

**BAR  
STANDARDS  
BOARD**

REGULATING BARRISTERS

# **Review of the Fitness to Practise Rules and Guidance**

## **Consultation Paper**

**March 2013**

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## Review of the Fitness to Practise Rules and Guidance Consultation Paper

### 1. Introduction

- 1.1. The purpose of this consultation paper is to set out the Bar Standards Board's ("BSB") existing Fitness to Practise ("FTP") process and to consult on revisions to these Rules and the supporting Guidance.

### 2. Background

- 2.1. The BSB regulates barristers called to the Bar in England and Wales, in the public interest. It is currently responsible for monitoring the service provided by barristers in order to assure quality and is required by the Legal Services Act 2007 (LSA 2007) to comply with its regulatory objectives, which include protecting and promoting both the public, and the consumer interest.
- 2.2. The BSB aims to identify areas of risk and take action to mitigate against any risk to the public or consumers in the provision of legal services. This includes taking action where the BSB becomes aware of issues that call into question a barrister's ability (fitness) to practise on physical or mental health grounds within the Bar's Code of Conduct. Therefore, under this definition, fitness to practise does not include matters of professional conduct or discipline (these are managed under a separate conduct process).
- 2.3. The existing Fitness to Practise Rules ("the Rules"), as set out in Annex O to the Code of Conduct of the Bar of England & Wales, prescribe the manner in which any issue concerning a barrister's fitness (or unfitness) to practise should be managed. The Rules were produced in liaison with the Council of the Inns of Court (COIC) - the body responsible for administering the independent Panels that ultimately determine whether a barrister is fit to practise or not. COIC's role includes appointing the Panel members, supporting them in their role, and ensuring that members remain eligible to sit on these Panels. However, it is ultimately the BSB that retains statutory responsibility for ensuring that the Bar's disciplinary arrangements are robust, carried out in accordance with the LSA 2007 and meet the regulatory objectives, as well as the Legal Services Board's regulatory standards framework.
- 2.4. The current FTP process comprises a referral system whereby a case is referred to a Medical Panel ("a Panel") by the Professional Conduct Committee (PCC) (formerly known as the 'Complaints Committee'). The President of COIC then convenes a Panel. The ensuing preliminary hearing may give directions for a full hearing in which a Medical Panel will decide if a barrister is unfit to practise and take action accordingly. For a full description of the Fitness to Practise process, please see [Annex 1](#).

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<sup>1</sup> A copy of the existing Rules (as of January 2011), can be found on the website and accessed through: <http://www.barstandardsboard.org.uk/regulatory-requirements/the-code-of-conduct/annexes-to-the-code/annexe-o-fitness-to-practise-Rules/>

- 2.5. The Rules are designed to cover a range of circumstances, from determining whether a barrister has a physical or mental condition that affects their ability to practise (and whether adjustments can be made to support them in their practice), to applying restrictions on a barrister's ability to practise or suspending them as a result of any underlying condition (such as drug or alcohol addiction).

**Identified issues with the current Rules**

- 2.6. Section 27 of the LSA 2007 provides a broad power for the BSB to maintain and revise procedures for the regulation of barristers (including the regulation of fitness to practise issues) and for these to be implemented through the Rules. The existing Rules, having been in operation since 2005, have not been substantively revised since their original publication. Therefore, some are antiquated and use an outmoded drafting style in places. The BSB is aware that the Rules, in their present form, pose certain risks which, if unaddressed, may expose the individuals subject to the proceedings to an imbalanced process that is not in the public interest. The following problems have been identified:

- a) The drafting of the Rules can be considered overly-complex and confusing;
- b) The criteria for decision making requires clarification;
- c) Some of the terms used in the Rules, on which Panel decisions are based, have not been properly defined; for example, the expression "seriously impaired", which comprises the definition of 'unfit to practise', could create ambiguity and leave the BSB exposed to challenges, given that the seriousness of an impairment is an opinion;
- d) The role of the medical practitioner (appointed by a Panel to advise on medical issues and conduct medical examinations), is not defined within the Rules;
- e) The Equality Act 2010 has overhauled and enlarged the general law about discrimination on, among other areas, discrimination. Clarification is needed as to whether the powers granted to the Panel, as set out in the Rules, and the Fitness to Practise process operated by the BSB, remain reasonable and fully compliant with Human Rights and Equality legislation;
- f) Clarification is needed as to whether the procedure as set out in the Rules is an example of best practice, and continues to be fit for purpose;
- g) No supplementary guidance or policy document was available to support the Rules, and therefore no further information was available regarding the operation of the Rules or the criteria to be taken into account by Panels when taking decisions; and,
- h) As a result of a restructure of the Professional Conduct Department (the Department responsible for administering the initial processing of FTP cases) in

January 2011, the Rules contain out of date technical references to internal processes and terminology.

- 2.7. The BSB considers there to be reputational risks for both the BSB and the barristers' profession, as well as the courts and the legal system in England and Wales if modern, efficient and clear processes are not in place to deal with issues of fitness to practise.
- 2.8. Therefore, the aim of the review is to make improvements to the Rules to ensure that the BSB moves closer to achieving the anticipated aims and outcomes of the Rules, as set out in Paragraph 3.3 below. The realisation of these aims will be measured through the long term application of the Rules without difficulty or challenge, and the increased use of a supervisory approach to resolving FTP cases. No significant risks have been identified in relation to the undertaking of this review since the emphasis is on the clarification of existing Rules, rather than the imposition of any particular new Rules.

### **3. Risk and Anticipated Outcomes**

#### **Assessment of risk**

- 3.1. It is difficult to assess the potential level of risk to the public associated with fitness to practise issues, yet it is important to make this assessment. The BSB has referred 35 cases to FTP proceedings between 2000 and the present day (see also Paragraph 5.1). The cases are few in number which should indicate that the risk to members of the public is relatively low. However, the potential impact on and risk to the public, should FTP issues arise, is substantial, whether that be in terms of physical risk, impairment of the barrister's judgement or their competence to such an extent that they are unable to adequately protect their client's interests. The risk posed to the individual barrister, whether personally or professionally, must also be considered.
- 3.2. Given the circumstances outlined above, the Rules are designed to address low probability/high impact scenarios. The existing Rules give the BSB the ability to refer a practising barrister to a Panel where there are concerns that he/she may be:
  - i) incapacitated due to a physical or mental condition (including addiction); and,
  - ii) as a result, the barrister's fitness to practise may be seriously impaired; and,
  - iii) suspension from practice, or the imposition of conditions on their practise, may be necessary to protect the public.

#### **Outcomes**

- 3.3. The Rules are designed to achieve the following outcomes:
  - High level public protection from the risk of being exposed to barristers who, by reason of an incapacity, are not fit to provide legal services to the standard expected, that is, to understand instructions and to act appropriately for their

client;

- A supportive system that encourages affected barristers to address any physical or mental health issue, and return to practice as soon as possible, or continue to practise alongside the provision of adequate safeguards/supervision where necessary;
- Full clarity of processes for determining whether a barrister's fitness to practise is impaired by reason of his or her health for complainants and members of the public, barristers and their representatives, members of Panels, as well as members of the PCC, and COIC and BSB staff;
- Consistency of approach in the application of the FTP processes;
- Fairness and transparency in dealing with cases concerning a barrister's fitness to practise; and,
- Promotion of adherence to the professional principles, including maintaining proper standards of work within a profession that acts in the best interests of the public and in accordance with the regulatory standards.

#### 4. Regulatory Practice

##### Process and restrictions

- 4.1. The BSB's FTP process is consistent with the processes applied by other regulators; most regulators employ a 'health' Panel to take decisions on whether or not a professional is deemed unfit to practise, based on available evidence and expert advice. These Panels have the authority to impose conditions on a professional's practice or to suspend them where significant concerns about their fitness to practise and/or public safety are raised, or where there is evidence that the professional is not following medical advice. Further, most regulators offer the professional the opportunity to sign an undertaking not to practise or to have certain conditions imposed upon their practice, until the underlying issues have been fully resolved and investigated. For some regulators, the offering of an undertaking will have the effect of restricting the professional's practice without having their matter referred to full Panel. This is consistent with the BSB's approach.
- 4.2. Some regulators, including the General Medical Council (GMC) and General Pharmaceutical Council (GPhC), may request that, in the first instance, the professional undertake a health assessment by a registered medical professional, before considering what, if any, measures will be needed for protection of the public or referring a case to a Panel for a substantive decision. It should be noted that the regulators mentioned do not have power themselves to suspend a professional and have to make a referral to a Panel to consider such action.
- 4.3. In contrast, the BSB's approach is to refer all cases where no undertaking has been given, to a Preliminary Hearing in the first instance. At this hearing, the Medical Panel, which will include a medically qualified member, will be in the position to order that a medical assessment be carried out or take other appropriate action (including suspending a barrister) without having to first wait for the report of the medical examination. Unlike, the aforementioned health care regulators, the BSB does not

have access in-house to medical expertise, so it would be inappropriate for it to consider the results of a medical assessment.

### **Powers to immediately suspend**

- 4.4. Most regulators do not have in place a separate process by which very serious/urgent cases relating to a professional's health can be expedited; a broad interim suspension process is applied in all cases, where there is reason to believe that a professional's registration should be restricted through the imposition of an interim/intervention order while allegations are resolved. The same process is applied whether the allegations relate to a professional's conduct, or to their health. The order is likely to involve either suspending a professional for a limited period or imposing a restriction on their practise.
- 4.5. However, ILEX Professional Standards (IPS) include within their Rules the ability for a staff member to immediately suspend a professional's membership on the basis of health, without referring the case to an interim orders Panel, should the information received be considered to be of such gravity and urgency. However, if the information received is not considered to justify immediate suspension, the matter will be referred to a 'health' Committee in accordance with their Rules.
- 4.6. The BSB's current interim suspension process<sup>2</sup> is only applicable to barristers convicted of or charged with an indictable offence, or those convicted by an Approved Regulator for misconduct of any sort, for which the barrister has been sentenced to a period of suspension or termination. The BSB's Interim Suspension Rules do not currently include any power to impose an immediate suspension on a barrister's practice, before a hearing. However, under the new proposed Code of Conduct, due to be introduced in early 2014, the PCC will be able to consider whether or not a barrister should be subject to an immediate suspension pending the interim panel with immediate effect.
- 4.7. The inclusion of a similar power to, in some way, immediately suspend an individual within the FTP Rules based on serious information concerning their health, is therefore an important consideration. As detailed above, however, most other regulators do not have this power in their Rules and will usually have to refer the matter to a Panel before any suspension can be imposed, so this will need to be born in mind.

### **Approach**

- 4.8. The BSB's approach is similar to that assumed by other regulators in that it is inquisitorial in nature. The standard of proof applied when facts are in dispute, also in keeping with other regulators, is the civil standard, that is, "more likely than not".

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<sup>2</sup> The BSB's current Interim Suspension Rules can viewed through this link: [https://www.barstandardsboard.org.uk/regulatory-requirements/the-code-of-conduct/annexes-to-the-code/annexe-n-interim-suspension-Rules-before-the-visitors-Rules-\(1\)/](https://www.barstandardsboard.org.uk/regulatory-requirements/the-code-of-conduct/annexes-to-the-code/annexe-n-interim-suspension-Rules-before-the-visitors-Rules-(1)/)

### Panel composition

- 4.9. 'Health' Panels in other regulators are often supported by a secretariat that is responsible for providing administrative support to a Panel, independent of both parties (a role conducted by COIC on behalf of the BSB). In general, these Panels will consist of at least one medically qualified member.

### Numbers of cases

- 4.10. There is limited availability of statistics regarding the numbers of FTP cases on health grounds dealt with by other regulators per year. However, the GDC have indicated that they refer on average around 20 cases per year. The GMC instigate around 350 health examinations a year, although only a very small minority of these are referred to a 'health' Panel, either in light of the findings of the health assessment/examination, or because of a refusal by the registrant to comply with the request to carry out an assessment in the first place. The Institute of Chartered Accountants (ICAEW) have also indicated that their powers to suspend individuals on health grounds are very rarely invoked. On the whole, this demonstrates that regulators generally deal with relatively few cases of this nature.

## 5. Medical conditions considered by the BSB under Fitness to Practise Rules

- 5.1. As stated above, the BSB has referred 35 cases to Fitness to Practise proceedings between 2000 and the present day. The types of Fitness to Practise matters dealt with under the BSB's Rules are varied, as indicated in Table 1 below:

**Table 1: Number of cases referred by the BSB per condition/issue**

Condition/issue	Number of cases referred by the BSB*
Mental Health Issues	16
Stress & Anxiety	3
Alcohol addiction/abuse	11
Depression	5
Neurological disorder	1
Physical impairment	3
Unknown	2

\*Some barristers were reported to have had more than one condition.

- 5.2. As the table shows, barristers were most likely to be subject to FTP proceedings for reasons relating to their mental health, which covers conditions such as psychosis, nervous breakdown and bipolar disorder. Alcohol (or other substance) addiction/abuse is also a common reason for a FTP referral.
- 5.3. Each case will have been assessed individually based on the severity of the condition and the surrounding circumstances and the decision outcomes for each

individual barrister will have been different (eg the Committee/Panel may have obtained an undertaking not to practise, or chosen to take no further action).

- 5.4. As an approved regulator under the LSA 2007, the BSB is obliged to act in accordance with its regulatory objectives and these are best served by requiring a barrister to seek treatment for their condition, especially where the evidence indicates that it is in the interests of the public to do so. It is, however, noted that following the expiry of a period of suspension or undertaking, in the majority of cases, the barrister has chosen not to return to practice.

## 6. Better Regulation Principles

- 6.1. The BSB demonstrate adherence to the Better Regulation Principles by ensuring that the current Rules offer flexible outcomes, are not punitive, and enable the Panel to arrive at an outcome that is proportionate to the risk presented. For example, when considering a fitness issue, a Panel may discover that a barrister referred to it is facing particularly difficult circumstances that have given rise to the fitness issue. In such an instance, the Rules enable the Panel to take these factors into account, as well as any psychological, professional or financial impact on a barrister's practice flowing from a restriction. Moreover, a referral to Fitness to Practise proceedings will not always result in a full hearing by a Panel; at a preliminary hearing, a barrister may agree to undertakings not to practise or to do so with supervision, which can be extended or reduced in length, or an initial assessment by a Panel may result in the conclusion that no further regulatory involvement is necessary. In fact, only 16 of the 35 Fitness to Practise cases previously mentioned have resulted in a full hearing.

### Accessibility of the Rules and Guidance

- 6.2. When considering the accessibility of the Fitness to Practise processes, it is important to consider how previous issues of Fitness to Practise came to light. The BSB records show that:
- 31.5% (11) came to light during the investigation of a misconduct complaint against that same barrister;
  - 25% (9) were reported by Heads of Chambers;
  - 23% (8) were brought to the attention of the BSB by the barrister directly;
  - 11.5% (4) were brought to the BSB's attention through other external sources;
  - 6% (2) were reported by the Legal Services Commission;
  - 3% (1) were reported by a Judge.
- 6.3. Despite information on the Fitness to Practise procedure being available to the public on the BSB website, concerns about a barrister's health have not been raised directly by any third party complainant. This may indicate that the information needs to be more accessible. As is clear from the statistics, fitness to practise issues are most likely to be raised during misconduct complaint proceedings.

**Question 1: Is there anything further that the BSB should do to make the Fitness to Practise process more accessible?**

## 7. Approach to current review

- 7.1. Given the general consistency of our approach with other regulators, the fact that the Rules will continue to deal with the same kinds of issues, and the necessity for the Rules in light of the risk that they address, it is the BSB's view that the Rules not only continue to be necessary, but that the processes are required to be reasonably prescriptive in nature, in order to ensure that they provide certainty for Panel members and barristers in respect of key rights and obligations. Barristers need clarity about the conduct required of them, so that decisions can, if needed, be made in tight timeframes, and clients need to be clear about what they can and cannot expect of their barrister.
- 7.2. The Rules will, at the same time, continue to permit a flexible approach within the defined set of processes, given the wide supervisory and enforcement options available to a Panel (eg suspension until treatment received, agreed voluntary undertaking not to practise or to do so with conditions, no further action, authorisation to practise, subject to the submission of medical reports). The choice of enforcement options will depend on the individual's situation, the impact of their impairment, the risk posed to the public, and, whether making reasonable adjustments will allow them to continue to practise.
- 7.3. Further, the BSB's view is also that the underlying, basic inquisitorial process of referral, preliminary hearing, full hearing and unfettered rights of review/appeal, remain reasonable and accord with the Human Rights Act 1998. In fact, any proposed amendments augment and build on the anticipated aims and outcomes associated with the application of the FTP Rules (set out in Paragraph 3.3) by encouraging the individual concerned to address their health issue(s) and facilitating reasonable adjustments, so that they are able to return to practise as soon as possible. Convening a preliminary hearing, with a medically qualified member, in the first instance (rather than awaiting a medical assessment before taking a decision to refer) allows for the case to be progressed more quickly to those with the relevant expertise and the powers to suspend a barrister, if this should be necessary, until the case has been fully investigated.
- 7.4. Given the low numbers of FTP case referrals over the last 13 years (see Paragraph 5.1), and the fact that there is no reason to suggest that this number will change, the BSB is also of the view that they have the continued capacity and skills available to deal with cases involving fitness to practise.

### Method

- 7.5. To take forward the review of the Rules, the BSB established a Working Group. Its purpose was to support and advise the BSB in addressing the main issues with the Rules, as identified in Paragraph 2.6. above, as well as assist in the formulation of the supporting Guidance. The Group comprised members of COIC's pool of barrister and lay persons eligible to sit on Medical Panels; members from the BSB's PCC; barristers and lay persons with experience of equality and diversity issues in a

regulatory environment; and, COIC and BSB staff members.

- 7.6. To address some of the issues in Paragraph 2.6. above, the Rules were revised in part in 2011 to ensure that:
- a) the FTP process operated is fully compliant with Human Rights, and equality legislation;
  - b) technical references reflected changes within the Professional Conduct Department (PCD), following a departmental restructure in January 2011. The main changes related simply to replacing the Complaints Commissioner's former decision making powers to refer cases to a Medical Panel with Committee powers; and,
  - c) the term "defendant" was removed from the Rules, given that the fitness to practise process is not disciplinary in nature.
- 7.7. These changes came into effect from January 2011<sup>3</sup>.
- 7.8. With assistance from the Working Group, the BSB have also already produced supplementary guidance to support the application of the current Rules<sup>4</sup>. The Guidance, however, was temporary, given that it was acknowledged that there would be a need to update it to reflect any changes to the Rules proposed as a result of this review.

## 8. Proposed revisions to the Rules and Guidance

- 8.1. Having sought legal advice, the Working Group has considered and approved proposed permanent revisions to the Rules as well as the revised supporting Guidance and has agreed that these are now ready for consultation.
- 8.2. The following paragraphs provide a summary of the main changes proposed by the Group and set out the outcomes the BSB is seeking to achieve by amending the Rules. A copy of the proposed revised Rules and supporting Guidance appear at [Annex 2](#) and [Annex 3](#) respectively.

### Summary of proposed amendments to the Fitness to Practise Rules

- 8.3. As stated above, the processes (as set out in [Annex 1](#)) will not change fundamentally in light of this review (see [Annex 4](#) for a process flow-chart), however, the Rules have been revised with a view to:
- removing, where possible, references to technical complexities. For example, the

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<sup>3</sup> A copy of the existing Rules (as of January 2011), can be found on the website and accessed through this link: <http://www.barstandardsboard.org.uk/regulatory-requirements/the-code-of-conduct/annexes-to-the-code/annexe-o-fitness-to-practise-Rules/>

<sup>4</sup> A copy of the most recent guidance can be found on the website, and accessed through this link: [https://www.barstandardsboard.org.uk/media/31052/fitness\\_to\\_practise\\_guidance.pdf](https://www.barstandardsboard.org.uk/media/31052/fitness_to_practise_guidance.pdf)

descriptions of the application of interim suspensions and interim prohibitions have been unified into one concept, now named 'interim restriction';

- softening references to adversarial terminology, given that the proceedings are not disciplinary, 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" for "Chair", and replacing "Complaints Committee" with "Professional Conduct Committee" (in light of the name change, effective from January 2012);
- 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 Rules.

- 8.4. Changes to the presentation of the Rules have also been made for clarity, so that they start with the commencement provisions and definitions clause, moving on to the constitution of Panels and then running through the fitness to practise procedure chronologically from referral to appeal. The final part includes general provisions that apply to all Panels, such as the Panel procedure, voting, postponements and adjournments.

***Question 2: The BSB are of the view that no substantial changes need to be made to the current Fitness to Practise process. Do you agree that the process is fit for purpose and aligns with the regulatory objectives?***

- 8.5. The substantive amendments to the Rules, can be summarised as follows (*Rule numbers below refer to the revised Rules, found at [Annex 2](#)*):

### **Definitions and renaming (Rule 3)**

- 8.6. The Rules now clarify the BSB's power to make the Rules and impose the Fitness to Practise procedures on the profession, in accordance with Schedule 4 of the LSA 2007. A number of amendments and additions have also been proposed to the definitions included in the Rules, with the aim of providing increased clarity and ease of reference, and to reflect the definitions used within the current Code of Conduct of the Bar in England and Wales.
- 8.7. Definitions for the 'PCC', 'President', 'suspension', 'prohibition', 'notice', 'restriction', and 'medical' are now set out in the Rules and the definition of a 'lay' person, has been changed to reflect the fact that the term 'lay' is used to refer to someone who has never been a barrister.
- 8.8. The 'Medical Panel' has been renamed the 'Fitness to Practise Panel' since the former could inaccurately imply that all Medical Panel members are medical professionals. The titles of the 'Appointed Medical Advisor' (AMA) and 'Medical Expert' have been amended to 'Medical Examiner' and 'Medical Member' respectively, so the roles are more clearly defined and less easily confused. The definition of the Medical Member (and of their role) clearly reflects the fact that, whilst both are eligible to sit on Panels, only the Medical Examiner is able to provide advice

on the medical evidence and/or to perform any independent medical examinations. The Medical Examiner may not provide opinion or advice to the Panel in private, and any attempt to do so would create the perception of unfairness and bias on the part of the Panel.

- 8.9. The definition of 'unfit to practise' has also been amended to remove the requirement for the impairment to be "serious"; the impairment must, by definition, be sufficient to require action to restrict the barrister's practice. The removal of this word reduces any complexities associated with the application of the threshold test when making a decision on the outcome of a case.

**Question 3: Are there any definitions in the Rules which lack clarity?**

**Question 4: Is the role of the Medical Member of the Panel sufficiently reasonable and clear in the Rules and/or Guidance?**

**Constitution of Panels (Rules 4)**

- 8.10. A description of the process by which Panels should be constituted, previously located within the Rules, has been moved to a separate Schedule at the end of the document to improve readability (Schedule 1).
- 8.11. Panels are convened independently of the BSB by the President of COIC to ensure the impartiality of the hearing (in accordance with the Human Rights Act 1998). The Schedule provides for the appointment and maintenance of a pool of panellists by COIC for both Fitness to Practise, and Review Panels, for which the provisions of both have been simplified and unified. Under the new Schedule, discretion to remove those members no longer meeting the appointments criteria is provided.
- 8.12. The parameters of the role of the President (and COIC) have been set out in the Rules, and have been limited to the appointment of the Panels and providing assurance of members' eligibility. To maintain independence, all other administrative aspects of the process (such as notifying or updating the barrister), are now conducted by the Chair of the convened Panel. In actuality, however, administrative functions afforded to the Chair can be exercised on their behalf by a committee or Panel secretary.

**Referral to Fitness to Practise Panel (Rules 5 – 10)**

- 8.13. The referral process has been simplified. This section now refers solely to the receipt of information in writing and is wide enough to include any complaint, self-referral or referral from another body or Committee (Rule 5).
- 8.14. The parameters of the BSB's role have been defined and simplified. The role is now confined to commencing the proceedings, carrying out any investigations appropriate to the consideration of whether the barrister may be unfit to practise (Rule 6), and referring a complaint, which raises issues about fitness, to a Panel (Rule 8).

- 8.15. To ensure that the process remains non-adversarial in its approach and that the BSB's independence from the final decision is clear, staff from the Professional Conduct Department (PCD) of the BSB will also attend each hearing in an administrative capacity only (see Paragraph 89 of the Guidance). For the same reasons, notification obligations regarding a referral to a full hearing now rest with the Chair of the convened Fitness to Practise Panel rather than the Chair of the PCC/BSB (Rule 7 and see also Rule 20). The notification process provides the barrister with opportunity to make submissions before any decision to refer the case to a Panel; a process, which adheres with the principles of natural justice.

**Test to be applied by PCC and role of the BSB (Rule 8)**

- 8.16. The new Rule 8 provides a single test to be applied by the PCC when referring a matter to a FTP Panel for determination. The test is that the barrister “*may* be unfit to practise” and imposes a low threshold thereby minimising the risk of exposure to the public. To maximise flexibility, the PCC now also have the discretion to refer a complaint to the FTP.

**Representations and right to appeal (Rule 9)**

- 8.17. In compliance with Article 6 of the Human Rights Act 1998, Rule 9 now permits the barrister to make representations to the PCC before a referral to a FTP Panel is considered.

**Preliminary Hearings (Rule 11)**

- 8.18. This previous unwieldy process of notifying a barrister of the referral of a case, has been replaced by a simple obligation to notify the barrister of the time and date of the hearing. More detailed direction relating to notification is now included in the Guidance (see Paragraphs 85 – 89).

**Medical Examiner (Rules 13 – 14)**

- 8.19. The proposed Rules presuppose that barristers will comply with directions made by a FTP Panel. Rules 13 and 14 therefore remove the need for a barrister to consent to a direction that he or she submit to a medical examination. Failure to comply may be taken into account by the Panel when considering whether the barrister is unfit to practise (see Rule 21). The new Rules also provide the Panel with an express power to indicate what should be included in the instructions to a Medical Examiner and allow the BSB discretionary power to require an examiner to attend a hearing in person. This discretion increases flexibility in the system, allowing for a Medical Examiner's report to be submitted and agreed in writing, rather than always orally in person.
- 8.20. In accordance with the Data Protection Act 1998, the Rules permit the disclosure of only *relevant* medical records.

### **Interim Restrictions (Rules 15 – 16)**

- 8.21. To ensure consistency with equivalent powers in other regulatory bodies, Rule 15 extends the range of reasons for imposing a suspension (or prohibition) on a barrister's practice to include reasons relating to the public interest or the interest of the barrister. It was particularly important to include the latter given that in health cases, a barrister *may* potentially have little insight into his/her condition or realise that his/her judgement is impaired. To avoid the risk of the restriction lapsing before the opening of the full hearing, this Rule now confirms that an interim restriction will last until the determination of the matter at a full hearing and a substantive decision is taken. The Guidance makes plain that in all circumstances in which a barrister is subject to an interim restriction, the Panel can direct that a hearing be expedited if there are particular circumstances that may signal the need for it (see Paragraphs 35 – 37 of the Guidance).

### **Acceptance of Undertakings (Rules 17)**

- 8.22. For maximum flexibility and safeguarding of the public interest, the period of any undertaking may be agreed and extended wider than the barrister's practice to cover his or her conduct or behaviour generally, pending the hearing, for example, in relation to treatment for his or her condition. This approach enables the barrister to address his or her physical or mental health issues effectively and facilitates a return to practise as soon as possible with adequate safeguards/supervision and progress monitoring, where necessary.

### **Review of Interim Restrictions (Rules 18 – 19)**

- 8.23. This Rules revises the previous Rule 22(g)(i) to give the Panel discretion (rather than an obligation) to direct a review hearing where it has ordered an interim restriction, as it may not be necessary if it is envisaged that the full hearing will take place in short order. For consistency, an obligation on the Chair to record in writing the Panel's decision, together with reasons, is also included (Rule 19).

### **Serving notice of a hearing (Rule 20)**

- 8.24. Rule 20 has been amended to reflect the fact that a medical report may not have been produced, either because there has been no direction to do so, or because the barrister has not complied with such a direction.
- 8.25. In compliance with public law principles, the Rules now include an express requirement to provide reasons for the decision to the barrister that are sufficient for them to understand why the decision has been made and these reasons can be challenged if appropriate (see *Phillips v General Medical Council* [2006] EWCA Civ 397). Exclusion of this Rules may leave the BSB subject to challenge on the basis of procedural unfairness, and risk reputational damage (see also Paragraph 49 of the Guidance).

### **Review of decisions made by the Fitness to Practise Panel test for Review**

### **Hearing (Rules 26 – 29)**

- 8.26. Rule 26 has been amended to extend the circumstances under which a review hearing can be held to include cases concerning the continuation of a restriction or conditions. It also now allows a hearing to be listed either on application by either party or on the Chair of the PCC's own motion (the Rules were previously limited to just the Chair of the 'Complaints Committee' (as it was formerly known)).
- 8.27. The test for holding a review hearing has been clarified. There may be a review hearing if there has been a 'significant change in circumstances' (eg where new evidence comes to light) or if there are 'other good reasons' for conducting a review. The powers of the Panel have been amended to confirm that the original direction may be revoked. These changes are fundamental in ensuring fairness in the proceedings.

### **Appeals (Rule 30)**

- 8.28. Rule 30 now provides that a barrister only has right of appeal against a Panel's decision to "impose, extend, vary or replace" a period of restriction, as opposed to any Panel decision. This change limits the barrister's power to appeal only substantive decisions that have an impact on the barrister's right to practise/work, however, within this context, a barrister's right to appeal still remains unfettered.

### **Procedure before a Panel (Rules 37)**

- 8.29. Rule 37 now includes expanded Rules relating to the procedure before a Panel. The wording at Rule 37(b) of the Rules has been revised to permit the Panel to proceed in the absence of the barrister, subject to "all reasonable efforts to serve notice" having been made (rather than referring to "all procedures requiring attendance"). Any discretion to commence proceedings in the absence of the barrister will be exercised with the utmost caution (see Paragraph 82 of the revised Guidance for the factors which should be taken into consideration by the Panel members before proceeding in the absence of the barrister).
- 8.30. The barrister also remains permitted to appoint their own advocate under Rule 37(b), where they are unable to represent themselves, perhaps, for instance, because of their medical condition.
- 8.31. The existing version of the Rules requires that evidence be submitted in advance of the hearing, but does not specify any time period for doing so. Accordingly, the Rules have been amended to include a 24 hour time limit for clarity, consistency and efficiency of proceedings (Rule 37(c)(ii)).

### **Referrals to PCC (Rule 38)**

- 8.32. Rule 38 now allows a Review Panel to refer a case to the PCC if a barrister has failed to comply with a direction or undertaking, in order that they may consider whether or not to refer the matter to a Disciplinary Tribunal if it would be likely to

result in a charge of professional misconduct being brought. This allows the BSB to carry out the function of dealing with complaints of misconduct and taking disciplinary action where appropriate. However, the Rule also allows flexibility of referral in cases where the failure may be a result of the barrister's ill health.

- 8.33. The FTP Rules are one of the constituent parts of good regulation and will not be applied in isolation. It is intended that they will work to form a cohesive whole. For example, information obtained through a supervision scheme, may be used as a basis for referral to the PCC by a Fitness to Practise Panel, if it considers that the (a) evidence before it warrants disciplinary action and (b) the available sanctions of the Disciplinary Tribunal offer a more appropriate way to deal with that matter (eg disbarment).

**Advice for Panel (Rule 39)**

- 8.34. In light of increasingly complex jurisdiction, Rule 39 has been introduced to permit a Panel to appoint a barrister to provide independent advice, where relevant expertise is not readily available within the Panel. The advice should be provided to both parties (either in their presence or copied to them) as soon as reasonably practicable, to give the barrister an opportunity to challenge any point in the advice which he or she considers unjustified. It also ensures that:

- the process remains fair to both parties;
- no complex points of law are misinterpreted; and,
- the Panel does not stray into any error of fact or law.

**Equality Act 2010 (Rule 43)**

- 8.35. Rule 43 highlights the Panel's legal obligations under the Equality Act 2010 and, when read in conjunction with the Guidance notes, provides a duty to take the relevant provisions of the Act into account. Adherence to this Rules will ensure that the Fitness to Practise processes are fair, objective, transparent and free from unlawful discrimination.

**Postponement, adjournment and cancellation, and proceeding in the absence of the barrister (Rules 44 – 48)**

- 8.36. These Rules now include a power for the Chair to postpone, adjourn or cancel (on application of the BSB) proceedings, subject to the barrister being given a fair opportunity to make representations. This provides a flexible mechanism for re-listing cases, for example, where the barrister's health prevents him/her attending the hearing or cancelling it where the Chair considers that there are no reasonable grounds for questioning whether the barrister is unfit to practise. This Rule now also caters for situations whereby the barrister has voluntarily waived their right to attend the FTP Hearing.

### Publication (Rules 49 – 45)

- 8.37. The publication Rule has been revised to provide the Chair with a broad power to make disclosures of Panel decisions, rather than to direct disclosure to specific bodies or persons as this may not always be in the public interest depending on the circumstance. The Guidance now sets out those persons to whom disclosures will routinely be made; in this way the Bar Standards Board retains the flexibility to make ad hoc disclosures where necessary.

***Question 5: The aim of the Rules is to protect the public. Taken as a whole, do you consider that they present a proportionate and expeditious means of achieving the aim of being fair to the barrister and protecting the public?***

***Question 6: Do you have any other comments on any of the proposed amendments to the Rules, which are not specifically addressed by the questions already included in this consultation paper?***

### Summary of proposed amendments to the Supplementary Guidance

- 8.38. The proposed draft Guidance supporting the proposed revised Rules is attached at [Annex 3](#). The Guidance offers a flexible mechanism for setting out procedural matters since, unlike the Rules, it can be subject to revisions over time without requiring approval from the Legal Services Board. In addition to providing further information about the operation of the Rules, the Guidance clarifies the BSB's obligations under the Equality Act 2010 and the duty to make reasonable adjustments. It also includes the criteria for decision-making, which comprises:
- when a case should be referred to a Fitness to Practise Panel;
  - factors to be taken into account when deciding if a barrister is unfit to practise;
  - whether restrictions should be imposed;
  - the criteria for determining whether an interim suspension or prohibition order should be made, or for determining whether adjustments to the process are reasonable;
  - factors to be taken into account for determining the most suitable restriction; and,
  - the nature of the appeal hearing.
- 8.39. The provision of clear decision-making criteria within the Guidance ensures that a robust, proportionate and fair decision-making system, mindful of the legal obligations set out in equality legislation, is put in place. It also helps the Panel to determine what is reasonable and prevents any risk to the public. Ultimately, the provision of such guidance allows the potential impact on the regulatory objectives to be measured through an assessment of vulnerability of the public, vulnerability of the barrister, and suitability of other available remedies (that do not impact on a barrister's ability to practise), based on the likelihood of that impact occurring.
- 8.40. While the Rules provide for flexibility in terms of the range of restrictions that may be imposed, it is necessary to include a certain amount of prescription for clarity and

certainty. The Guidance sets out the administrative processes that will be followed so that the barrister is clear about how the procedure will be applied. The need for clarity is important given that the process can be traumatic for the barrister who may not, owing to health reasons, be able to consider all aspects of the procedure at once. To ensure openness and transparency in the process, the Guidance will be made publicly available.

**Question 7: Are the processes in relation to making reasonable adjustments, as outlined in the Guidance satisfactory (see Paragraph 12 – 14 of the Guidance)?**

**Question 8: Is the Guidance supporting the Fitness to Practise process clear to follow and does it provide the necessary level of detail to inform decision-making? Specifically consider:**

- ***the factors to be taken into account by the PCC when considering whether to refer a matter to a Fitness to Practise Panel (See Paragraph 15 – 21 of the guidance);***
- ***the factors, which need to be taken into account by Fitness to Practise Panels, when considering whether to direct an interim suspension or prohibition (See Paragraphs 29 – 33 of the Guidance);***
- ***the decision-making criteria to be used by the Fitness to Practise Panel in determining whether the barrister is unfit to practise (See Paragraph 42 of the Guidance).***

**Question 9: Does the Guidance effectively cover the administrative and practical steps to be followed within the process (See Paragraphs 89-91 of the Guidance)?**

#### **Powers of immediate suspension**

- 8.41. While developing the Rules and Guidance, the BSB considered the need to include certain powers for the PCC to immediately suspend a barrister, where the available evidence suggests that their case should be dealt with more urgently than the standard process allows, due to the level of risk that they present to themselves or the public. The inclusion of this power could mirror the powers that will be incorporated into the proposed revised Interim Suspension Rules (see Paragraph 4.6. above), where any interim suspension imposed by the PCC shall take immediate effect and will remain in force until such time as an interim panel has considered the matter.
- 8.42. It was not considered appropriate in health cases, to allow the PCC to make a determination to immediately suspend a barrister from practise. Although the new Interim Suspension Rules will give the PCC powers to suspend someone either charged with or convicted of a crime immediately, this will be on the basis of evidence that has already been judged to have some validity by an appropriate body (such as the another Approved Regulator, CPS or court). No such judgement will have been made at this stage in relation to an individual's medical condition, given

that a medical report cannot be made available immediately, nor will the BSB have ready access to medical practitioners with the appropriate expertise to consider the findings of a medical report, unlike other Regulators, such as the GMC. Further, misconduct and health issues are not the same in character and it should therefore be considered appropriate to deal with the latter under separate processes/Rules. Finally, it would be very difficult to define which types of cases should or should not be subject to immediate proceedings, given that all cases, by definition of the need for referral to the process, would potentially be considered 'serious' or 'urgent'.

- 8.43. Moreover, research on best regulatory practise shows that most other regulators do not include within their Rules the power to suspend immediately by the Executive alone, despite their Interim Suspension Rules extending to both issues of conduct, and issues of health; the decision to suspend a professional still lies with a Panel.
- 8.44. The review also considered whether it would be necessary to include the provision to expedite the most serious cases. The Rules and Guidance state that a preliminary Panel (at which a barrister can be suspended) should be convened "as soon as is reasonably practicable" (Rule 11) and include no specific timeframes. Therefore, by definition, discretion will always lie with COIC to convene a Preliminary Panel as expeditiously as possible.
- 8.45. The Rules and Guidance seek flexibility in proceedings wherever possible (see Paragraph 7 of the Guidance), and encourage the case to be progressed within a timeframe appropriate to the risk associated with an individual case, rather than specifying a timeframe at every stage. Specifically, Paragraph 19 of the Guidance makes it clear that, although barristers should normally be required to make representations within 14 days, this timeframe should be applied flexibly, depending on the seriousness of the case, and the necessity to progress the case more expeditiously based on whether it is in the interests of the public or whether the barrister requires more time as a reasonable adjustment. This approach means that, on the whole, it is not essential to include specific timeframes for progressing the case within the Rules and Guidance (eg the number of days it should take to convene a Panel). Rule 18(b) also allows an interim Fitness to Practise Panel to direct an expedited full hearing of the Fitness to Practise Panel at the request of the barrister.
- 8.46. The BSB are of the view that its approach aligns with the stated outcomes of the Rules set out at paragraph 3.3 above and strikes the right balance between limiting any immediate risk to the public by ensuring that a Panel is convened in short order where necessary, and fairness to a barrister and their right to make representations.

***Question 10: Do you think that the proposed processes above, will allow the PCC to process cases (particularly the most urgent) expeditiously?***

## 9. Future changes to the Rules and the introduction of the new BSB Code of Conduct

- 9.1. The BSB intend to issue a revised Code of Conduct (known as the 'BSB Handbook') in 2014. Alongside facilitating a more outcomes-driven approach, the new Code will include a proposed regulatory framework for Entities. The BSB therefore proposes to apply to extend its regulatory reach to 'Authorised (non-BSB) Individuals', as they will be known (that is, non-barristers authorised to provide reserved legal activities by another Approved Regulator, where such individuals are employed by barristers or working as managers or employees of a BSB regulated entity).
- 9.2. To this end, the FTP Rules will need to be amended to be applicable to both barristers holding a practising certificate *and* 'Authorised (non-BSB) Individuals' ('Als'), to the extent that is appropriate and proportionate. The latter will have contact with lay clients and members of the public and therefore the BSB will be required to take action quickly where they may present a risk to the public on the grounds of health. The FTP Rules under the new Code will consequently extend the powers of the FTP Panels to disqualify such 'Als' from working in any BSB Regulated Entity, as well as notifying their Approved Regulator of the concern. The anticipated aims and outcomes of the application of Rules (as at Paragraph 3.3) will also be extended to include appropriate non-barristers.
- 9.3. Given that the BSB has already consulted extensively on the new Code and received broad approval to regulate entities, it is anticipated that the Fitness to Practise can be revised to be applicable to non-barristers without the need to further consult on these revisions. The revisions will be limited to amending any definitions to accord with those included in the new handbook and extending any reference to 'barristers' to also include 'Authorised (non-BSB) Individuals'. The Rules will also be amended to allow the BSB to disqualify or suspend 'Als' from working in a BSB regulated entity.

***Question 11: Do you have any comments on the BSB's proposal to extend the Fitness to Practise Rules to be applicable to non-barristers, in accordance with the provisions of the proposed new Code, without further consultation?***

## 10. Equality analysis

- 10.1. The BSB is committed to promoting equality and diversity throughout the Bar and within the 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 and consider the protected characteristics, which are: age; disability; gender re-assignment; pregnancy and maternity; race; religion or belief; sex; sexual orientation; and marriage and civil partnership.
- 10.2. Given the nature and subject of the Rules, particular attention was paid to equality issues throughout the review. Specifically, it is understood that issues relating to the protected characteristics of disability, pregnancy and maternity and age (i.e. older age) are more likely to arise than other protected characteristics in Fitness to

Practise proceedings (see Paragraph 9 of the Guidance), since barristers from these groups may be more likely to have health issues that could impact on their ability to practise.

- 10.3. The BSB's Equality and Diversity Advisor was consulted throughout the review to ensure that the Rule changes did not put protected groups at greater risk. Further, legal advice was sought on equality legislation and advice was also sought from barristers and lay members with experience of equality issues within the Working Group.
- 10.4. Diversity statistics have been collated from previous Fitness to Practise cases to establish whether there are any arising equality issues requiring further investigation. Given that there have only been 35 cases concerning barristers in the last 12 years, statistically significant diversity trends have been very difficult to analyse. However, an attempt is made at [Annex 5](#), within the Equality Analysis and the results suggest that there are no equality issues arising in terms of the age, gender or the race of barristers subject to these proceedings in the past (where statistics were available). The BSB does not hold statistics with regard to the other protected groups, however, there is no evidence to suggest that any group will be disproportionately impacted by the Rules and Guidance or the changes introduced under this review. The Equality Analysis also makes clear that the BSB is committed to monitoring equality data in relation to these protected groups going forward (see Section 4, Action Plan for improvement).
- 10.5. The review of the Rules and the development of the supporting Guidance have been designed to ensure that they are now compliant with the Equality Act and do not unlawfully discriminate against barristers who are subject to Fitness to Practise proceedings. Specifically, the Rules and Guidance:
  - include reference to making reasonable adjustments. Panels must also consider whether a barrister coming before them with a disability is fit to practise on the assumption that reasonable adjustments have been or will be made, as this is the duty of the barristers' chambers, workplace or courts (Paragraph 13 of the Guidance);
  - make clear that, where necessary, reasonable adjustments must be made for a barrister during the course of any fitness to practise hearing (Paragraph 12 of the Guidance);
  - define a disabled person as someone who has "a physical or mental impairment, which has a substantial and long term adverse effect on his or her ability to carry out normal day to day activities" (Paragraph 10 of the Guidance). Therefore, a short-term condition will be assessed differently from a long-term condition;
  - make reference to the Panel's general Equality Duties; Panels must exercise their functions in accordance with section 149 of the Equality Act 2010 (Rule 43 and Paragraph 11 of the Guidance);
  - are now less adversarial, so to distinguish these proceedings from complaints of misconduct;
  - ensure that the Panel are clear that the focus of the hearing should be on whether the barrister's impairment actually impacts on their fitness to practise (Paragraph

- 14 of the Guidance);
- make clear that, some conditions, although not considered disabilities for the purposes of the Equality Act 2010, will render the barrister 'unfit to practise' eg alcoholism. Equally, the Rules and Guidance make clear that just because a barrister is unwell, it does not render them unfit to practise (Paragraph 15 of the Guidance);
  - include processes that allow for a review of the outcome of a hearing where a barrister's circumstance has changed; Panels are directed to seek flexibility in the proceedings wherever possible (Paragraph 7 of the Guidance);
  - include processes that allow reasonable time for the barrister to submit representations (Rule 9), which can be extended or varied depending on the risk associated with the case or whether the barrister requires more time to respond (Paragraph 19 of the Guidance); and,
  - make clear that, on nominating the Examiner, the Panel will take into account the available information about the barrister's condition and have regard to any reasonable objections to the nominated Medical Examiner raised by the barrister (Paragraph 24 of Guidance).
- 10.6. It should also be noted that the BSB's Disclosure and Publications Policy prevents the publication or disclosure of information concerning the nature of the medical reason requiring these conditions or restrictions in order to protect the privacy of the barrister concerned.

***Question 12: Do the revisions to the Rules raise any equality issues not identified in Paragraph 10 above or the Equality Analysis ([Annex 5](#)). If so, do any further revisions need to be made to the Rules and/or Guidance?***

## **11. Consultation Questions for interested parties on the proposed changes**

- 11.1. It is considered best practice to consult on both the proposed revised Rules and Guidance and 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.
- 11.2. The feedback obtained by way of responses to the questions set out throughout the paper, and within Paragraph 11.3. below, will direct the revisions made to the new Rules, and the accompanying guidance documents. Any changes to these Rules will need to be overseen by COIC and approved by the BSB Board. The BSB will then make an application to the Legal Services Board for final approval.
- 11.3. **Questions on the proposed revisions to the Rules and Guidance**
- ***Question 1: Is there anything further that the BSB should do to make the Fitness to Practise process more accessible?***
  - ***Question 2: The BSB are of the view that no substantial changes need to be made to the current Fitness to Practise process. Do you agree that the process is fit for purpose and aligns with the regulatory objectives?***

- **Question 3: Are there any definitions in the Rules which lack clarity?**
- **Question 4: Is the role of the Medical Member of the Panel sufficiently reasonable and clear in the Rules and/or Guidance?**
- **Question 5: The aim of the Rules is to protect the public. Taken as a whole, do you consider that they present a proportionate and expeditious means of achieving the aim of being fair to the barrister and protecting the public?**
- **Question 6: Do you have any other comments on any of the proposed amendments to the Rules, which are not specifically addressed by the questions already included in this consultation paper?**
- **Question 7: Are the processes in relation to making reasonable adjustments, as outlined in the Guidance satisfactory (see Paragraphs 12 – 14 of the Guidance)?**
- **Question 8: Is the Guidance supporting the Fitness to Practise process clear to follow and does it provide the necessary level of detail to inform decision-making? Specifically consider:**
  - ***the factors to be taken into account by the PCC when considering whether to refer a matter to a Fitness to Practise Panel (See Paragraph 15 – 21 of the guidance);***
  - ***the factors, which need to be taken into account by Fitness to Practise Panels, when considering whether to direct an interim suspension or prohibition (See Paragraphs 29 – 33 of the Guidance);***
  - ***the decision-making criteria to be used by the Fitness to Practise Panel in determining whether the barrister is unfit to practise (See Paragraph 42 of the Guidance).***
- **Question 9: Does the Guidance effectively cover the administrative and practical steps to be followed within the process (See Paragraphs 89 – 91 of the Guidance)?**
- **Question 10: Do you think that the proposed processes will allow the PCC to process cases (particularly the most urgent) expeditiously?**
- **Question 11: Do you have any comments on the BSB's proposal to extend the Fitness to Practise Rules to be applicable to non-barristers, in accordance with the provisions of the proposed new Code, without further consultation?**
- **Question 12: Do the revisions to the Rules raise any equality issues not identified in Paragraph 10 above or the Equality Analysis ([Annex 5](#)). If so, do any further revisions need to be made to the Rules and/or Guidance?**

## 12. Responding to the Consultation

- 12.1. A distribution list is attached at [Annex 6](#). This list is not exclusive and responses are welcome from anyone who wishes to comment on the issues raised in this paper. Consultees are welcome to address all or only some of the issues set out in this paper and to provide observations on issues not specifically covered by the questions.
- 12.2. The BSB will summarise the responses received and will publish the summary document on its website. If you do not want your response or a summary of it published please do make this clear when you reply to us.
- 12.3. Responses to this consultation must arrive by **5pm on 6 May 2013** and should be sent to: [\*\*SMayhew@BarStandardsBoard.org.uk\*\*](mailto:SMayhew@BarStandardsBoard.org.uk).

Hard copy responses can also be sent by post to:

**Siân Mayhew**  
**Professional Conduct Department**  
**Bar Standards Board**  
**289 – 293 High Holborn**  
**London WC1V 7HZ**