as well as any consequential updating of terminology, and, again more recently in January 2015 to reflect the BSB's extended jurisdiction to regulate entities.

11. Since they were last reviewed, a number of issues with the current Regulations had been identified, as listed below, and it was decided that a substantive review was required to ensure that the Regulations remained fit for purpose:
- Where a breach of the Handbook not amounting to professional misconduct is identified by the Tribunal, there is currently no provision for the Tribunal to impose administrative sanctions, nor to refer the matter back to the BSB to be dealt with. Instead, the case must be dismissed;
 - There is no express provision in the Regulations requiring the President of COIC to nominate a person from a pool selected by the Tribunal Appointments Board¹;
 - The Regulations do not currently require the individual subject to tribunal proceedings to disclose details of their financial circumstances in advance for sentencing purposes;
 - There is currently no provision to allow the Bar Tribunals and Adjudication Service (BTAS) to make fixed cost claims at Tribunal.
12. A project was subsequently launched and a detailed analysis of the Regulations was carried out through consultation with key persons involved in the disciplinary system. In addition, a separate Council of the Inns of Court (COIC) Working Group was established to consider any implications for the Regulations arising from the 'Browne Review'² and a benchmarking exercise was conducted with other professional regulators. In excess of 60 issues were considered and debated by the Review Working Group throughout this process and a set of revised Regulations were drafted with the assistance of external legal advice.
13. In accordance with the BSB's commitment to openness and transparency, a consultation exercise was conducted to obtain the views of any party who has an interest in, or will potentially be impacted by, the changes to ensure that no areas have been overlooked. The consultation paper posed 19 questions, 14 of which were for immediate attention. Five were about issues of principle, not covered in the revised Regulations, on which the BSB wanted to seek views to inform future consideration.

¹ This issue was highlighted in the case of [Leathley, Mehey and Hayes v. Visitors to the Inns of Court and BSB \[2013\] EWHC 3097 \(Admin\)](#)

² In November 2011 the Council of the Inns of Court (COIC) established a review of its disciplinary functions, chaired by Desmond Browne QC. The review was asked to make recommendations to ensure that COICs procedures were in line with the best regulatory practice and that there was a proper degree of independence from the BSB. The review led to the establishment of the Bar Tribunals and Adjudication Service (BTAS).

14. More specifically the proposals in the revised Regulations include:
- removing, where possible, references to technical complexities;
 - softening references to adversarial terminology, given that the proceedings are not criminal for example referencing the 'directing of restrictions' rather than 'imposing penalties' and 'questioning' rather than 'cross-examining';
 - modernising and streamlining the drafting style and terminology, for example, replacing 'Chairman' with 'Chair', replacing 'Complaints Committee' with 'Professional Conduct Committee' (in light of the name change, effective from January 2012), and replacing the term 'defendant' with 'respondent';
 - Clarifying the Inns of Courts' role in the imposition of Tribunal sanctions , except in relation to disbarments;
 - Addressing potential gaps in the Disciplinary Tribunal powers;
 - Extending, in the public interest, the regulator's ability to appeal the outcome of disciplinary tribunals;
 - Limiting the costs that can be claimed by barristers who represent themselves at Tribunals;
 - removing, where possible, details of administrative matters that might more appropriately appear in supplementary guidance; and,
 - increasing clarity, particularly in relation to the anticipated outcomes of the Regulations.

Analysis of consultation responses

15. The consultation period ran from 7 July 2015 to 12 October 2015. In addition, two workshops were held on 21 September 2015 and 1 October 2015 for anyone interested in feeding back their views on the proposed changes in an open forum.
16. Ten written responses were received and one verbal response from the Legal Ombudsman (LeO) was recorded at the first workshop. Although the second workshop was well attended, those present subsequently submitted written responses with the exception of the representative from the Queen's Council Appointments (QCA) who attended in an observational capacity only. Written responses were received from:
- 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)
- 4 individual barristers

17. All responses have been given careful consideration by the BSB and full analysis of the responses to individual questions is set out below.

Responses to questions

Question 1: Do you agree with the changes to terminology and the clarification of roles outlined above? Are there other changes in these areas that you consider would be beneficial?

18. The consultation considered the suitability and accuracy of the language/terminology used within the regulations, given that the disciplinary process has historically reflected the language of the criminal prosecution process. Consideration was also given to clarifying roles throughout the Regulations to update inaccurate references and amend titles where a particular action is more appropriately performed by a different person/body.
19. Ten of the 11 respondents responded to this question. The majority were in favour of the changes with Barrister 1 finding the change from 'prosecutor' to 'case presenter' unnecessary and the Bar Council suggesting 'Board's representative' instead. Barrister 4 objected to the exclusion of the use of the male pronouns. While the majority of respondents made no further suggestions for changes, COIC suggested that the Regulations are amended to make it clear that a Tribunal should be chaired by a senior individual.

Comment

20. The BSB query what COIC mean by a 'senior individual' and conclude that this is a point for accompanying guidance rather than the Regulations themselves.
21. In light of the consultation responses received, the majority of which agree with the changes to language/terminology, the BSB will proceed with the amendments as drafted.

Question 2: Do you agree with the changes that have been made to the 'Directions' section (at rE106 – rE126) and the Standard Directions at Annex 6 of the revised Regulations (see annex 2)?

22. The consultation addressed a number of points in relation to amending the provisions on 'Directions' (rE106 – rE126 – annex 2). Those who regularly apply the processes set out in these Rules agree that they require streamlining and simplification although no changes are proposed to the fundamental approach. In summary, the Directions section has been amended to separate out standard directions from 'special directions', renaming them 'non-standard directions'. The revised Regulations include an additional regulation stipulating that oral directions will be held in private (rE123 – annex 2), and, an amendment to rE168 (annex 2) to give the Tribunal the power to exclude evidence or draw an adverse inference against a party if the Directions have not been properly complied with.
23. Ten of the 11 respondents responded to this question and the majority agreed with the changes. The main points of controversy are around Hearings being held in private, the removal or amendment of Direction 3bii, and, the power of a Tribunal to draw adverse inferences.
24. In contrast to the current practice, for reasons of protecting the public interest and confidence, the PNBA, the Bar Council and COIC are united in agreement that all Hearings should be held in public, unless there is a good reason otherwise.
25. The BMIF suggest the removal of Direction 3bii or, alternatively, that the BSB specify the facts they are asking the Respondent to admit by serving a Notice to Admit Facts with the bundle.
26. PNBA, COIC and CHBA are all of the opinion that Tribunals should not be given the power to draw adverse inferences as this may prevent the admission of important evidence and the ability of a barrister to fully defending himself/herself against a charge.

Comment

27. The BSB considered carefully the points raised in the consultation responses but are satisfied that Directions Hearings should continue to be held in private. It would not be fair to the barrister to make public a Hearing about which nothing has previously been published and could result in the case being dismissed.

28. With regards to the specific issue of oral directions Hearings, the manner in which the rule in the current Regulations rE199.3, but (rE243.b in annex 2) is drafted states that the BSB will not publish details of a case that has been dismissed unless the barrister requests it. Taking into account the views expressed in the consultation, the BSB will amend rE243b to reference explicitly publication at the request of the respondent where charges are dismissed prior to the final hearing.
29. The BSB agree, to some extent, with the points raised by BMIF on Direction 3bii but consider that a blanket rule to specify the facts is too wide. Instead, the BSB will redraft Direction 3bii to state that where charges are not admitted, the disputed issues of fact or law will be identified.
30. The BSB have taken into account the points raised about adverse inferences and while the strong arguments against the introduction of such a power have been noted and broadly accepted, the BSB consider that there is a need to include at least some power in the Regulations. To this end, rE168 will be reworded to remove the word 'relevant' and make it clear that the evidence need not be relied on if it is submitted late ie:

“Where a party has previously failed to comply with any direction made by the Directions Judge, or has failed to do any act, including the submission of evidence, within the time periods specified in a direction, the Disciplinary Tribunal may, at its discretion:

- 1. Decide to exclude the ~~relevant~~ evidence; or*
- 2. Draw an adverse inference against that party.”*

Question 3: Do you agree with the list of those people who may be treated by the Tribunal as ‘vulnerable witnesses’ (rE176 – annex 2) and should the list be extended to include reference to victims of other types of allegation, and not just allegations of a violent or sexual nature?

31. The current Regulations lack specific provisions concerning the process for taking witness evidence at Hearings and the treatment of vulnerable witnesses. The revised Regulations at annex 2 include two new sections covering these issues as the BSB consider it important, as a matter of public interest, for these practices to be set out in the Regulations.

32. Nine of the 11 respondents responded to this question. Respondents were in unanimous agreement with the list of those treated as “vulnerable witnesses”.
33. The majority of the respondents made no extensions to the list. CHBA queried the necessity for a blanket restriction on preventing a respondent from cross-examining a witness and suggested allowing such a power to prevent cross-examination only when the Tribunal would appropriately want to make an order. The Bar Council suggested an amendment to the wording of rE181 to clarify that the power to make an application should be given to the party calling the witness.

Comment

34. Taking into account the responses received, the BSB is content that list of ‘vulnerable witnesses’ is complete and requires no further amendment.
35. In response to the point raised by CHBA, the BSB is of the opinion that a blanket restriction on a respondent personally cross-examining witnesses is necessary and reflects the practice in other regulators/jurisdictions. Furthermore, there is a caveat in rE180 making clear that the respondent is not being denied the chance to cross-examine.
36. The BSB agree with the Bar Council and will, instead, draft a new Regulation to read: “Any witness who is not regarded as a vulnerable witness under rE176 may apply for one or more of the measures set out in rE179 to be put into place on the ground that the measure(s) is desirable to enable the Disciplinary Tribunal to receive his or her evidence” (rE178).

Question 4: Do you have any comments on the changes to the Regulations outlined about above in Section B which are not subject to specific questions?

37. The consultation sought opinions on any other changes to the Regulations outlined in Section B of the paper namely: nomination of Tribunal panel members; removal of the prohibition on Directions Judges sitting as Tribunal Chairs; recommendations by the PCC that a judge should Chair a three person panel; applications to adjourn proceedings; joinder provisions; procedure at the Hearing; action taken by the BSB/Bar Council; keeping complainants informed; and, other minor straightforward points.
38. Nine of 11 respondents answered this question. The responses proposed no further changes but the Bar Council consider a general requirement should be imposed on the BSB to ensure that complainants are given appropriate information throughout the life of a case;

and, the BMIF are of the view that the respondent should be allowed the same opportunity as the PCC to submit their views on the composition of the Panel.

Comment

39. The BSB consider that the Bar Council's suggestion would be better placed in the accompanying guidance and will take this into account when drafting the guidance.
40. The BSB considers that the point made by the BMIF is one for consideration in the Complaints Regulations due for review in 2016/17, given that the relevant regulation falls within this part of the Handbook. The BSB will ensure that this point is considered when updating the Complaints Regulations.

Question 5: Do you agree that Tribunals should be given the power to refer matters back to the BSB for consideration of the imposition of administrative sanctions? If not, which of the other options above do you consider would be more appropriate?

41. The consultation paper outlines a potential gap in the Tribunal's powers of disposal. The power to impose administrative sanction lies solely with the PCC in the current regulations and the imposition of an administrative sanction for a breach of the Handbook is proved on the civil standard. Tribunals do not have the power to impose administrative sanctions. A Tribunal, where it is not satisfied to the criminal standard that professional misconduct has been proved, only has the option to dismiss a charge even if it considers that a breach of the Handbook has occurred. In contrast, the Professional Conduct Committee may impose an administrative sanction where it is satisfied, on the balance of probabilities, that there has been a breach of the Handbook. The lack of power for a Tribunal to impose an administrative sanction on the same basis as the Professional Conduct Committee can result in no action at all being taken by a Tribunal against a respondent who has clearly breached the Handbook but in circumstances where that breach does not amount to professional misconduct. The issue therefore was whether the Tribunal should be able to refer a case back to the PCC for consideration of the imposition of an administrative sanction, be given powers itself to impose administrative sanctions or retain the status quo of all or nothing.
42. Nine of the 11 respondents responded to this question with the majority disagreeing that Tribunals should be afforded the power to refer matters back to the BSB. While the Bar

Council wishes to retain the current system, it would accept a provision allowing the Tribunal to make a formal finding that a breach has occurred in order that the BSB impose an administrative sanction. PNBA have more general concerns about the imposition of administrative sanctions, believing they should only be imposed by Tribunals, and, CHBA suggest referring back in the public interest, based on risk, and not simply because a finding could be made on a lower standard.

Comment

43. The Working Group considered the risk-based suggestion offered by CHBA and decided that, while it is a valid argument, its implementation would be unrealistic in practical terms.
44. The Working Group also appreciated the Bar Council's suggestion which is, in part, aligned to the original views of the Working Group that tended towards the view that the preferred system would be to refer cases back to the BSB for consideration of the imposition of an administrative sanction. However, taking into account the other responses, the Working Group were persuaded that the current system should be maintained ie the Tribunal should not have the power to impose an administrative sanction or refer a case back to the PCC for consideration of such an imposition.
45. The Working Group recognised the advantages of maintaining the status quo in that it requires the PCC to continue to focus on effective risk assessment and on referring to Tribunal only those cases that are serious enough to warrant professional misconduct proceedings. It also recognised the disadvantages of this option is that it goes against the public interest for a Tribunal to dismiss a case in circumstances where a breach of the Handbook can be proved on the balance of probabilities and it would be appropriate for some action to be taken. However, it took into account that since the introduction of the Handbook in January 2014, there have been no relevant cases where the power to impose an administrative sanction clearly could have been exercised by a Tribunal were it to have existed. Another advantage of maintaining the status quo is that any perception of the BSB being afforded "two bites at the cherry" by allowing a Tribunal to refer a case back to the BSB, would not arise. The Working Group fell on the side of maintaining the status quo but was cognisant that the issues are difficult ones and ultimately the decision on what approach to take should be decided by the Board of the BSB. Therefore, no firm decision was taken and the revised Regulations remain the same ie maintaining the status quo pending further consideration by the Board.

Question 6: Do you agree the power to impose deferred sentences should be removed from the Regulations?

46. The consultation put forward the suggestion that the power to impose deferred sentences should be removed from the Regulations, especially given that it has not been exercised for nearly three years and is of little practical use.
47. Nine of the 11 respondents responded to this question and while the majority agreed with the removal of the power there were some points raised by those opposing or partly agreeing.
48. In particular, the IBC argued that deferred sentences should remain an option where there are mitigating circumstances and Barrister 1 raised the point that there will likely be situations where the Tribunal decides that suspension from practice would be appropriate, but defers the start of the period of suspension.

Comment

49. In light of the consultation responses received, the BSB intends to remove the power to impose deferred sentences from the Regulations. However, the BSB are persuaded by the points raised by the IBC and Barrister 1 and will draft a new rule stating that the Tribunal has discretionary powers to postpone the start of a period of suspension for such a period it sees fit in exceptional circumstances, but only where the period of suspension is less than 3 months. It would not be in the public interest for lengthier suspensions to be postponed given that they would reflect more serious behaviour.

Question 7: Do you agree that the formal restrictions on the BSB mounting appeals against decisions of Tribunals should be removed?

50. The consultation explained that new restrictions on the BSB's right to appeal against decisions of Tribunals were introduced with the BSB Handbook. The BSB's current view is that it is not in the public interest to retain such prescriptive requirements in relation to appeals, and, the BSB should have the ability to mount an appeal if it is in the public interest to do so.
51. Nine of 11 respondents answered this question and opinions were almost split. Of those opposed, the PNBA request further information as to why the BSB feels the current powers

are limited and the CHBA called for greater consideration to be given to the policy behind the existing restrictions.

52. COIC is not in favour of removing the restrictions but argue that the current wording in rE185 and rE187 is inconsistent.

Comment

53. The BSB notes the divided opinions but considers that the formal restrictions should be removed to allow decisions on appeals to be based on the public interest and also reflect generally accepted best practice. The BSB will ensure that any concerns will be addressed in the relevant policy and guidance documents.

Question 8: Do you agree with the removal of the regulations in relation to the involvement of the Inns of Courts in the disciplinary system except in relation to the pronouncement of disbarments?

54. The consultation asked for consideration of the removal of the regulations in relation to the involvement of the Inns of Court in the imposition of disciplinary sanctions particularly the task of 'pronouncing' sentences, which is currently carried out by the Inns. It also put forward the suggestion that the Tribunal's ability to remove the barrister's "*rights and privileges as a member of his Inn*" when suspended is removed on the grounds that it is not a regulatory matter. The consultation paper, however, made clear that the disbarments should continue to be pronounced by the Inns in line with the Inns' statutory responsibility for calling (appointing) relevant candidates to the Bar.
55. Eight of 11 respondents answered this question with six in agreement with the proposals set out in the consultation paper.
56. Barrister 1 strongly opposed the proposals stating that the BSB has no "role to perform in the actual calling, disbarment or disciplining of barristers; it merely prescribes the rules and regulations to which they must conform." COIC raise clear concerns about the removal of the Inns from the disciplinary process and state that "the adoption of this proposal would represent a profound change in the discipline of the profession". To this end, COIC calls for the BSB to fully articulate its aims and rationale to all interested parties.

Comment

57. The BSB has noted COIC's concerns but remain of the opinion the current Regulations contain anachronistic provisions which give sanctioning functions to the Inns that are no longer appropriate or needed. Under the current Regulations, the Inns are tasked with 'pronouncing' all sentences imposed by Tribunals including the imposition of reprimands, fines and suspensions. No sentence of a Tribunal can therefore come into effect until "pronounced" by the relevant Inn. The Inns also have the power under the current Regulations to set the dates on which sentences are to take effect. However, there is no longer any clear rationale for Inns to perform these functions except in relation to disbarments and it is particularly incongruous in relation to suspensions where only the BSB has the power to suspend a practising certificate.
58. The BSB notes the agreement by the majority of respondents to remove the Inns role in imposing sanctions and considers that its practice should mirror that of other regulators who control their registrants' authorisation to practice. S.20(6) of the LSA 2007 states that, "An approved regulator may authorise persons to carry on any activity which is a reserved legal activity in respect of which it is a relevant approved regulator." The BSB is the body nominated by the approved regulator to so authorise barristers and the Inns play no role in that authorisation. Therefore in the case of suspensions or conditions on practice it is more appropriate for these functions to be exercised under the auspices of an independent Tribunal rather than the Inns. Taking into account the majority opinion expressed in the responses, the BSB remains of the view that it is appropriate to remove the regulations in relation to the Inns sentencing functions (except disbarment).

Question 9: Do you agree with the proposed amendments to streamline the reporting process?

59. The BSB is of the view that the system for reporting on Tribunal outcomes, that currently produces reports at three different stages, should be streamlined into one single 'decision report' (judgment) for each case, regardless of the outcome.
60. Eight of 11 respondents answered this question with all eight concurring with the BSB's 'single decision report' proposal.

Comment

61. In light of the responses, the BSB is satisfied that the reporting system should be streamlined as proposed.

Question 10: Do you agree with the proposal to remove reference to the full list of bodies to which the final report should be sent and allow the distribution of such reports to be determined at the discretion of BTAS/the President?

62. Under the current Regulations, the three different reports at three different stages are distributed to detailed lists of individual/bodies. It is the view of the BSB that these lists should be distilled into one list applicable to the single 'decision report'. The President, and therefore by policy BTAS, would retain the discretion to send the report to other appropriate people or bodies.
63. Eight of 11 respondents answered this question. A majority of seven agreed with the proposal to distil the lists into one.
64. COIC and the Bar Council recognise that a policy will be drafted if the proposal is accepted and the Bar Council would welcome the opportunity to comment on the draft policy.

Comment

65. Taking into account the responses which mainly agree with the proposal, the BSB are content to move forward with the proposal to distil the lists into one.

Question 11: Do you agree with the BSB's current approach to the publication of decisions of Disciplinary Tribunals online, or are you of the view that our approach should be amended to allow for the publication of all Tribunal decisions online, regardless of the outcome?

66. In the consultation paper, the BSB questioned the current approach to publishing decisions of Disciplinary Tribunals online. At present, findings are published online only where the charges have been found proved by a Tribunal and where charges are dismissed, the decision may only be published in anonymised form (rE243.c - annex 2). Taking into consideration the interests of the public and of transparency, the BSB welcomed views on publishing full non-anonymised details of all findings online, regardless of the outcome.

67. Nine of 11 respondents answered this question. A slim majority of five were in favour of retaining the current system with IBC, Barrister 2, BMIF and CHBA largely in agreement due to concerns about the damage to a barristers' reputation.
68. The Bar Council does not agree that all decisions should be published, but it acknowledges that there are cases where the respondent would want an acquittal published and believes their wishes should be respected.
69. There are, however, opposing views. Both PNBA and COIC are of the opinion that details of all decisions should be published. PNBA cite the principle of open justice and the practices of healthcare regulators. COIC find the current approach problematic arguing that to remove all mention of the case from the public domain after the decision was taken in public could prompt more questions. LeO suggest that the amendment is re-drafted to state that all outcomes will be published unless the respondent makes representations otherwise.

Comment

70. The Working Group were of the view that the current system should be retained ie no reports on dismissed cases are published. However, they recognised the concerns raised by some of those responding about the potential lack of transparency in the current system and the arguments in support of publishing all outcomes, which could, in the case of dismissals, be anonymised. The view, therefore, is that this is an issue that needs to be considered by the Board. No firm decision has been taken and the revised Regulations (annex 2) still reflect the current publication system pending further consideration by the Board.

Question 12: Do you agree with the changes introduced, which allow for the granting of a fresh hearing on application in any circumstance where the respondent has a good reason for not attending the original Hearings?

71. The BSB consider that the current circumstances whereby a re-hearing may be granted are too restrictive. The consultation sought views on whether a fresh hearing should be granted if a respondent has a good reason for not attending the hearing.
72. Nine of 11 respondents answered this question. No issues of concern were raised and all nine respondents agreed to the introduction of the changes.

Comment

73. In light of the responses received, the BSB will effect the proposal.

Question 13: Do you agree with the amendment to the Regulations limiting the hourly rate that self-representing barristers can claim to the rate applicable to litigants in person under the CPRs?

74. In the consultation paper, the BSB sought views on limiting the hourly rate that self-representing barristers can claim to the rate applicable to litigants in person under the CPRs. The reason for this question arises from a case in which an unregistered barrister, acting in person, claimed costs at professional hourly rates.

75. Nine of 11 respondents answered this question. Views were split with a slim majority disagreeing with the proposed changes.

76. PNBA, BM, CHBA and COIC disagree with the comparison with litigants in person in civil claims. The Bar Council agree, in principle, that barristers should be able to recover costs but believe that, in exceptional circumstances, there should be a higher level of recovery. Barrister 2 suggests removing the option for either party to claim costs.

Comment

77. Given the responses, the BSB has decided not to change the current position. The BSB will remove rE244 (annex 2) “where the respondent has represented himself/herself in the proceedings and intends to make an application for payment of his or her costs by the Bar Standards Board, the rate payable to the respondent will not exceed the rate from time to time specified in respect of litigants in person”, but will make it clear that there should be discretion as to the award and level of costs in rE246 (annex 2).

Question 14: Do you have any other comments on any of the proposed amendments to the Regulations set out in Section C above which are not specifically covered by specific questions?

78. No substantive comments were received.

Issues of principle

79. The last five questions in the consultation paper were on issues not intended to be covered in the revised Regulations but on which opinions were sought to allow the BSB to decide how to move forward with the issues in the future. The various issues are rehearsed in the paragraphs below but in summary relate to: costs, size of Tribunal panels; re-admittance to the Bar; and, settlement agreements.
80. For each of the remaining questions the BSB has taken on board the comments and has noted them to ensure that they inform our thinking when considering future changes to the disciplinary tribunal system. However, we have not commented individually on the responses although we are very grateful for the comments received which will be invaluable in shaping our approach to the issues in the future.

Question 15: What are your views on potential changes to the current regime for claiming BSB costs, taking into account the alternative approaches set out at paragraphs 75 – 77 (of the Consultation Paper)?

81. Under the current Regulations, the BSB is prohibited from claiming the costs of preparation for Hearings and the ability to recoup the costs of successful prosecutions is limited. However, the BSB also runs the risk of exposure to cost orders covering respondent's full costs. There are clear arguments in favour of removing the current prohibition on the BSB claiming the preparatory costs for Hearings. An alternative approach, adopted by a number of other regulators, would be to remove the ability for either party to claim costs.
82. Views expressed in the responses were varied. IBC are supportive of the removal of ability of either party to claim costs, while PNBA consider that the recoverability of costs should be symmetrical. Most of the respondents think that the BSB should be able to recover "something" for the costs of preparation but the Bar Council question the need for a formal billing system and the BMIF do not agree with the alternative approaches. Both LeO and COIC believe that costs should be a matter for the Tribunal.

Question 16: What are your views on removing the jurisdiction of five-person Tribunal panel and replacing them with three person panels potentially Chaired by a Judge?

83. The current regime of three and five person panels allows for more serious cases to be dealt with by a panel of five people with a Judge acting as Chair. Most other regulators use three

person panels only, with the option to use a Judge as Chair in more serious cases. In light of this, the consultation asked for the initial view of interested parties.

84. The responses indicated clear support for the change although one respondent, Barrister 2, would opt to retain five person panels for serious cases. The Bar Council support the change on the grounds that it is comparable with other regulators and other respondents are content for Judges to Chair more serious cases as long as the Chair is legally trained (COIC) and has a current ticket (BMIF). LeO suggest that an option to call in extra expertise, where necessary, is introduced.

Question 17: Do you agree that the decision to re-admit a barrister to the Bar following disbarment should be a matter for the BSB as the regulator and taken by Tribunals not the Inns of Court?

85. It is the responsibility of the Inns of Court to call persons to the Bar and disbar barristers on the order of a Tribunal. They also decide if a disbarred barrister may be recalled to the Bar. The BSB is of the opinion that the recalling of a disbarred barrister is a regulatory matter that should be transferred to Tribunals. In the consultation paper, the BSB points to the strong public support for this for reasons of consistency and independence.
86. Responses to this question suggest that opinions on this matter are evenly split with five respondents in favour, five respondents opposed and one in part agreement. It should also be noted that this was the only question answered by all eleven respondents.
87. The individuals who responded to the consultation, Barrister 1, Barrister 2 and Barrister 3 all oppose the suggestion of Tribunals deciding to re-admit disbarred barristers. They are supported by COIC who argue that, as the BSB will have been the prosecutor at the Tribunal where the decision was made, for the Tribunal to make this decision would represent a conflict of interest. COIC also make a separate point that the decision to re-admit a barrister is delegated to an independent Tribunal.
88. The Bar Council agrees with the proposal in principle but calls for a wider examination of the relationship between the Inns and the BSB to avoid causing confusion for the public and the profession.

89. The remaining respondents agree with the proposal with BMIF saying that it would bring the system into line with other regulators.

Question 18: Do you support the introduction of “settlement agreements” as an alternative means of determining the outcome of disciplinary cases?

90. Some other regulatory bodies give the respondent the option of agreeing the outcome of the disciplinary proceedings and the sanction to be applied prior to a hearing. Such arrangements are normally known as ‘settlement agreements’ which subsequently require approval by the Tribunal panel to allow them to come into effect with the Tribunal panel having the power to reject the terms of the settlement. In the consultation paper, the BSB asked for views on adopting this mechanism within the DT Regulations.
91. Nine of the 11 respondents answered this question. Responses were mixed with three respondents supporting the introduction of settlement agreements and one, Barrister 1, disagreeing with the principle for the ‘reasons set out in the consultation paper’ namely, that such agreement may lengthen proceedings and the public may see them as lacking transparency.
92. The majority of the respondents were in part-agreement. IBC would support the proposal if misconduct is accepted at an early stage. PNBA, the Bar Council, BM and CHBA would all like to see more details before offering full support.

Question 19: Do you consider that any of proposed changes to the Regulations could create adverse impacts for any of the equality groups?

93. The Bar Council express concerns on the impact of those with mental health issues and encourage the BSB to consider the possibility of additional protection for these individuals.
94. CHBA make the point that there may be adverse impacts on those with protected characteristics who are not on the list of vulnerable witnesses and suggest that they are afforded the same rights as those on the list in relation to cross examination.
95. LeO suggests that those who are and are not offered settlement agreements could be a point of concern.

Comments

96. The BSB is committed to promoting equality and diversity throughout the Bar and within the BSB as an organisation. Every effort is made to ensure that processes and procedures are fair, objective, transparent and free from unlawful discrimination. The BSB also aims to promote awareness of the obligations under the Equality Act 2010. An equality screening of the impact of the proposed changes to the Regulations was carried out. No adverse impacts in relation to any of the protected characteristics were identified.
97. In relation to the point made by the Bar Council, the view is that the Regulations already give the Tribunal discretion to direct the conduct of proceedings which would include making adjustments for those with mental health issues. However, the BSB will continue to monitor the progress of cases for any problems in this area: if necessary further revisions to the Regulations can be made once there is a clear evidence base as to the type of revisions that might be required.
98. With regards to the point made by CHBA, the Regulations have now been revised in light of the consultation responses to allow any person who is not classed formally as a “vulnerable witness” to apply for any of the measures available to vulnerable witnesses (see rE178 annex 2).
99. The suggestion by LeO has been noted for future discussion.
100. The BSB will monitor the impact of the new Regulations for any equality issues that might arise and will ensure that impact assessments are carried out in relation to the new policies that will be required to underpin the implementation of the Regulations

Additional observations from the Bar Council

101. The Bar Council has submitted additional observations on the Regulations relating to the order of proceedings at a hearing. Although they are not covered by any of the questions posed, the Bar Council asked the BSB to consider the following issues:
- The Bar Council queried the necessity for the proposed new rE189 which suggests that it is obligatory for the Disciplinary Tribunal to retire into private session to consider any submissions from the parties;
 - The Bar Council asserted that the procedure followed at rE199 onwards after the respondent has admitted the charge (rE193) makes no provision for the BSB to provide an outline of the case, or for either party to call evidence;
 - The Bar Council raised concerns that the procedure set out from rE203, providing that the Disciplinary Tribunal may receive evidence of previous findings against

the respondent, includes no general power to hear evidence at the sanction stage;

- The Bar Council suggested that the Regulations clarify whether receipted email counts as service (see rE248.1) and provides reasons why if not.

Comment

102. The BSB consider that rE190 (annex 2) reflects good practice in the conduct of such hearings where the decision is one to be made by a panel after discussions. It is further noted that the Chair does have an overriding discretion as to the conduct of proceedings and it may be that in the context of straightforward decisions this is exercised in response to submissions which are not contentious and the panel does not need to retire. The current Regulations are silent on the procedure to be followed at Tribunal Hearings and the BSB consider that it is in the public interest to enshrine these basic procedural details in the Regulations.
103. New regulations from rE188 onwards (see annex 2) have been added to the Regulations to bring them into line with the approach of other regulators that include such rules to assist those appearing before panels. They are intended to provide clarity for people attending Tribunals who are not barristers. rE188 gives the power to the Tribunal to vary this in any way it considers appropriate.
104. It is the case that receipted email counts as service provided that the respondent agrees to service by email. This provision mirrors that of the Civil Procedure Rules.

Summary of Policy Decisions

105. The following is a summary of the main decisions taken by the BSB in response to this consultation:

Publication of dismissals at oral Hearings:

- The BSB will amend rE243.b (see annex 2) to explicitly reference publication at the request of the respondent where charges are dismissed prior to the final hearing.

Amendment to Direction 3bii:

- The BSB will redraft Direction 3bii to state that where charges are not admitted, the disputed issues of fact or law will be identified.

Non/late-compliance with Directions:

- To ensure that some power is retained to exclude evidence or draw and adverse inference against that party if Directions have not been complied with, the BSB will remove the word 'relevant' from rE168 (see annex 2) and make it clear that the evidence need not be relied on if it is submitted late.

Vulnerable witnesses:

- The BSB will draft a new rule to clarify that the power to make an application for measures to adjust the way in which evidence is presented should be given to the party calling the witness (rE178 – annex 2).

Imposition of deferred sentences:

- The BSB will draft a new rule stating that the Tribunal has discretionary powers to postpone the start of a period of suspension for such a period it sees fit in exceptional circumstances (rE221 – annex 2).

Removal of Tribunal's ability to remove a barristers "*rights and privileges as a member of his Inn*":

- The BSB will remove this aspect of a Tribunal's sentencing powers from the Regulations (rE170 in the current Regulations).

Format and distribution of reports of findings and sentence:

- The BSB will streamline the reporting system by requiring only one "decision report" and distillation of the distribution lists into one consolidated list.

Rate for claiming costs for respondents acting in person:

- The BSB will remove rE244 "where the respondent has represented himself/herself in the proceedings and intends to make an application for payment of his or her costs by the Bar Standards Board, the rate payable to the respondent will not exceed the rate from time specified in respect of litigants in person", but will make it clear that there should be discretion for the Tribunal to decide the level of fees applied in an assessment of costs as in rE246 (annex 2).

Next Steps

106. In line with the consideration of the responses received to the consultation paper, as outlined above, the draft Regulations have been revised to include the changes made as result of the consultation. There are two outstanding issues that need to be considered by the Board of the BSB (see paragraphs 41 – 45 and paragraphs 66 – 70 above) and a decision taken as to the final content of the Regulations.

107. Thereafter, the BSB will make an application to the LSB for approval of the Regulations in line with the requirements of the Legal Services Act 2007. The revised Regulations (annex 2) will come into effect following this approval and once the supporting policies and guidance referred to above and in the consultation paper are developed and put in place.

List of respondents

Barristers

3 individual barristers

Bar Associations

Institute of Barristers' Clerks (IBC)

Bar Council

Council of the Inns of Court (COIC)

Professional Negligence Bar Association (PNBA)

Chancery Bar Association (CHBA)

Bar Mutual Indemnity Fund (BMIF)

Organisations

The Legal Ombudsman (LeO)