



The Council
of the Inns
of Court

Response to BSB Consultation document:

“Proposed revisions to the Enforcement Regulations: Part 5 of the BSB Handbook, Second Consultation”

Introduction

1. The Council of the Inns of Court (COIC) thanks the Bar Standards Board (BSB) for the opportunity to respond to the second consultation paper on the proposed revisions to the Enforcement Regulations: Part 5 of the BSB Handbook.
2. The four Inns of Court have appointed (COIC) to submit a response on their behalf. This is that response. A draft response was prepared by COIC and circulated to the Inns for consideration and comment by their committees. Those comments have been taken into account in this final document which therefore sets out the views that are common ground between the Inns and their members. This response should be read in conjunction with the response from the Bar Tribunal and Adjudication Service, an arm of COIC, which was drafted by members of its Strategic Advisory Board and addresses in more detail the practical implications of the proposed new regulations.
3. In this introduction, COIC sets out its overall view on the matters raised in the consultation and addresses common points which arise under more than one of the questions asked. The individual responses to the questions refer back to these comments where appropriate rather than repeating the same response each time.
4. COIC recognises and wishes to acknowledge the considerable work and effort that the BSB has put into the matters addressed in the consultation. COIC notes in particular the careful and comprehensive nature of the equality impact assessment which has highlighted and addressed a range of issues. COIC welcomes this.

5. COIC also welcomes the proposal to redraft the regulations to improve their organisation and structure. COIC considers that the result is a significant improvement on the present arrangement. The simplified numbering and splitting of the regulations into four stand-alone segments make them easier to follow and use and will be appreciated by the profession.
6. The BSB has asked a number of questions about whether it has achieved its objectives in the redrafting process. Matters of this nature are raised in particular by questions 6 and 8-11. COIC wishes to make clear that it is not for it to comment on whether the BSB has succeeded in its objectives of providing a suitable framework, simplifying the language of the new regulations or using plain English or whether what is proposed accords with the BSB's overall objectives. Those are matters on which the BSB should, if it considers it necessary, seek independent advice.
7. Nor is this response intended to provide a comprehensive review of the language used in the new regulations. Indeed, COIC does not consider that it would be appropriate for it to take such an approach. It does nevertheless wish to point out that there are points in the proposed new regulations – some of which are new and some of which are carried over from the existing regime – where the drafting is unnecessarily convoluted or where the operation of the regulations seems inappropriate.
8. By way of example, COIC notes that in the proposed Enforcement Decision Regulations, Regulation 6, which is carried over from the current rule rE9, takes an approach which is difficult to understand. It appears to provide that a report about the conduct of a barrister in that role should not be dealt with by the BSB if the barrister has subsequently taken up a full-time judicial post. COIC would suggest that the better course would be for the issue to be addressed by the BSB and the outcome of its deliberations sent to the appropriate judicial conduct body for that body to take any action it considers appropriate in the light of the BSB's findings. If COIC has misunderstood how Regulation 6 is intended to operate, then it would suggest that consideration be given to whether redrafting might make the operation of the Regulation clearer.
9. Again, by way of example, the drafting of Regulation 35 of the BSB Disciplinary Tribunals Regulations is, in COIC's view, unduly complicated. It could be condensed into a single paragraph such as:

“The *BSB* shall take immediate [and appropriate] steps to put into effect the finding or sanction of the *Disciplinary Tribunal*, provided that, where the Respondent has given notice of appeal to the High Court against the finding or sanction of the *Disciplinary Tribunal* on the charges of *professional misconduct* and there is no finding that the *BSB regulated person* should be subject to immediate suspension or imposition of conditions, no action may be taken until the appeal has been finally disposed of.”

Redrafting in this way would have the additional benefit that it states the BSB’s duty without qualification with the proviso following naturally in the identified special circumstances. COIC has highlighted this Regulation as it provides a good example of the way in which it considers that the current language of the Regulations remains unnecessarily complicated and how further simplification might be achieved.

10. The BSB will see from the responses to question 2 on publication and questions 12 and 13 on the provision of materials to third parties, that COIC considers that these raise sensitive and difficult issues in relation to the balance between transparency and safeguarding of confidentiality and privacy in personal information. COIC would ask the BSB to consider carefully the issues raised and whether the current proposals are likely to provide a fair and workable solution before making any changes to the present regime. Members of the COIC working group have extensive experience of the difficulties of ensuring effective redaction of documents containing private or confidential information. Skeleton arguments often contain matter the comprehensibility of which depends upon knowledge of private or confidential information. In practice, it is frequently impossible to produce a document which is of value in promoting open justice whilst avoiding disclosures which cause harm to individuals. That being so, COIC would suggest that, before any changes to these regimes are put in place, their practical effect is assessed to ensure that the new regime provides a real improvement to that currently in place. The time and financial costs of what is proposed should be properly addressed before obligations are imposed on parties to provide redacted materials for any purpose.
11. With that brief introduction, we turn to the responses to the individual questions.

Question 1

Do you agree with our proposal to update the commencement and transitional provisions so that the new regulations will come into force on or around 1 February 2027 and apply to all new and ongoing cases from that specified date? If not, why not?

COIC does not agree with the proposal. COIC has concerns about the fairness of this proposal. This proposal would mean that the new rules would apply retrospectively to cases that are ongoing at the date of inception, which includes implications on the publication of charges.

COIC's expectation is that the new rules ought not to apply to existing cases that are already in the system. It is important for those against whom allegations are brought that they are clear what rules and procedures will govern the process and there is a risk of unfairness if those rules and procedures change partway through the process. COIC felt that the relevant rules should be the rules in force at the date on which the complaint is made, i.e. the new rules will apply prospectively.

There is also a concern that a date of February 2027 for the new rules to come into force would prove to be administratively difficult. The consultation has not yet concluded and COIC understands that final approval may still require a period of months. It is likely not possible that BTAS would be able to develop new rules, procedures, and guidance, nor is it likely possible that they could recruit and train required individuals, in such a short time period. It is envisaged that there would need to be a six-month mobilisation period from the point the rules are finalised before the first hearing is held under the new procedures.

Question 2

Do you agree with the publication provisions being extended so that outcomes are published in all cases, including where the charges against a barrister have been dismissed? If not, why not?

COIC does not agree with this proposal and instead offers an alternative proposal: publication is suspended for a set period of time, at the very least in cases where none or only some of the charges are proved. During this window the barrister should be given the opportunity to make

representations as to why the finding should not be published, or how and to what extent the determination ought to be redacted, in order to protect their reputation in the circumstances. This is likely to be particularly relevant in cases where all charges have been dismissed, or where the only charges found proven could be said to be the least serious of the allegations that have been brought. COIC does not comment on to whom representation should be made, but if the BSB agrees then guidance should make clear who this body/individual should be.

COIC agrees that there may be instances where barristers are content for their exoneration to be made public, however there will also be occasions where allegations are not found proven against the barrister, but nonetheless the judgment may contain critical reference of the barrister which could cause the barrister reputational damage, despite being exonerated of all charges.

COIC noted the current position is that if all charges are dismissed, BTAS removes all reference to the matter from its website. This proposal suggests that in the event that a case is dismissed there would still be a considerable paper trail in the public domain.

There is a fragile balance to be struck between the public interests of transparency as against fairness to the barrister. A compromise of a period of suspension before publication could seek to find a balance in appropriate cases.

COIC recognises that this proposal is likely in part a result of the Harman Report, which recommends transparency. With that recommendation in mind, COIC accepts that, in certain cases, there may be warranted exceptions to the alternative proposal. For example, in cases involving allegations of a sexual nature, or in a case involving allegations of bullying/harassment, it may be appropriate to reduce the length of a suspension for a barrister to make representations regarding publication. COIC suggests the barrister would ordinarily have to demonstrate that there were exceptional circumstances or reasons not to publish or not to publish in full in such circumstances.

Question 3

Do you agree with our proposal to extend the power to impose an immediate and interim order so that such orders may be imposed on the basis of interim conditions, rather than interim suspension or disqualification only? If not, why not?

COIC agrees that this is a sensible proposal. COIC suggests that, in line with other regulators, the test to adopt for the imposition of an interim order is that it is both necessary and proportionate.

Question 4

Do you agree that the right to request a review of an interim order should be extended so that it also applies in respect of undertakings accepted and imposed by an interim panel? If not, why not?

COIC agrees that this is a sensible proposal.

Question 5

Do you agree with our proposal to allow both parties the right to appeal a decision of the Health Panel and to be notified equally of the appeal hearing, have a right to attend and be notified of the outcome? If not, why not?

COIC does not agree with this proposal. If a panel has made a decision on a health matter based on informed medical advice, it is not for the BSB to then try to appeal that decision. COIC cannot envisage a scenario where the BSB would be better informed than the medical evidence and/or expertise placed before a panel.

COIC perceived that any appeal by the BSB in these circumstances risks being seen as punitive, which is not the aim of proceedings before a Health Panel.

A high threshold must be in place for challenges of a decision of the Health Panel to proceed. Such challenges should be on the basis of an application for judicial review of the decision on rationality grounds rather than an appeal seeking a review of the merits of the decision. COIC noted that the BSB already has the ability to challenge an irrational decision through judicial review proceedings.

Question 6

Do you think the new regulations are:

- *better organised,*
- *simplified,*
- *expressed using plain English and*
- *accord with regulatory best practice?*

Please explain your view.

COIC does not believe that this falls within the remit of a consultation and rather the BSB ought to satisfy itself of the answers to these questions by obtaining relevant legal advice.

However, as an example, COIC notes that the ‘administrative sanctions’ section of the regulations is at present difficult to understand and would benefit from consideration of a re-draft to improve readability.

Question 7

Do you agree with the proposed revisions to the defined terms in Part 6 of the Handbook, as set out in Annex 2? If not, please explain your view and whether you consider any amendments are required.

COIC believes that there is an overuse of italicised defined terms within the content of the regulations which makes the regulations somewhat inaccessible.

Some of the definitions, such as ‘judge’, appear to be factually incorrect. The BSB should take relevant legal advice to assure itself that proper and appropriate definitions have been used.

The BSB proposes to remove the definition of ‘professional misconduct’. COIC is concerned that without a definition, arguably every breach of the Code could be deemed to be professional misconduct. At the very least, if there is no definition, there should be accompanying guidance. Not all breaches of the Code merit categorisation as professional misconduct, and certainly not ‘serious’ misconduct. The BSB should be clear about which breaches may lead to enforcement action. Without a definition, COIC stresses that the jurisdiction of tribunals is ambiguous which may be contrary to the rule of law.

(Questions 8 – 11 are taken together for the purpose of this response).

Question 8

Do you think that the proposed Enforcement Decision Regulations as set out in Annex 2 provide a suitable framework that:

- a) implements our policy positions; and*
- b) accords with our overall objectives of improving the fairness, transparency, efficiency and effectiveness of the end-to-end enforcement process?*

Please explain your view.

Question 9

Do you think that the proposed Disciplinary Tribunals Regulations as set out in Annex 2 provide a suitable framework that:

- a) implements our policy positions; and*
- b) accords with our overall objectives of improving the fairness, transparency, efficiency and effectiveness of the end-to-end enforcement process?*

Please explain your view.

Question 10

Do you think that the proposed Interim Orders, Suspension and Disqualification Regulations as set out in Annex 2 provide a suitable framework that:

- a) implements our policy; and*
- b) accords with our overall objectives of improving the fairness, transparency, efficiency and effectiveness of the end-to-end enforcement process?*

Please explain your view.

Question 11

Do you think that the proposed Health Panel and Procedure Regulations as set out in Annex 2 provide a suitable framework that:

- a) implements our policy positions; and*
- b) accords with our overall objectives of improving the fairness, transparency, efficiency and effectiveness of the end-to-end enforcement process?*

Please explain your view.

In respect of questions 8 – 11, COIC does not believe that this falls within the remit of a consultation and rather the BSB ought to satisfy itself of the answers to these questions by obtaining relevant legal advice.

Generally speaking, COIC does note that the role of a panel secretary must be clearly explained as it is COIC's understanding that this is intended to be purely administrative in nature. A panel secretary should not at any stage be involved in the decision-making process.

(Questions 12 and 13 are taken together for the purpose of this response).

Question 12

Do you think the guidance has struck the right balance between the public interest in ensuring open justice and transparency and a barrister's rights, including those under the European Convention on Human Rights? Please explain your view.

Question 13

Do you have any general feedback on the guidance on access to tribunal documents by non-parties? We welcome as much detail as you can provide.

COIC draws the BSB's attention to:

<https://www.bailii.org/ew/cases/EWCA/Civ/2026/640.html>, in which the Court of Appeal overturned the need for maximum transparency for court observers. COIC recommends that the entirety of the proposed draft guidance is reviewed in light of recent developments.

COIC recommends that, beyond the charge sheet, applications to receive copies of any other documents should be specifically requested by an individual. The provision of such documents should then be determined once all parties have been afforded the opportunity to comment.

Beyond the charge sheet, no other documents should be published as routine. Skeleton arguments and written submissions are not ordinarily provided or published routinely in the course of other regulatory proceedings. COIC does not envisage a situation where it would be appropriate to publish such material, rather than responding to individual applications to be provided with such documents.

It is wholly unrealistic to expect the parties to bring additional copies of materials should observers wish to have copies of written submissions or skeleton arguments in a case.

COIC further notes that provision of skeleton arguments and written submissions is likely to involve a labour intensive and time-consuming task by the parties to ensure that, where necessary or appropriate, redactions are made to those documents. For example, whilst a case may be heard in public, certain aspects, such as references to personal life or health of a barrister, might be held in private session. A written submission might therefore refer to information that is to be heard in both the public domain and in private session.

If the BSB intends to publish written submissions and skeleton arguments, it is likely that there might be lengthy and resource-intensive satellite disputes over redactions, for which neither party would be remunerated, and which may be at cost to the BSB.

Question 14

Do you have any feedback about the EIAs we have conducted? Are any other equality impacts we should consider, beyond those set out in the EIAs? Where possible, please provide evidence.

COIC wishes to acknowledge the quantity and quality of the impact assessments that have been undertaken.

Page 27 of the EIA refers to recognition of different protected characteristics when making cost decisions. The BSB proposes a tiered approach based on PQE to ensure more equitable outcomes. COIC believes that this has the potential to discriminate on grounds of, for example, age, where PQE itself may not be a good indicator of accumulated wealth. A person may, for example, have had a lucrative career in another industry before transferring to the Bar. COIC suggests that the BSB could simply adopt the income banding scale used to determine practising certificate fees.

Page 34 refers to service by email. COIC recommends that consideration is given to the fact that barristers' professional email addresses are likely to be accessible to chambers' staff, who would potentially be able to see any confidential information sent by email. COIC therefore recommends that any confidential, sensitive and personal data ought to be marked as such, and

key details included in an attachment, as opposed to the covering email.

Question 15

Are there any other potential data protection or privacy issues raised by the new regulations that you think we should be aware of? Where possible, please provide evidence.

COIC is unclear what requires review and consultation in respect of question 15. The BSB states that it has done some work in this area however the findings do not appear to have been shared for consultation.

COIC in essence repeats the concerns it has raised in respect of questions 2, 12 and 13.