



The Bar Council

Bar Council response to the Second BTAS Sanctions Guidance Review Consultation

1. This is the response of the General Council of the Bar of England and Wales (the Bar Council) to the BTAS Sanctions Guidance Review - Second Consultation (September 2021).¹

2. The Bar Council represents approximately 17,000 barristers in England and Wales. It promotes the Bar's high-quality specialist advocacy and advisory services; fair access to justice for all; the highest standards of ethics, equality and diversity across the profession; and the development of business opportunities for barristers at home and abroad.

3. A strong and independent Bar exists to serve the public and is crucial to the administration of justice. As specialist, independent advocates, barristers enable people to uphold their legal rights and duties, often acting on behalf of the most vulnerable members of society. The Bar makes a vital contribution to the efficient operation of criminal and civil courts. It provides a pool of talented men and women from increasingly diverse backgrounds from which a significant proportion of the judiciary is drawn, on whose independence the Rule of Law and our democratic way of life depend. The Bar Council is the Approved Regulator for the Bar of England and Wales. It discharges its regulatory functions through the independent Bar Standards Board (BSB).

INTRODUCTION

4. The Bar Council welcomes the opportunity to participate in this second consultation on the disciplinary sanctions and specifically the proposed sanctions guidance document.²

¹ <https://www.tbtas.org.uk/wp-content/uploads/2021/09/Sanctions-Guidance-review-Second-Consultation-paper-Sept-21-For-Publication-2.pdf>

² <https://www.tbtas.org.uk/wp-content/uploads/2021/09/BTAS-Sanctions-Guidance-2022-Draft-for-Consultation-For-Publication.pdf>

5. As stated in the response to the first consultation³, as the representative body for the profession we have experience both promoting good practice in relation to tackling any reported incidents of harassment and bullying at the Bar, and of supporting victims of misconduct, including providing support following incidents of harassment. We are keen to ensure that complaints in this area are dealt with appropriately, recognising the ongoing impact that any incident can have on a victim, and others in a vulnerable position, with respect to both their professional and personal lives.

Question 1: Do you consider [that] the specific factors for the 13 Misconduct Groups in Part 2 are appropriate and do you have any suggestions for change?

(i) Inclusion of “discourtesy” in Group I

6. We propose that Group I (Misconduct Group – Behaviour towards other) is better defined. At first blush, it is potentially very broad due to the emphasis on the word “discourteous”. Barristers are regularly in confrontational and uncomfortable situations with opponents (orally or during correspondence) or during, say, cross-examination. Equally, a barrister’s duty to their client may mean that they need to have challenging conversations with judges or lay members. The current definition of conduct which falls to Group I is insufficiently well-defined to understand what would be deemed unacceptable and “discourteous” in the context of a role which means that a barrister will often be required to be direct and challenging in a way which might cause discomfort in others. We propose that Group I is revisited and redrafted so that barristers can fully understand their obligations. The word “discourteous”, if retained, should be comprehensively defined.

(ii) Mitigating Factor - Social Media in Annex 7

7. We would like to reiterate what we said in our response to the first consultation, in terms of the social media group at Annex 7, we consider that the following should be added as a mitigating factor;

“The public interest in freedom of expression and the right to receive and impart information, including whether the material highlighted is a matter of public interest.” This takes into account Article 10 of the European Convention on Human Rights. As such matters may be highly complex, sensitive and contentious, specific guidance should address how such matters should be approached and the balancing of competing rights.”

³ <https://www.barcouncil.org.uk/uploads/assets/c6f7bd4e-6e22-4e45-82b401483819efd0/Bar-CouncilBTAS-Sanctions-Guidance-Review-ConsultationFINAL-RESPONSE-2806.pdf>

Question 2: Do you consider that the general factors set out at Part 3 Annex 2 are appropriate and do you have any suggestions for change?

8. They are appropriate.

Question 3: Do you consider the sanctions ranges for the additional groups listed above are appropriate and proportionate?

(i) *Sexual misconduct requires more serious indicative sanctions*

9 An indicative sanction of 24 months to 36 months suspension for middle range misconduct of a sexual nature (Misconduct Group B) is insufficiently punitive bearing in mind that to fall into this category the individual may have moderate culpability and moderate harm or significant culpability and limited harm or low culpability and significant harm. Disbarment should therefore be included as an indicative sanction. The indicative sanction should be altered to read 'from 24 months suspension to disbarment' for the middle range category.

(ii) *Discrimination requires more serious indicative sanctions*

10. For Misconduct Group C – 'Discrimination, non-sexual harassment and bullying' the indicative sanction for middle range misconduct currently reads 24-26 months (which we believe is a typo and should read to 36 months) but it should be altered to reflect a similar level of seriousness as Misconduct Group B – Misconduct of a sexual nature. The indicative sanction should therefore be altered to read 'from 24 months suspension to disbarment'.

11 The seriousness of discriminatory conduct (including bullying and harassment related to a protected characteristic) as opposed to bullying and harassment that is not related to a protected characteristic needs to be recognised.

12 The indicative sanctions, including the amendments suggested above for the middle range of misconduct would provide a suitable range to encompass both types of misconduct, but it is suggested that guidance could be provided, e.g. by way of footnote, that for misconduct that amounted to discrimination, the expectation is for a sanction to be imposed which is greater than for similar acts of misconduct which were not motivated by a protected characteristic.

Question 4: Is the length and detail of the Guidance appropriate to support effective and consistent sanctioning decisions?

13. Yes, other than in relation to Group I (Misconduct Group – Behaviour towards other) as explained in response to Question 1 above.

Question 5: Are there any areas of the Guidance where the content could be reduced, or maybe added to, without impacting on its overall effectiveness?

14. No.

Question 6: Do you think overall the Guidance as drafted will be beneficial in promoting effective and consistent sanctioning? If not, what areas of the Guidance do you consider should be adapted, amended or deleted to achieve these aims?

15. Yes.

Question 7: Are there any issues not covered in the Guidance that you consider should be covered?

16. No, save as has been specifically addressed above.

Question 8: Do you consider there are adverse implications arising from the Guidance as drafted for any of the protected groups, as defined by the Equality Act 2010, and what do you consider they are?

17. Yes. See the response to Question 3 above. The indicative sanctions should be increased for middle range misconduct in Group C (Discrimination, non-sexual harassment and bullying) so as to be brought into line with the indicative sanctions for Group B Misconduct, to ensure that the protected characteristics other than sex are not treated differently to sexual misconduct.

Question 9: Do you have suggestions about how the terms of the Guidance could address any adverse impacts or better advance equality of opportunity and foster better relationships between the protected groups and others?

18. Yes. See the response to Questions 3 and 8 above.

The Bar Council
21 October 2021

*For further information please contact
Sam Mercer, Head of Policy D&I and CSR
The General Council of the Bar of England and Wales
289-293 High Holborn, London WC1V 7HZ
Email: smercerc@barcouncil.org.uk*