BTAS AND BSB CONSULTATION RESPONSE 25th May 2021

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1. SUMMARY

The present sanctions guidance does not ensure that Barristers who commit any sort of misconduct receive appropriate penalties. This is particularly obvious where sexual misconduct is concerned. The sanctions guidance is unacceptably lenient and out of step with modern societal norms.

The proposed sanctions guidance does not go far enough by way of defining the boundaries between serious, moderate and less serious misconduct. It allows for flexibility that will produce a range of inconsistent tribunal sanctions for similar instances of misconduct. It is important that this is addressed to ensure that misconduct sanctions exercises are approached in the same way, no matter which panel is seized of the decision-making.

At present, the Bar sanctions misconduct significantly more leniently than all other regulated professions, and there are discrepancies[1] between tribunal decisions on sanctions.[2] Complainants of serious misconduct do not receive support from the BSB or Bar Council at any stage, leaving them at the mercy of their chambers or employers.

When suspensions are imposed, the BSB should apply for interim suspensions as a matter of routine.

Specific consultation questions are answered at 7.

[1] BLOG: Sexual Misconduct at the Bar | Carmelite Chambers
[2] Sexual Misconduct; Time's Up at the Bar – Crime Girl's Blog

2. REPRESENTATIONS

2.1. The Bar's priorities in addressing the review to sanctions guidance include protecting the public's trust in the profession and promoting and maintaining proper professional standards and conduct. (This includes the deterrence of poor behaviour).

2.2. However, the profession should also have renewed regard to what happens after sanctions are imposed, i.e. the monitoring of Barristers subject to sanction (but not disbarred).

2.3. There should be action undertaken to ensure victims of misconduct are supported.

2.4. Through being alive to the ripple effect of misconduct, it is more likely that victims of misconduct will feel supported to report it. The reporting of misconduct is already a very difficult decision for a Barrister to make, as the Bar is very small and the specialist areas even smaller. Any step that makes the process less daunting will empower others to feel they can speak up.

2.5. Where the misconduct statistically effects more women (sexual misconduct and harassment), this has the secondary effect of improving retention and bolstering equality within the profession. It will also assist in achieving the Bar's stated aims of protecting the public's trust and deterring poor behaviour.

3. CASE STUDY

The following information has been provided by the complainant in a recent BTAS decision. Her identity is known to the author, and she has approved the contents of this section regardless of the potential for 'jigsaw identification'. With her full consent it will be published online.

3.1. F is a junior Barrister who shared the same chambers as a male Barrister who repeatedly sexually assaulted her. At the time of the assault, F had been in pupillage. The person who sexually assaulted F was a tenant. Between the reporting of the sexual assault and the BTAS tribunal hearing, she was offered a tenancy, which she accepted.

3.2. However, she was not supported by her chambers during the BSB investigation nor the prosecution, nor was she supported by the BSB or Bar Council. F was effectively left to her own devices, but with a significant expectation on the part of the BSB that she would engage with each request they made, without issue.

3.3. Her chambers carried out their own inquiry and found serious misconduct proven. They merely fined the respondent Barrister and allowed him to continue working. During their inquiry they had clerked the two Barristers separately, but once their inquiry had concluded, they clerked them together, with the result that they sent the respondent Barrister and F to act for parties in the same case. This compounded F's distress and left her astounded at what she was experiencing. This decision was taken *while the BSB investigation was still ongoing.*

3.4. The BSB made the decision to prosecute and F now faced this second process. F found the BTAS hearing to be an uncomfortable experience. Having been objectified and deeply humiliated in the most personal way by the man who attacked her, she was then excluded from the parts of the hearing where his personal mitigation was heard. She states *"the system as it stands goes a long way in perpetuating the power imbalance between perpetrator and victim."*

3.5. Although a great deal is made in the sanctions guidance about the *'impact upon the victim'*, no one asked F what the impact had been at any stage. There was no victim personal statement akin to criminal proceedings. F was not invited to give evidence on the subject. The panel were left in complete ignorance of the true impact of the respondent's misconduct.

3.6. Following a finding of serious sexual misconduct by the tribunal, the respondent Barrister received a short suspension. This was despite sexual misconduct being proved that would have significantly crossed the custody threshold had it been prosecuted at the Crown Court. The author is of the opinion that he would certainly have been imprisoned had he lost a trial.

3.7. The BSB did not apply for an interim suspension[3], meaning this very junior Barrister was left (still) being clerked alongside the member of chambers who had assaulted her. Despite the misconduct finding, the offending Barrister could (and did) work for the entire period leading up to the suspension commencing. This understandably caused severe distress to the victim.

3.8. F was left feeling powerless, and that she had no choice but to leave chambers. Meanwhile, the Barrister subjected to the suspension was able to 'diary cram', picking up work to financially tide over the suspension period, leaving it with less bite and reducing its punitive effect. He was left on the website for some time, and the suspension was so short that it was much the same as a sabbatical or a long holiday. He remains a tenant at his chambers.

3.9. It was only thanks to disclosing what was going on to senior members of the profession outside of F's chambers that any real moral and practical support was received, albeit unofficial, and she was assisted in making her escape.

Commentary

3.10. This is unacceptable and should be a source of deep embarrassment for the profession. It cannot be the case that such a situation should ever be allowed to be repeated.

[3] The author is not aware that the BSB have ever applied for an interim suspension order in any case despite having had the power to do so for some time.

3.11. Mechanisms must be put in place to prevent a chambers mishandling misconduct allegations in this way and then not self-reporting their behaviour to the BSB.

3.12. Training packages should be delivered and there should be central monitoring. Chambers ought to sign up to a joint protocol for the handling of misconduct allegations.

3.13. The BSB needs to offer the ability for witnesses to submit victim impact/personal statements in cases where there is a complainant who has been wronged.

3.14. Victims of sexual misconduct, dishonesty, harassment and assault should not be excluded from sections of hearings where 'personal' mitigation is delivered, whether or not it relates to the respondent's health. It can be subject to reporting restrictions in the usual way, but the exclusion of the victim is inappropriate. Those who have been found to have violated others should forfeit their right to privacy over matters they wish to pray in mitigation.

3.15. It is also unacceptable for a panel to find that someone behaved a certain way due to things that were going on in their private life. In the case of BSB v Daren Timson-Hunt the panel were clear that they accepted Mr Timson-Hunt's family problems caused him to follow a lone female and upskirt her by a tube station[4]. This is absurd. Personal mitigation may invite a panel to be more generous by way of sanction if that mitigation stands out in such a way as to be worthy of generosity, but it is entirely wrong for panels to be able to find a causal link between entirely separate personal mitigation about a Barrister's wife and their attack upon, or predatory following of, a completely different woman.

[4] Approved-Report-of-Finding-and-Sanction-Timson-Hunt.pdf (tbtas.org.uk) para 11.

3.16. Furthermore, allowing victims to be present prevents the ability of the respondent barrister to lie in mitigation in relation to matters about which the victim has personal knowledge.

3.17. There is no explanation for the lack of interim suspension in this or any other matter, when such an order is clearly warranted and should be the norm.

4. ONLINE POLL RESULTS

4.1. With the above in mind, as well as the disparity in sanctions guidance between sexual misconduct and other categories of misconduct, the author carried out a poll[5] using the social media medium Twitter. It was open to the public as well as members of the profession.

4.2. The thread is still available to view online. Its results provided no more than a mere guide as to the thoughts of the general public and the profession in relation to appropriate sanctions, and betrayed a lack of understanding in respect of the differences between allegations, the civil standard of proof and the criminal standard of proof. Alarmingly many were put off the 'disbarment' sanction due to the lower standard of proof required to find misconduct had occurred.

4.3. The results of two questions stood out in particular. Serious sexual misconduct, expressly described as including *"under the clothes"* sexual assault, received 87.4% votes in favour of disbarment[6].

4.4. The second; *"Barrister commits a serious sexual offence and is convicted at Court, becoming a registered sex offender"* received a 99.3% vote in favour of disbarment[7], with the only other vote entered erroneously, the person responsible declaring their finger had slipped while scrolling.

[5] https://twitter.com/CrimeGirl/status/1395130882718060548?s=20
[6] https://twitter.com/CrimeGirl/status/1395130903664504832?s=20
[7] CrimeGirl on Twitter: "7. Barrister commits a serious sexual offence and is convicted at Court, becoming a registered sex offender" / Twitter

4.5. These two results provided an insight into why there has been such widespread condemnation of recent sexual misconduct tribunal sanctions decisions, where gross sexual misconduct has been rewarded with sanctions akin to a short slap on the wrist followed by a return to practice as usual.

4.6. When asked *"Should the BSB become more involved when sexual misconduct complainants are offended against by a fellow member of their chambers, perhaps by appointing someone independent to assist the victim & chambers navigate this difficult territory?"* 92% of 1,375 voters said yes.

4.7. When asked *"Should it be possible to restrict a Barrister's practice? For example, prevent them from directly working with the public, prevent them from working with children and vulnerable people, or prevent them from accepting instructions in a certain area of law."* 83.2% of 1,429 voters said yes[8].

Out of those who voted no, a few commented underneath that they voted no because they felt anyone who required restrictions on their practising certificate should be prevented from practise, i.e. disbarred.

Out of those who voted yes, suggestions were made in respect of the ability to supervise pupils or hold management positions in chambers.[9]

OTHER PROFESSIONS

The Armed Forces

4.8. Comparing the Court Martial sentencing guidelines[10] for sexual misconduct committed by service personnel; upon conviction by Court Martial

"Offenders should.. be dismissed… unless there are exceptional reasons for retention".

[8] CrimeGirl on Twitter: "11. Should it be possible to restrict a Barrister's practice? For example, prevent them from directly working with the public, prevent them from working with children and vulnerable people, or prevent them from accepting instructions in a certain area of law." / Twitter
[9] https://twitter.com/fazcafazca/status/1395138404476723201?s=20
[10] Guidance on sentencing in the Court Martial version 5 (judiciary.uk)

4.9. The starting point in all cases of dishonesty is dismissal.

> *"The Court Martial should always consider dismissal for offences of dishonesty in the same way as any other employer. It should not impose a sentence of imprisonment if the level of culpability falls too far below the level which would justify prison in the civilian system. However a sentence of detention might be appropriate in these circumstances to reflect the breach of the higher standards of honesty and integrity required within the Armed Forces."*

Doctors

4.10. The Medical Practitioners Tribunal Service Sanctions Guidance[11] states in respect of sexual misconduct;

> *"Sexual misconduct seriously undermines public trust in the profession. The misconduct is particularly serious where there is an abuse of the special position of trust a doctor occupies, or where a doctor has been required to register as a sex offender. More serious action, such as erasure, is likely to be appropriate in such cases."*

4.11. In respect of dishonesty, *"Good medical practice states that registered doctors must be honest and trustworthy, and must make sure that their conduct justifies their patients' trust in them and the public's trust in the profession*[12]*"*

> *"Although it may not result in direct harm to patients, dishonesty related to matters outside the doctor's clinical responsibility (e.g. providing false statements or fraudulent claims for monies) is particularly serious. This is because it can undermine the trust the public place in the medical profession. Health authorities should be able to trust the integrity of doctors, and where a doctor undermines that trust there is a risk to public confidence in the profession. Evidence of clinical competence cannot mitigate serious and/or persistent dishonesty"* [13]*.*

> *"Dishonesty, if persistent and/or covered up, is likely to result in erasure*[14]*"*

The Police

[11] dc4198-sanctions-guidance---16th-november-2020_pdf-84606971.pdf (mpts-uk.org)
[12] dc4198-sanctions-guidance---16th-november-2020_pdf-84606971.pdf (mpts-uk.org) para 120
[13] dc4198-sanctions-guidance---16th-november-2020_pdf-84606971.pdf (mpts-uk.org) para 124
[14] dc4198-sanctions-guidance---16th-november-2020_pdf-84606971.pdf (mpts-uk.org) para 128

4.12. The College of Policing Guidance on Outcomes in Police Misconduct Proceedings[15] states:

4.13. *"Offences of dishonesty, sexual offences (including possession of child pornography) and violent crime are particularly serious and likely to terminate an officer's career. Such offending involves such a fundamental breach of the public's trust in police officers and inevitably brings the profession into disrepute."*

Solicitors

4.14. The Solicitors Disciplinary Tribunal[16] treats sexual misconduct as serious misconduct. The 2016 case of *SRA v Dart*[17] involved a Solicitor who engaged in an inappropriate discussion about arrangements to settle a bill of costs, and watched pornography with a vulnerable female in his office. He was struck off.

5. UNREGISTERED BARRISTERS

5.1. It should not be the case that members of the public, or colleagues at the Bar or in our sister professions should have to look Counsel up online to check that they are not going into a conference room alone with a registered sex offender[18], or someone convicted of GBH[19].

5.2. Both cases referred to at 5.1. relate to unregistered Barristers, who could go on to become practising members of the profession as they have not been disbarred. The author submits they should clearly have been disbarred and that 'joining another profession' is insufficient reason to merely suspend.

5.3. These unregistered Barristers received press that tarnished the name of the practising profession. The public do not understand the difference between unregistered and registered Barristers, and the media do not include the word 'unregistered' in their headlines.

[15] Guidance on outcomes in police misconduct proceedings (prgloo.com)
[16] GUIDANCE NOTE ON SANCTIONS 4th edition December 2015 website.pdf (solicitorstribunal.org.uk)
[17] 11511.2016.Dart .pdf (solicitorstribunal.org.uk)
[18] Approved-Report-of-Finding-and-Sanction-Timson-Hunt.pdf (tbtas.org.uk)
[19] Approved-Report-of-Finding-and-Sanction-Evans.pdf (tbtas.org.uk)

5.4. The ongoing regulation of Bar students who did not ever complete pupillage is at odds with other professions. It costs the profession to prosecute unregistered Barristers, financially but also reputationally. Students who have never completed pupillage should not be able to call themselves Barristers, and should not be regulated until they have qualified fully as Barristers and then for whatever reason decided to lie fallow without a practising certificate, akin to membership of the Roll of Solicitors.

6. ADVERSE TRIBUNAL DECISIONS

6.1. The author has previously commented publicly on other recent tribunal decisions and adopts and repeats those comments for the purpose of this consultation.[20]

6.2. It should not be the case that someone convicted of fraud at the Crown Court should be able to escape disbarment[21]. It should not be the case that when considering sanctions guidance, a suspended sentence of custody is treated any differently to an immediate sentence of custody.

Henry Hendron

6.3. Mr Hendron is a recent example of a Barrister with a litany of disciplinary matters on his record but who remains in practice. In chronological order these are:

6.3.1. Driving with excess alcohol, disqualified for four years (on a guilty plea) - £7000 fine

6.3.2. Reprimanded and fined £2000 in 2014 for writing 'disparaging comments' about witnesses in a criminal trial. This misconduct related to the trial of his

[20] Sexual Misconduct; Time's Up at the Bar – Crime Girl's Blog
[21] https://www.tbtas.org.uk/wp-content/uploads/hearings/5028/Approved-Report-of-Finding-and-Sanction-Rowan-1.pdf

friend Nigel Evans MP.[22] It received widespread press coverage and the reporting showed that the court was scathing about his behaviour:

"A barrister friend of Nigel Evans allegedly jeopardised the trial with an "irresponsible" blog on the Internet. Henry Hendron was said by trial judge Mr Justice King to have committed "a very serious contempt of court".

Prosecutor Mark Heywood QC said the online comments had caused at least one of the alleged victims to consider pulling out of the trial. Although the comments – claiming to be news from "Camp Nigel" - were taken down, the court heard that they had been tweeted and retweeted on the eve of the trial.

Mr Evans' own QC Peter Wright described it as "irresponsible and jeopardised the trial process." The judge reported him to the Attorney General Dominic Grieve, saying "this is a prima facie contempt of court and it could influence jurors too. This is a very serious contempt."

At the time, Mr Hendron was running his own legal business, 'Strand Chambers'.

6.3.3. In May of 2017 he was before BTAS again for misconduct. This time he had failed to pay a Barrister or giving adequate notice of dismissal while head of Strand Chambers. He received two reprimands and £2000 in fines.

6.3.4. Mr Hendron's fourth appearance before BTAS should have been his last appearance as a Barrister. He had been convicted at the Crown Court for possession with intent to supply, in extremely dangerous circumstances; he had given his 18 year old boyfriend Miguel Jimenez the drugs that led to his death.[23]

6.3.5. By 2019 he had an unattractive misconduct record and clearly an entrenched drug problem. He had supplied drugs to someone significantly younger than him

[22] Nigel Evans' barrister friend jeopardised trial with online blog | London Evening Standard | Evening Standard
[23] Outcome-Posting-Hendron-00971.pdf (tbtas.org.uk)

(Hendron was 35[24] at the time, an age disparity of 17 years), causing the teenager to lose his life. By even the most generous measure, this was plainly behaviour incompatible with membership of the profession. Yet he was suspended for merely three years.

6.3.6. It was not long before he was back before the tribunal. In 2019 he returned to be prosecuted for harming public confidence in the profession after failing to pay a debt of £850[25]. This was in relation to misconduct that occurred in 2017.

6.3.7. He had failed to honour a decision made by the Legal Ombudsman in that he had failed to pay a client her compensation. He was suspended for three months and prevented from accepting public access instructions[26] for nine months.

6.3.8. That case was the subject of an appeal; the Court of Appeal quashed the result. The BSB had no jurisdiction over him at the time due to his suspension.

6.3.9. His fifth prosecution occurred in 2020 and concluded in May of 2021. The report has not yet been published[27]. This time he faced eighteen charges of misconduct spanning his suspension period. The charges included conducting litigation, appearing at the High Court, online advertisements and referring to himself as a Barrister while suspended. They also included using inappropriate or threatening language in emails. Nine were found proven.

6.4. Hendron had attempted to delay his fifth prosecution by applying for the prosecution to be struck out, then insisting on an in-person hearing during a pandemic, then raising fears of having Covid himself. He then appeared without any papers and requested an adjournment in order that he could get them. He then criticised the BSB for delay. He submitted *"I am not competent to represent myself in these proceedings".* When the Judge asked him why he hadn't brought his papers, he

[24] Henry Hendron barrister supplied drugs that killed Miguel Jimenez | Metro News
[25] Approved-Report-of-Finding-and-Sanction-H-Hendron-July-2019.pdf (tbtas.org.uk)
[26] Public access instructions are those accepted directly from the public, without a solicitor as go-between.
[27] Charge-Sheet-Hendron.pdf (tbtas.org.uk)

replied that he couldn't explain, and that *"most of the charges were rubbish*". He said he had done *"sod all"* recently by way of work.

6.5. When he appeared at the next hearing he sought to dismiss some of the charges. When he was asked why he hadn't prepared any written argument, he launched into a tirade at the panel. He stated *"I have had these proceedings drag on… I'm sick to death of everything the BSB has done.. so forgive me that when I get home I don't want to guess about these proceedings.. I don't have the mental wherewithal to represent myself in these proceedings…"*

6.6. He told the panel that he sent threatening emails to a client and that he didn't regret doing so because the client was also a friend. He stated that he had been injecting drugs daily at the time he did so.

6.7. He was also bankrupt by the time the proceedings began. Nine of the eighteen charges were found proven.

6.8. The final hearing was covered by a journalist who was present:

"Nine of the eighteen charges against Hendron have been found proved by barristers' professional disciplinary body Bar Tribunal & Adjudication Service. The panel, chaired by retired Crown Court Judge James Meston, found Hendron committed misconduct by behaving 'in a way which is likely to diminish the trust and confidence which the public places in the profession' and 'in a way which could reasonably be seen by the public to undermine his integrity'.

These include failing to remove an advertisement for his legal services on lawsurgery.com while he was suspended, even after the Bar Standards Board requested he do so.

While suspended he also held himself out as barrister by performing a 'reserved legal activity' by serving a Notice of Acting to Painsmith Solicitors, and signing off emails

'barrister - non practising,' the panel found. The panel have not released their full judgement explaining their reasoning, saying it will be uploaded to their website on a future date.

Harini Iyengar, for the BSB, said today: 'There are significant factors in terms of aggravating features found in the guidance. On the BSB's submission Mr Hendron has shown a lack of insight into his own conduct and a lack of remorse for the misconduct the panel found proved. An important question for this panel to ask is: what is the extent to which Hendron is capable of learning from his mistakes as a professional, given the history and sequence of events in his practice?

'There is also the importance of the protection of the public and the reputation of the profession. One might have thought that someone who had been suspended would have taken all their professional obligations seriously at this stage.'"

6.9. He was not disbarred. Instead;

"Reprimanded by the Tribunal for his unacceptable and unprofessional behaviour. Prohibited from accepting public access instructions whether by himself or through any other person or entity for 2 years. To attend a Public Access Training Course before taking on any Public Access cases. No Costs ordered to the BSB."

Comment

6.10. The fact that this Barrister was not disbarred at any point is astonishing. There have been not one, but tens of perfectly justifiable reasons to disbar him. He has demonstrated repeatedly over many years that he is unfit for this profession. Irreparable damage has been done to the reputation of the profession by this behaviour and the subsequent lenience shown. It is of great concern that he operates without instructing solicitors and continued to be client-facing in a 'consultant' role during his suspension.

6.11. This is not intended to be a personal attack on Mr Hendron, the author does not know him. He posted on social media that he had asked BTAS to disbar him as he had *"done a thousand things which justify charges and disbarment*[28]*"* (albeit not the charges levied). Even he appeared to be shocked at their most recent act of leniency[29].

6.12. It is quite something that a Barrister can invite their own disbarment in agreement with the public and a vast swathe (if not all) of the profession and yet BTAS still step back and allow him to make his own mind up about his suitability to continue.

7. CONSULTATION QUESTIONS

The author agrees with the findings of the working group in that in relation to the "starting points" for breaches as set out in the current Part 2, the starting point for sexual misconduct is too lenient, for criminal convictions including drunk driving the starting point is too lenient. The same applies to violence, and for conduct involving drugs the guidance is unclear and inconsistent.

7.1. Question 1 – *Do you agree that the revised Guidance should remove reference to fine levels for entities regulated by the BSB?*

I agree with the working group in that the same approach should be taken as set out in the sanctions guidance for the SDT and the guidance ought only to include specific fine levels in relation to sanctions for individuals. Part 1 of the Guidance should include general principles applicable to deciding sanctions misconduct by BSB entities, including fines.

7.2. Question 2 – *Do you consider there is a more appropriate alternative to having categories of fines? Please provide further details.*

[28] https://twitter.com/barristertalk/status/1382044794764034053?s=20
[29] https://twitter.com/barristertalk/status/1397938987659104257?s=20

I agree that the three levels of fines are retained but the brackets for each should be revised to make the imposition of fines a more meaningful sanction that can reflect the seriousness of the misconduct. However, I am of the opinion that these can and should be imposed alongside a suspension. I am in agreement that fines should be means-assessed.

7.3. Question 3 – *Do you agree that the three categories for fines should be retained in the revised guidance?*

Yes

7.4. Question 4 – *Do you agree with the proposed revised financial brackets for each of the fine categories? If not, in what way do you think they should be amended?*

Yes but number them so that they can be aggravated, see below.

7.5. Question 5 – *Do you agree that a descriptor should be added for each of the fine categories, and do you agree with the proposed descriptors?*

In addition to 'moderately serious' insert 'or repeated or sustained misconduct ordinarily falling into category three' and in addition to 'serious misconduct' falling short of suspension, insert 'repeated or sustained misconduct ordinarily falling into category two'

7.6. Question 6: *Do you agree that the categories for suspension should be reduced to two?*

No, they should reflect the entire sentencing bracket. At present they focus too heavily on the 12 month cut off point in respect of the differentiation in panel sanction ability; the focus should be on achieving the correct result.

7.7. Question 7 – *Do you agree that the categories should be up to 12 months and over 12 months? If not, what do you consider the categories should be?*

Three categories:

1. Up to 12 months
2. 12-24 months
3. 24-36 months

7.8. Question 8 – *Do you agree with the general culpability and harm factors as set out at Annex 1?*

Please add in the culpability section:

- Significant disparity in age or experience
- Whether respondent attempted to prevent the reporting of the misconduct
- Whether the respondent's actions would comprise a standalone criminal offence

Please remove from the culpability section:

- 'level of experience' this is an aggravating or mitigating feature later on, and does not properly sit in the 'culpability' section.

7.9. Question 9 – *Do you agree with the general aggravating and mitigating factors as set out at Annex 1?*

- Relationship breakdown and health issues should not be capable of being used as an explanatory fact in respect of violent, sexual or dishonest conduct. It is suggested that these are removed and replaced with 'significant personal mitigation' with a caveat that underlines this in the guidance. The fact that someone is dying, or has a relative with terminal cancer for example is a mitigating feature when deciding upon sentence, but it should not be stated that any personal mitigation is potentially a *"reasonable explanation for the behaviour."*

7.10. Question 10 – *Do you agree that the structured approach outlined above is appropriate?*

I agree that a structured approach is preferable. However, the structure in respect of both the general misconduct and the group-specific misconduct sanctions guidance is insufficiently clear as to guide a panel member towards defining where misconduct increases from one level to another, or decreases. This will invite disparity in sanctions for similar conduct.

7.11. Question 11 – *Are there any adaptations to the approach you consider should be made?*

Additional guidance is required so that someone imposing a sanction based on the general guidance can work out what combination of factors mean misconduct is serious, moderate or lower level. This does not need to be overly formulaic or restrictive so as to allow sufficient flexibility to adjust for the novel facts of a case, while still ensuring parity and fairness of similar-class respondents before the tribunal.

7.12. Question 12 – *If you disagree with the structured approach outlined above, what approach to imposing sanctions do you consider decision-makers should take?*

N/A

7.13. Question 13 – *Should misconduct involving violence, in the absence of a criminal conviction, be included in Behaviour towards others or a separate Group?*

It should be a separate group.

7.14. Question 14 – *Do you agree with the concept of creating Groups of types of misconduct?*

Yes

7.15. Question 15 – *Do you agree with the proposed Groups outlined above?*

Drugs, the possession and sale thereof and violence should be two additional discrete groups. Driving related misconduct should be a discrete group. Breaches of court orders or misconduct involving acts contrary to justice should be a discrete group.

7.16. Question 16 – *Do you have any suggestions for amendments to the titles of the Groups and/or the intended coverage of each?*

As above

7.17. Question 17 – *Do you agree with the concept of including the Guidance bands for sanctions within the ranges?*

Yes

7.18. Question 18 – *Do you agree with proposed descriptors for the lower, middle, and upper bands for each range?*

Yes

7.19. Question 19 – *Do you agree with the range for each of the Groups (see paragraphs 79-86)?*

The range for misleading as set out in Annex 2 begins too low – this is 'dishonesty adjacent' and should be treated as such.

7.20. Question 20 – *Do you agree with the specific culpability and harm factors included for each Group? Are there any additional factors that should be included?*

Dishonesty: include in the culpability factors the following

- Abuse of position of power or trust or responsibility
- Sophisticated dishonesty/significant planning

Dishonesty: include in the HARM factors the following:

- Victim of misconduct vulnerable (due to factors including but not limited to their age, financial circumstances, mental capacity)

Sexual misconduct: include in the culpability factors the following:

- Misconduct took place in view of others
- Respondent intoxicated
- Sustained or prolonged behaviour
- Removal or attempted pulling aside of clothes
- Penetration by body part or other object
- Contact with bare skin

Sexual misconduct: include in the HARM factors the following:

- Significant disparity in age or experience
- Respondent used drink or drugs in the commission of the misconduct (plying, for example).
- Recording of the misconduct by respondent

In sexual misconduct aggravating factors, add the following:

- Location of the misconduct
- Timing
- Professional nexus to complainant
- Specific targeting of an individual
- Domestic nature

In mitigating factors please remove "attempt to remedy harm" as this could invite interference with complainants and what would likely be seen as attempts to prevent the reporting of misconduct.

7.21. Question 21 – *Do you agree with the specific aggravating and mitigating factors included for each Group? Are there any additional factors that should be included?*

Questions 21 and 22 are addressed above, but in addition I say this:

The construction of the proposed sanctions guidance is still flawed, as it allows too much freedom of interpretation, and therefore will cause wide sanctions discrepancies (and appeals). For ease of use, there should be distinct sentencing brackets akin to the Sentencing Council guidelines, allowing for a straightforward

decision to be made in respect of the individual groups. Higher culpability and greater harm = disbarment, medium range = suspension (with fixed variables) and so forth.

At present the proposed guidance speaks of *"significant*" culpability and harm, but does not explicitly set out what is *"significant"* and what causes a step down to "moderate". Those factors that ought to be deemed significant should be in a box labelled significant, or there should be a formulaic approach in that one or more of the factors combined with one or more of the harm factors gives rise to disbarment, for example.

The most recent cases of sexual misconduct have involved groping and grabbing at extremely junior female barristers. If we consider a theoretical scenario for the panel using the draft guidance:

A young female pupil barrister is booking in for their case in the robing room, leaning over the keyboard as there is no chair. A male Barrister of 15 years' Call walks up behind her and leers at her about her position and how attractive her bottom is, before grabbing her on the bottom with force. The young female pupil pulls away quickly, laughs the incident off and goes to robe. Others have seen the conduct and ask if the pupil is OK. She says she is. She is in reality humiliated and reports it to her pupil supervisor. Supported by her pupil supervisor, she makes a complaint to the BSB. The respondent denies the grab was a grab, defines it as a smack and says it was not sexual and was merely a joke. The misconduct is proven on the basis that it was a grab and was sexual as it followed the sexually inappropriate comment.

Taking the draft sexual misconduct sanctions guidance, there is almost nothing of relevance to assist the panel in terms of classifying this behaviour, leaving the case likely to be deemed low-level sexual misconduct, because none of the culpability factors come into play.

The person the panel are to sanction however, is have a senior Barrister who has been found to lack credibility (he lied to the tribunal) and committed a forceful sexual assault on a very junior colleague in front of other members of the bar. Although the behaviour may not have been intended to degrade or humiliate, it should have been obvious that this was going to be the outcome. In criminal terms it is a sexual assault. On the criminal scale perhaps a low-level sexual assault, but in professional disciplinary terms this sort of behaviour should be incompatible with membership of

the profession. The aggravating factors are the disparity in age and experience, the time and place, the presence of others and the fact the misconduct was denied. **None of these factors appear in the present general guidance or group-specific guidance.** It should not fall to the complainant to aggravate the sanction by virtue of their own evidence in relation to harm. There will be cases where the complainant does not come forward or where they incapable of articulating the harm done (or no-complainant cases.)

The reality is that cases as the theoretical one described, and the two recently reported tribunal cases of Woolard and Tipper involved sexual assaults (grabbing, groping in drink) are the most routine sort of sexual misconduct cases BTAS panels will have to come to grips with. It is important that the sanctions guidance is drafted in such a way as to afford panels the ability to properly categorise this conduct.

As the draft sanctions guidance stands, all three cases, one theoretical and two real, would be perfectly capable of being classed as the lower level sexual misconduct. If the point of drafting new sanctions guidance is to right past wrongs and make meaningful progress, then we have not tightened the guidance up sufficiently enough yet.

7.22. Question 22 – *Do you agree with where the lower, middle, and upper bands for the ranges have been pitched for each Group? Do you consider any adjustments should be made to the bands? Please give reasons.*

Should the sanctions decision making equation be clarified in respect of the individual groups, the ranges must also be tightened up so that severe harassment receives a starting point of a more severe sanction and a more narrow range.

7.23. Question 23 – *Do you consider that the equality impacts rehearsed above provide a basis for departing from any of the proposals in this paper?*

No

7.24. Question 24 – Are there any other equality issues BTAS should take into account when developing further the contents of the Sanctions Guidance?

No

8. CONCLUSIONS

8.1. It is clear that the present sanctions guidance is unacceptably lenient and that the public outcry at recent sanctions decisions is justified, should have been expected, and review and amendment is overdue.

8.2. The threshold over which incidents of misconduct need to pass before mitigation cannot prevent disbarment is at present unacceptably high. It neither promotes trust in the profession nor promotes or maintains proper standards of professional conduct. The new proposed sanctions guidance goes someway towards addressing this, but still leaves room for too much discretion when considering the categorisation of misconduct.

8.3. It should not be the case that an incident of sexual misconduct akin to sexual assault be treated any differently because the victim chose not to report the case to the police and go through a criminal trial. If the misconduct is found proven, there should be no difference in respect of sanction.

8.4. It is positive that being intoxicated is no longer an acceptable strand of mitigation and is now an aggravating feature, but this needs to be made more explicit.

8.5. The BSB should liaise with the Bar Council to ensure that when two Barristers involved on opposite sides of a misconduct allegation are co-tenants, employees or work in the same chambers, the parties receive separate support and clerking, and that

chambers' or employer management of the situation is both scrutinised and supported, where appropriate. This should involve the rollout of training packages and the appointment of separate mentors.

8.6. Allegations of misconduct that are capable of comprising criminal offences should be reported to the police, provided the complainant consents to this. Complainants should be supported such that they feel empowered to do so.

8.7. All cases hearing allegations of misconduct involving serious misconduct, including all allegations of dishonesty and sexual misconduct, should comprise five members to ensure that they are not restricted to minimal sanctions and can disbar if appropriate.

8.8. There should be a prohibition on regulated persons from other professions who have been removed, struck off or erased entering or transferring to the Bar. This includes the medical profession as well as solicitors and the police.

8.9. Practising certificates should be restricted, where appropriate, in addition to sanctions falling short of disbarment.

8.10. Every panel imposing a suspension should impose an interim suspension order upon the application of the BSB de rigueur.

8.11. It should be possible for the both BSB and BTAS to have jurisdiction over a suspended barrister, and the legislation preventing this needs to change.

These BTAS and BSB draft proposals go a long way toward rectifying what has been an unedifying position that has made the Bar an unattractive professional discipline comparator of late. They do not yet quite go far enough in terms of categorising the types of misconduct that cause the gravest harm to the public's perception of the Bar and to women. They do not yet reassure that serious misconduct will be treated more robustly, nor achieve parity of panel results. Further amendment will provide greater reassurance to those considering reporting misconduct, and will assist in raising professional conduct standards.

This response will be published here.

A junior Barrister

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