



REGULATING BARRISTERS

Consultation on Proposed Amendments to powers to take interim action

Part 5 of the BSB Handbook

June 2023

Executive summary

1. Under the Legal Services Act 2007, the Bar Standards Board (**BSB**) has regulatory objectives to protect and promote the public interest and the interests of consumers. One of our core functions is therefore to take appropriate enforcement action where there has been a breach of the BSB Handbook and, where this could amount to professional misconduct, to pursue disciplinary action. Such action might lead to a barrister's¹ ability to practise being restricted or removed where professional misconduct is found proved and where their continuing to practise is not in the public interest.
2. Sometimes, Disciplinary Tribunals adjourn a hearing after a finding of professional misconduct has been made but before they decide on the sanction. In such circumstances, there may be strong public interest reasons in certain cases to take interim action to stop a barrister from continuing to practise, or to impose restrictions on that barrister's practice, pending the final decision on sanction. This consultation responds to gaps that have been identified in the ability of Disciplinary Tribunals to take such interim action.
3. The BSB has the power, under the Interim Suspension and Disqualification Regulations (Part 5: Section C of the BSB Handbook) to refer barristers to an independent interim suspension panel for a decision on whether the barrister's ability to practise should be restricted prior to disciplinary action being taken. Under the current regulations this power is limited to specific circumstances as set out in paragraph 14 below. Those circumstances do not include interim action being necessary generally to protect the public or where taking such action would be in the public interest.
4. Although the situations in which this may arise are rare, the gaps we have identified restrict the ability of the BSB and the Disciplinary Tribunal to take action in the public interest. As a result, we are consulting on rule changes that would:
 - a. give Disciplinary Tribunals the power to impose interim restrictions on a barrister's practising certificate, or the withdrawal of practising rights on an interim basis, where a finding of misconduct has been made but the decision on sanction has been deferred to a later date; and
 - b. extend the BSB's power to refer a person to an interim suspension panel, by replacing "*to protect the interests of clients (or former or potential*

¹ The term "barrister" is used throughout this consultation paper. However, the remit of the Disciplinary Tribunal and interim suspension panels extends to "authorised persons" and "applicable persons" and therefore also covers: registered European Lawyers, BSB entities and any employees or managers of practising barristers and BSB entities.

clients)” with “*for the protection of the public or in the public interest*” as a criterion for such a referral.

5. We believe there is a strong public interest case for introducing these changes.
6. To respond to this consultation, please email policy@barstandardsboard.org.uk by **5pm on 2 August 2023**. We may publish your response and so please let us know if you would like it to be anonymised.

Background

7. In a recent case before the Bar Tribunal and Adjudication Service (**BTAS**), gaps were identified in the powers of Disciplinary Tribunals to impose interim suspensions and in the BSB’s ability to refer barristers to an independent panel for consideration of an interim suspension.
8. In the case in question, the Disciplinary Tribunal had found serious charges of professional misconduct proved but deferred the decision on sanction to a later date. Given the nature of the misconduct, the Disciplinary Tribunal was of the view that to protect the public the barrister should be suspended from practice pending the decision on sanction. However, it was unable to take this action because under the current provisions of the Disciplinary Tribunals Regulations (Part 5: Section B of the BSB Handbook) it had no power to do so. The BSB was also unable to take action under the Interim Suspension and Disqualification Regulations (Part 5: Section C of the BSB Handbook) because none of the criteria for referring a case to an interim suspension panel were satisfied (see paragraph 14 below).
9. The Disciplinary Tribunal was able to address the public protection concerns by accepting undertakings from the barrister that restricted their practice. However, the BSB considers that the Disciplinary Tribunal should have express powers to impose interim orders post-finding and pending sanction and that the BSB should have an explicit power permitting referral of a barrister to an interim suspension panel where it is necessary for the protection of the public or in the public interest.

Proposed changes

Disciplinary Tribunal powers

10. The current powers of Disciplinary Tribunals allow them to suspend barristers from practice, prohibit public access work or the conduct of litigation, or prevent them from obtaining a practising certificate, on an interim basis following a finding of professional misconduct, pending any appeal. The power only applies where the sanction imposed is over 12 months suspension from practice or disbarment

and there are no equivalent powers for a Disciplinary Tribunal to impose suspensions or restrictions on practice where a finding has been made but no sanction yet imposed.

11. Although rare, there will be circumstances where there is a risk to the public of a barrister continuing to practise, or being able to practise without restriction, during the period between finding and sanction. Where this is the case, we believe that a Disciplinary Tribunal should have the power to impose interim measures. This is most likely to arise in cases involving sexual misconduct, discrimination, harassment, and dishonesty.
12. We are therefore seeking views on proposed new rules E202A to E202F to the Disciplinary Tribunals Regulations, as set out in **Annex A**. These replicate to some extent the powers Disciplinary Tribunals currently have following a finding and sanction (pending an appeal) and are similar to the powers available to interim suspension panels.
13. The effect of these rules would be to permit a Disciplinary Tribunal to order the suspension of a barrister's practice, or impose conditions on their practice, pending a decision on sanction. In the case of a barrister without a current practising certificate, the order would require the BSB not to issue a practising certificate to them. Unless the Disciplinary Tribunal directs otherwise, such an order would take place immediately and would remain in place until the decision on sanction is taken. Such orders could only be imposed if it was in the public interest to do so. The changes include a procedure for the barrister to request a variation of the order if circumstances change prior to the decision on sanction.

Question 1: Do you agree that a Disciplinary Tribunal should be able, in the public interest, to order a suspension of a barrister's practice, or impose conditions on their practice, following a finding of professional misconduct and pending a decision on sanction? Please give reasons for your answer.

BSB power to refer to an interim suspension panel

14. Prior to, and up to, the conclusion of any disciplinary proceedings, the BSB can refer a barrister to an interim suspension panel under rE268 of the Interim Suspension and Disqualification Regulations for a decision on whether they should be subject to an interim suspension or have conditions placed on their practice. The criteria for a referral are currently:
 - a. The respondent has been convicted of, or charged with, a criminal offence [...]; or

- b. The respondent has been convicted by another Approved Regulator, for which they have been sentenced to a period of suspension; or
- c. The respondent has been intervened into by the Bar Standards Board; or
- d. The referral is necessary to protect the interests of clients (or former or potential clients) (rE268.1.e);

and having regard to the regulatory objectives, pursuing such a referral is appropriate in all the circumstances.

15. We consider that the last criterion (rE268.1.e) is too narrowly drafted and restricts the ability of the BSB to pursue interim action where there is a need to protect the wider public as opposed to only those who are (or could be) clients. For example, in the case of alleged sexual misconduct, it may be necessary to take action to protect members of the public or a barrister's colleagues from the risk that the conduct will be repeated.
16. We are therefore proposing to replace the current criterion at rE268.1.e with a broader criterion based on the wider public interest and not solely on client interests (we consider that the public interest includes the interest of clients). The proposed new criterion is set out below and also via tracked changes in **Annex B**:

"the referral is necessary for the protection of the public or in the public interest"

17. A referral based on the revised criterion could still only be made where it is appropriate to do so in all the circumstances having regard to the regulatory objectives. The power to impose any interim orders would remain with an interim suspension panel or, in the case of immediate interim suspension, the Chair of the Independent Decision-Making Body. We are satisfied that the proposed change would be in the public interest and also in keeping with similar criteria used by many other professional regulators when considering interim action.

Question 2: Do you agree that the BSB should be able to refer a barrister to an interim suspension panel because it is necessary for the protection of the public or in the public interest to do so? Please give reasons for your answer.

Regulatory objectives

18. The changes to the BSB Handbook proposed in this consultation are primarily intended to promote the regulatory objectives of protecting and promoting the public interest. They are intended to enhance both the BSB's and the Disciplinary

Tribunal' powers to take interim action where it is necessary to protect the public or in the public interest to do so. Although the cases in which the powers may need to be exercised will be rare, the need to do so will arise from cases where the misconduct is serious and poses a significant risk to the public. It is important that the BSB and Disciplinary Tribunals have appropriate powers to take interim action in such circumstances.

19. The proposed revisions are likely to be exercised most often in relation to allegations of dishonesty, sexual misconduct, harassment, and discrimination. They therefore will also assist in promoting the interests of consumers as well as helping to encourage an independent, strong, diverse and effective legal profession by enabling appropriate action to be taken to try to prevent further serious misconduct and assisting with ensuring that the Bar is a safe place to work for all.

Equality, Diversity and Inclusion

20. The BSB has undertaken an Equality Impact Assessment (**EIA**) for the proposed amendments to the BSB Handbook (as set out in this paper). As part of the EIA, we compiled two internal data sets on:

- a. barristers who have previously been the subject of interim suspension proceedings (10 barristers in total); and
- b. barristers whose Disciplinary Tribunal proceedings were adjourned between a finding of professional misconduct and sanction (19 barristers in total);

and then analysed the protected characteristics of those barristers to identify whether specific groups of barristers could potentially be affected by the proposed BSB Handbook amendments. The number of barristers included in the internal data sets is very small compared to the total barrister population.

21. Although the internal data sets are very small, and we did not have sufficient data to conduct an analysis for some protected characteristics, we have identified that barristers aged 65+, barristers from minority ethnic backgrounds, and male barristers may be slightly more likely to be subject to these interim measures. However, these are not particularly reliable conclusions to draw from the data because the data pool is very small.
22. In any event, the BSB Handbook applies equally to all barristers, regardless of their protected characteristics. The BSB's enforcement process is reactive to barristers' conduct of which we become aware, and which is often brought to our attention by third parties, and which may be a breach of the BSB Handbook. The

BSB also monitors its enforcement processes to identify any disproportionate impact on particular groups and will take action to mitigate any such impact that is identified. Accordingly, we believe the proposed BSB Handbook amendments are a proportionate (appropriate and necessary) means of achieving a legitimate aim (the regulation of barristers in the public interest), and therefore it is unlikely that the proposed BSB Handbook amendments would indirectly discriminate against any particular group of barristers with specific protected characteristics (even if the EIA identified that a specific group may be negatively affected).

23. We also think the proposed BSB Handbook amendments have the potential to promote equality, diversity and inclusion at the Bar and good relations between different groups by enabling the BSB or a Disciplinary Tribunal to take interim action against certain barristers where they pose a risk to the public or to people who share certain characteristics (those protected under the Equality Act 2010 or otherwise). As indicated above, the need to exercise the revised powers are most likely to occur in cases of dishonesty, sexual misconduct, harassment and/or discrimination, all of which are likely to diminish the trust and confidence which the public places in the barrister or in the profession. If urgent action is not taken in these cases, such misconduct could also have a negative impact on individuals with certain characteristics practising at the Bar,² including junior and pupil barristers. Taking appropriate interim action in these cases will:
- a. indicate that such behaviour is not tolerated at the Bar (thereby increasing consumers' and the public's trust that members of the Bar are unlikely to, and have not, conducted themselves in such a sufficiently serious manner that they could be the subject of interim action); and
 - b. ultimately assist with ensuring that the Bar is a safe place to work for all (thereby advancing equality of opportunity for those who are currently members of, and those who wish to join, the Bar).
24. An edited copy of the EIA is included at **Annex C**, with our analysis of the internal data removed from this published version for data protection reasons: as the names of individuals who have been the subject of interim suspension /disqualification or interim conditions imposed by an Interim Panel are published on the BSB's website, and as this is a very small pool of data to begin with, individuals' protected characteristics may become known to readers through jigsaw identification. The BSB retains a full, unedited version of the EIA internally.

² Available evidence suggests that barristers with certain protected characteristics are more likely to experience bullying, discrimination or harassment. For example, the results of the Bar Council's [Barristers Working Lives 2021](#) survey indicated that, of those who responded to the survey, 43% of female barristers, 53% of Black/Black British barristers, 47% of Asian/Asian British barristers, 46% of mixed ethnicity barristers, and 45% of barristers with a disability said that they had personally experienced bullying, discrimination or harassment in the previous two years.

Question 3: Do you have any comment to make on our analysis of the regulatory objectives or wish to raise any potential equality impacts of these proposals?

Question 4: Do you wish to make any further comment on the proposals?

How to respond

25. Please respond to policy@barstandardsboard.org.uk by **5pm on 2 August 2023**. We will publish all responses, so please let us know if you would like your response to be anonymised.

Annex A – Proposed new regulations to be inserted in the Disciplinary Tribunal Regulations:

NB All terms in italics are defined in Part 6 of the BSB Handbook.

Interim suspension/withdrawal of practising rights pending a final decision on sanction

rE202A In any case where charge(s) or application(s) have been found proved against the *respondent* and the *Disciplinary Tribunal* have decided to adjourn the hearing before deciding what sanction to impose, or where under rE211 a three-person panel refers a case to a five-person panel for sanction, the *Disciplinary Tribunal* must consider prior to the adjournment taking effect whether it is in the public interest to make an order that:

- .1** requires the *respondent* to suspend their *practice*, in which case the *Bar Standards Board* must suspend that respondent's *practising certificate*; or
- .2** requires the *Bar Standards Board* to impose such conditions on the *respondent's practice* as the *Disciplinary Tribunal* deems necessary; or
- .3** prohibits the *respondent*, either unconditionally or subject to such conditions as the *Disciplinary Tribunal* deems necessary, from accepting or carrying out any public access instructions; or
- .4** the *respondent's* authorisation to conduct litigation be suspended or be subject to such conditions as the *Disciplinary Tribunal* deems necessary; or
- .5** where that respondent does not currently hold a *practising certificate*, requires the *Bar Standards Board* not to issue any *practising certificate* to them.

rE202B Any order made under rE202A will take effect immediately and last until a decision on what sanction to impose has been made unless the *Disciplinary Tribunal* directs otherwise. Where an order is made under rE202A.1 the effect of the suspension will be as set out in rE220.

rE202C Where an order is made in respect of a *respondent* under rE202A and that *respondent* considers that, due to a change in the circumstances, it would be appropriate for that order to be varied, they may apply to *the President* in writing for it to be so varied.

rE202D When *the President* receives an application made under rE202C, they must refer it to the Chair and to one of the *lay members* of the *Disciplinary Tribunal* which originally made the order to make a decision on the application or where under rE211 a three-person panel refers a case to a five-person panel for sanction and that five-person panel has been convened by the *President* to the Chair and to one of the *lay members* of the new five-person panel.

rE202E Any application made under rE202C must be sent by the applicant, on the day that it is made, to the *Bar Standards Board*. The *Bar Standards Board* may make such representations as they think fit on that application to those to whom the application has been referred by the *President*.

rE202F The persons to whom an application made under rE202C above is referred may vary or confirm the order in relation to which the application has been made.

Annex B – Proposed changes to the Interim Suspension and Disqualification Regulations:

NB All terms in italics are defined in Part 6 of the BSB Handbook.

Referral to an interim panel

rE268 On receipt of a referral or any other information, the *Commissioner* may refer a *respondent* to an *interim panel* if:

- .1 subject to rE269:
 - .a the *respondent* has been convicted of, or charged with, a *criminal offence* in any jurisdiction other than a *minor criminal offence*; or
 - .b the *respondent* has been convicted by another *Approved Regulator*, for which they have been sentenced to a period of suspension or termination of the right to practise; or
 - .c the *respondent* has been intervened into by the *Bar Standards Board*; or
 - .d removed;
 - .e the referral is necessary ~~to protect the interests of clients (or former or potential clients)~~ for the protection of the public or in the public interest; and
- .2 the *Commissioner* decides having regard to the *regulatory objectives* that pursuing an *interim suspension* or an *interim disqualification order* is appropriate in all the circumstances.

rE269 No matter shall be referred to an *interim panel* on any of the grounds of referral set out in rE262.1.a to rE262.1.b unless the *Commissioner* considers that, whether singly or collectively, the relevant grounds of referral would warrant, in the case of a *BSB authorised person*, a charge of *professional misconduct* and referral to a *Disciplinary Tribunal*, or, in the case of a *applicable person*, an application to a *Disciplinary Tribunal* for *disqualification* (in each case such referral or application to be made in accordance with Section 5.B).

rE270 If the *Commissioner* refers a *respondent* to an *interim panel* under rE268, the Chair of the *Independent Decision-Making Body* shall consider whether or not the *respondent* should be subject to an immediate *interim suspension* or *disqualification* under rE272 pending disposal by the *interim panel*.

rE271 An immediate interim *suspension* or *disqualification* may only be imposed if the Chair of the *Independent Decision-Making Body* is satisfied that such a course of action is justified having considered the risk posed to the *public* if such interim *suspension* or *disqualification* were not implemented and having regard to the *regulatory objectives*.

rE272 Any immediate interim *suspension* or *disqualification* imposed by the Chair of the *Independent Decision-Making Body* shall:

- .1 take immediate effect;
- .2 be notified in writing by the *Commissioner* to the *respondent*;
- .3 remain in force until the earlier of:
 - .a such time as an *interim panel* has considered the matter; or
 - .b the date falling four weeks after the date on which the immediate interim *suspension* or *disqualification* is originally imposed;
- .4 where relevant, result in the removal of the relevant *BSB authorised individual's practising certificate, litigation extension* and/or right to undertake public access work (as appropriate);
- .5 where relevant, result in the imposition of conditions on the relevant *BSB authorised person's* authorisation and/or licence (as appropriate)
- .6 be published on the *Bar Standards Board's* website; and
- .7 be annotated on the *Bar Standards Board's* register of *BSB authorised persons* which is to be maintained by the *Bar Standards Board* in accordance with rS60.2 and ~~rS129~~rS128 or be included on the *Bar Standards Board's* register of individuals that are the subject of a *disqualification order* (as appropriate).

Guidance

gE1 If an immediate interim *suspension* or *disqualification* has been imposed by the Chair of the *Independent Decision-Making Body* it must be considered by an *interim panel* within four weeks of the date that that the immediate interim *suspension* or *disqualification* is originally imposed. If it is not considered by an *interim panel* within that period, it shall automatically fall away and no

further period of interim *suspension* or *disqualification* may be imposed on the *respondent* until the matter is considered by an *interim panel*.

gE2 If, subsequent to the imposition of an immediate *suspension* or *disqualification* under rE271, the *applicable person* agrees to provide to the *Commissioner* an undertaking in written terms in accordance with the provisions of rE274.4 below which is satisfactory to the *Commissioner* and which is subject to such conditions and for such period as the *Commissioner* may agree, the *Commissioner* may elect to remove or qualify the immediate interim *suspension* or *disqualification* pending the disposal of any charges or application by a *Disciplinary Tribunal*. For the avoidance of doubt, in these circumstances the referral to the *interim panel* shall also be withdrawn in accordance with the provisions of rE275 below.

Annex C – Equality Impact Assessment

Date of Assessment	May-June 2023
Assessor Name & Job Title	Anna McNee, Legal Support Lawyer
Name of Policy/ Function to be Assessed	Amendments to the BSB Handbook regarding Interim Suspensions
Aim/Purpose of Policy	The BSB is proposing to make urgent amendments to the Disciplinary Tribunal Regulations (Part 5B of the BSB Handbook) (“DTRs”) and the Interim Suspension and Disqualification Regulations (Part 5C of the BSB Handbook) (“ISDRs”) to address gaps that have been identified: • in the ability of Disciplinary Tribunals to take interim action after a finding of professional misconduct has been made but before they decide on the sanction; and • in the ability of the BSB to refer barristers to an interim suspension panel to protect the public, or where taking such action would be in the public interest.

1. Evidence

What evidence will you use to assess impact on equality?
<u>The BSB’s current approach to interim action</u> The BSB Handbook serves as the key regulatory tool through which the BSB can ensure the effective administration of justice is served and to promote the attainment of our regulatory objectives, to promote access to justice, the public interest, and the rule of law. The BSB Handbook (relevantly) sets out: the standards of conduct for barristers (Part 2); the procedures for assessing reports regarding barristers’ conduct and for investigating such conduct (Part 5A); and the procedure to be followed where a case is referred to a Disciplinary Tribunal (Part 5B) or an Interim Suspension Panel (Part 5C). Once a report is made to the BSB of an alleged breach(es) of the Handbook, a risk assessment and a preliminary assessment are undertaken to determine whether the report is appropriate for the BSB to investigate and to identify what the issues are. This decision-making process is set out in Part 5A of the BSB Handbook and also in policy ROD02. Where a report is investigated by the BSB and there is sufficient evidence of a potential breach of the BSB Handbook, staff or the Independent Decision-making Body (“IDB”) may refer the case for Disciplinary Action (either the Determination by Consent procedure or the Disciplinary Tribunal). This decision-making process is set out in Parts 5A and 5B of the BSB Handbook and also in policy LED04. Under the Disciplinary Tribunal Regulations (DTRs), the current powers of Disciplinary Tribunals allow them to suspend barristers from practice, prohibit public access work or the conduct of litigation, or prevent them from obtaining a practising certificate, on an interim basis following a finding of professional misconduct, pending any appeal (rE225-rE233). The power only applies where the sanction imposed on a barrister is over 12 months suspension from practice or disbarment. There are no equivalent powers for a Disciplinary Tribunal to impose suspensions or restrictions on practice where a finding has been made but no sanction yet imposed. Under the Interim Suspension and Disqualification Regulations (ISDRs), a barrister may be subject to: • a referral by the BSB, on receipt of a referral or any other information, to an Interim Panel under rE268 for interim action, pending consideration by a Disciplinary Tribunal (rE262); and/or • an immediate interim suspension/disqualification imposed by the Chair of the IDB under rE272, pending consideration by an Interim Panel (rE263), and in both cases, provided the relevant criteria are met. Any immediate interim suspension/disqualification imposed by the Chair of the IDB, or any interim suspension/disqualification or interim conditions imposed by an Interim Panel, shall be published on the BSB’s website (rE272.6 and rE294). <u>Diversity at the Bar Report 2022</u> The BSB collects protected characteristic data (excluding marriage/civil partnership and pregnancy/maternity) for both registered and unregistered barristers. The data from registered barristers is analysed in the annual Diversity at the Bar Report, the latest edition of which is the 2022 report. Although disclosure rates for some

protected characteristics are low, it is the most accurate source of collated information on diversity at the practising Bar.³

Complaints Diversity Analysis Complaint outcomes from January 2015 - October 2019

This research [report](#), published in July 2021, analysed the relationship between barristers' protected characteristics and the outcomes of complaints against barristers,⁴ and the likelihood of practising barristers being subject to a complaint during this period. The report found:

- Race no longer significantly predicted whether complaints were closed without investigation or referred to Disciplinary Action. However, race was close to statistical significance when looking at whether cases were referred to Disciplinary Action, which suggested there may be some association between being from a minority ethnic background and a greater likelihood of a complaint being referred for Disciplinary Action.
- Sex continued to significantly predict whether complaints were referred to Disciplinary Action: male barristers were more likely to have complaints referred to Disciplinary Action than female barristers.
- Race continued to significantly predict a barrister being subject to an internal complaint (initiated by the BSB, although often after a referral to us by another regulator or a criminal conviction): white barristers were less likely to be subject to an internal complaint than minority ethnic barristers. However, the association between race and the likelihood of an internal complaint being referred for Disciplinary Action appeared to become weaker from 2017 onwards.
- Sex significantly predicted whether a barrister was likely to be subject to an internal complaint: male barristers were more likely to be subject to an internal complaint than female barristers.

Although these findings are historical and not directly relevant to the barristers who have previously been the subject of interim action, it gives an indication of the types of barristers who are more likely to feature in the BSB's disciplinary system, and particularly those who may be subject to proceedings in the Disciplinary Tribunal.

Internal Data – barristers who have previously been the subject of Interim Suspension proceedings

We have compiled and analysed internal data from 1 January 2014 to 12 May 2023 on the number of barristers (registered and unregistered) who have previously been the subject of interim suspension proceedings under the ISDRs, and the protected characteristics (where known) of those individuals.

These data were obtained by extracting all "Suspension" cases on the Case Management System, manually reviewing the cases to ensure they were appropriate to include, and excluding any cases that were not (e.g. the case had been opened in error).

Overall, there are 10 barristers who have been the subject of Interim Suspension proceedings across 11 cases. There is one barrister who has been the subject of multiple Interim Suspension proceedings.

In eight out of the 11 cases, the barristers had been convicted of criminal conduct (which was the basis for the BSB referring each barrister to an interim suspension panel under rE268.1.a or the equivalent predecessor). In the remaining three cases, the barristers' conduct concerned their practice or provision of legal services (or scope of such) as a barrister and the referrals to an interim suspension panel were made under rE268.1.e.

As the names of individuals who have been the subject of any interim suspension/disqualification or interim conditions imposed by an Interim Panel are published on the BSB's website, and as this is a very small pool of data, **our analysis of the protected characteristic breakdown will not be included as part of this EIA for data protection reasons, as individuals' protected characteristics may become known to readers through jigsaw identification.**

Internal Data – Barristers whose Disciplinary Tribunal proceedings were adjourned between a finding of professional misconduct and sanction

We have compiled and analysed internal data from 1 January 2014 to 12 May 2023 on the number of barristers (registered and unregistered) who have been the subject of Disciplinary Tribunal proceedings that were adjourned between a finding of professional misconduct and sanction, and the protected characteristics (where known) of those individuals. Had the proposed BSB Handbook amendments to the DTRs been in place at the time these barristers were the subject of Disciplinary Tribunal proceedings, they could potentially have been the subject of an interim order by the Disciplinary Tribunal, pending decision on sanction.

³ We have over 95% response rates to questions about gender and ethnicity, and around 89% on age. Other protected characteristics have much lower response rates, such as disability (around 63%), sexual orientation (around 60%), and religion and belief (around 58%).

⁴ Being the subject of "Disciplinary Action" means the barrister's conduct is dealt with either under the Determination by Consent procedure, or charges and/or a disqualification application are referred to the Disciplinary Tribunal (see the definition of "Disciplinary Action" in Part 6 of the BSB Handbook).

These data have been obtained by extracting all “Investigations” cases on the Case Management System where the task Z02 (“Hearing Adjourned – part heard”) has been run (thereby changing the status of the case to “adjourned”) after the date that the Disciplinary Tribunal was scheduled to occur (as recorded on the case file). These cases were then manually reviewed to exclude any cases where the adjournment was not between a finding of professional misconduct and sanction (e.g. a case may have been adjourned because the panel ran out of time).

There is a task (H15 (“Charges proved”)) which might also be relevant and may be used by Case Officers where charges of professional misconduct have been found proved but where no sanction was imposed at that time. However, due to limitations in the Data Warehouse, it was not possible or proportionate to extract these data. There are 19 barristers whose Disciplinary Tribunal proceedings were adjourned between a finding of professional misconduct and sanction across 25 cases. There are four barristers who have been the subject of multiple Disciplinary Tribunal proceedings that were adjourned between a finding of professional misconduct and sanction.

As this is a very small pool of data, **our analysis of the protected characteristic breakdown will not be included as part of this EIA for data protection reasons, as individuals’ protected characteristics may become known to readers through jigsaw identification.**

We have also collated information from the BSB case files for each of these 25 cases as to why the Disciplinary Tribunal proceedings were adjourned between a finding of professional misconduct and sanction:

- three cases were referred from a 3-person Disciplinary Tribunal to a 5-person Disciplinary Tribunal for sanction (in accordance with rE211);
- nine cases were adjourned to give the barrister the opportunity to provide further information or submissions in mitigation before consideration at the sanction hearing;
- 12 cases were adjourned because the Disciplinary Tribunal did not have sufficient time to come to a decision on sanction; and
- one case was adjourned for a decision on sanction, pending the outcome of outstanding High Court proceedings.

Looking at the protected characteristics of the individual barristers whose cases were adjourned for the different reasons set out above, unfortunately these data do not provide us with any further insight into the equality impact of the proposed BSB Handbook amendments.

Finally, we have also reviewed a small subset of these 25 cases where the barrister was registered at the time the conduct was reported and the sanction was a suspension or disbarment, with such conduct being sufficiently serious that:

- the BSB may have wanted to refer the barrister for Interim Suspension proceedings under rE268, but could not do so because a referral cannot be made only to protect the public or in the public interest; or
- the Disciplinary Tribunal may have considered imposing an interim order in the public interest, had such powers existed.

Looking at the protected characteristics of the individual barristers in these cases, unfortunately these data do not provide us with any further insight into the equality impact of the proposed BSB Handbook amendments. However, there are some commonalities in the types of conduct engaged in by the barristers in these cases, which may indicate that the BSB may take such action described above in cases which involve: dishonesty or false and misleading conduct, a breach of the public access rules, or where the barrister does not act in their client’s best interests.

Other research

To date, the BSB has not conducted any research into the outcomes of Disciplinary Tribunal hearings or Interim Suspensions that could otherwise inform the analysis in this EIA.

2. Impact on Equality

Consider whether the evidence listed above shows the potential for differential impact, either adverse or positive, for different groups. If there are negative impacts, explain how you will attempt to mitigate these. Mitigating actions can be described in more detail in your Action Plan (Section 4).

The BSB Handbook and enforcement approach applies equally to all barristers, regardless of their protected characteristics. The BSB’s enforcement process is also reactive to barristers’ conduct of which we become aware, and which is often brought to our attention by third parties, and which may be a breach of the BSB Handbook.

It is therefore crucial to note that any potential negative impact identified on barristers with certain protected characteristics is not necessarily an indication that the BSB Handbook discriminates against those barristers. As the BSB Handbook (and any proposed amendments to it) is applied equally to all barristers, it is more likely that the barristers' conduct and other external factors outside the BSB's control (for example, actions of third parties like law enforcement) will impact the frequency at which those barristers appear in the internal data. As such, it is difficult for the BSB to identify or propose any measures to mitigate any potential negative impact.

Under s.19 of the Equality Act 2010, indirect discrimination can occur if the BSB applies a provision, criterion or practice to a barrister which is discriminatory in relation to a relevant protected characteristic of that barrister, unless the BSB can show that it is a proportionate means of achieving a legitimate aim. The proposed amendments to the BSB Handbook are a proportionate (appropriate and necessary) means of achieving a legitimate aim (the regulation of barristers in the public interest). Therefore, it is unlikely that the proposed amendments to the BSB Handbook indirectly discriminates against any particular group of barristers with specific protected characteristics, even if this EIA identifies that a specific group may be negatively affected by the proposed amendments to the BSB Handbook.

Age	<u>Barristers whose Disciplinary Tribunal proceedings were adjourned between a finding of professional misconduct and sanction</u> - The internal data do not suggest there is any particular trend in relation to the age of the barristers who have been the subject of Disciplinary Tribunal proceedings that have been adjourned between a finding of professional misconduct and sanction, as the age profile of those barristers broadly matches the age profile of the Bar as a whole, with the exception of the age group 65+. Barristers in this age group are slightly overrepresented compared to their proportion of the practising Bar, suggesting they may be more likely to be the subject of Disciplinary Tribunal proceedings that are adjourned between a finding of professional misconduct and sanction: however, this is not a reliable conclusion to draw because the data pool is very small. <u>Barristers who have previously been the subject of interim suspension proceedings</u> - The internal data do not suggest there is any particular trend in relation to the age of the barristers who have previously been the subject of interim suspension proceedings, as the age profile of those barristers broadly matches the age profile of the Bar as a whole.
Disability	We are not aware of any anecdotal or data-based evidence which suggests the proposed BSB Handbook amendments will have a negative impact based on disability.
Gender Reassignment	We are not aware of any anecdotal or data-based evidence which suggests the proposed BSB Handbook amendments will have a negative impact based on gender reassignment.
Marriage and Civil Partnership	The BSB does not collect data on protected characteristics of marriage and civil partnership. We are also not aware of any anecdotal evidence which suggests the proposed BSB Handbook amendments will have a negative impact on barristers based on marriage and civil partnership.
Pregnancy or Maternity	The BSB does not collect data on protected characteristics of pregnancy and maternity. We are also not aware of any anecdotal evidence which suggests the proposed BSB Handbook amendments will have a negative impact based on pregnancy or maternity.
Race	<u>Barristers whose Disciplinary Tribunal proceedings were adjourned between a finding of professional misconduct and sanction</u> The internal data show that the majority of barristers who have been the subject of Disciplinary Tribunal proceedings that have been adjourned between a finding of professional misconduct and sanction are White (although we recognise this reflects the fact that the majority of the Bar is White). It is likely that this trend will continue under the proposed BSB Handbook amendments to the DTRs.

	• However, a higher proportion of those who were the subject of Disciplinary Tribunal proceedings that have been adjourned between a finding of professional misconduct and sanction is from a minority ethnic background when compared to the profession as a whole (i.e. they are slightly overrepresented). This suggests that minority ethnic barristers <u>may</u> be more likely to be the subject of Disciplinary Tribunal proceedings that have been adjourned between a finding of professional misconduct and sanction; however, this is not a reliable conclusion to draw because the data pool is very small. <u>Barristers who have previously been the subject of interim suspension proceedings</u> • The internal data show that the majority of barristers who have been the subject of interim suspension proceedings are White (although we recognise this reflects the fact that the majority of the Bar are White). It is likely that this trend will continue under the proposed BSB Handbook amendments to the ISDRs. • However, a higher proportion of those who were the subject of interim suspension proceedings are from a minority ethnic background when compared to the profession as a whole. This suggests that minority ethnic barristers <u>may</u> be more likely to be the subject of interim suspension proceedings; however, this is not a reliable conclusion to draw because the data pool is very small.
Religion or Belief	• We are not aware of any anecdotal or data-based evidence which suggests the proposed BSB Handbook amendments will have a negative impact based on religion or belief.
Sex	<u>Barristers whose Disciplinary Tribunal proceedings were adjourned between a finding of professional misconduct and sanction</u> • The internal data show that male barristers are slightly overrepresented compared to their proportion of the practising Bar. Male barristers are also more likely to be the subject of Disciplinary Tribunal proceedings that have been adjourned between a finding of professional misconduct and sanction when compared to female barristers. It is likely that these trends will continue under the proposed BSB Handbook amendments to the DTRs. • There is no evidence (data-based or anecdotal) to explain why female barristers are less likely to be the subject of Disciplinary Tribunal proceedings that have been adjourned between a finding of professional misconduct and sanction. <u>Barristers who have previously been the subject of interim suspension proceedings</u> • The internal data show that male barristers are more likely to be the subject of interim suspension proceedings when compared to female barristers, and it is likely that this trend will continue under the proposed BSB Handbook amendments to the ISDRs. • There is no evidence (data-based or anecdotal) to explain why female barristers are less likely to be the subject of interim suspension proceedings.
Sexual Orientation	• We are not aware of any anecdotal or data-based evidence which suggests the proposed BSB Handbook amendments will have a negative impact based on sexual orientation.
Other Identified Groups	• We are not aware of any anecdotal or data-based evidence which suggests the proposed BSB Handbook amendments will have a positive or negative impact on barristers in other identified groups who share common characteristics or experiences (for example, barristers who live outside England & Wales, or barristers who are subject to multiple professional regulators).
How does the policy advance equality of opportunity?	
One of the reasons for introducing these proposed amendments to the BSB Handbook is to deal with situations where a barrister's conduct amounts to discrimination or harassment, which, in the future, could be directed	

towards the barrister's colleagues or other members of the legal profession, as well as clients and potential clients. As such, the proposed BSB Handbook amendments promote equality of opportunity for current and potential future barristers by enabling appropriate interim action to be taken against a barrister who has conducted themselves in a sufficiently serious manner such that charges of professional misconduct have been found proved or the relevant grounds of referral would warrant a charge of professional misconduct and referral to a Disciplinary Tribunal, in an attempt to prevent them from committing further serious misconduct.

Amending the BSB Handbook as proposed is also an attempt to eliminate all forms of discrimination and promote an independent, strong, diverse and effective legal profession, and ultimately assist with ensuring that the Bar is a safe place to work for all, thereby advancing equality of opportunity for those who are currently members of the Bar, and those who wish to join the Bar.

How does the policy promote good relations between different groups?

The proposed BSB Handbook amendments promote good relations between different groups, such as barristers, prospective barristers, consumers, other members of the legal profession, the judiciary, and the public, by enhancing both the BSB's and the Disciplinary Tribunals' powers to take interim action where it is necessary to protect the public, or in the public interest to do so. This will arise from cases where the misconduct is serious and poses a significant risk to the public (this could be in cases where the barrister is also a risk to people who share certain characteristics – those protected under the Equality Act 2010 or otherwise, e.g. pupil barristers). These are likely to relate to allegations of dishonesty, sexual misconduct, harassment, and discrimination, all of which are likely to diminish the trust and confidence which the public places in the barrister or in the profession.

The proposed BSB Handbook amendments will therefore indicate to all relevant groups (but particularly consumers and the public, and people who share certain protected characteristics who may be the target of the misconduct in question) that such behavior is not tolerated at the Bar. This thereby increases consumers' and the public's trust that members of the Bar are unlikely to, and have not, conducted themselves in such a sufficiently serious manner that they could be the subject of interim action.

3. Summary of Analysis

Now you have considered the potential impacts on equality, what action are you taking? (Mark 'X' next to one option and give a reason for your decision)

a. No change to the policy (no impacts identified)	Your analysis demonstrates that the policy is robust, and the evidence shows no potential for discrimination. You have taken all appropriate steps to advance equality and foster good relations between groups.	
b. Continue the policy (impacts identified)	Continue with the proposal, despite any adverse impacts, provided it is not unlawfully discriminatory and is justified.	
c. Adjust the policy and continue	Take steps to remove barriers, mitigate impacts or better advance equality before continuing with the policy.	
d. Stop and remove the policy	There are adverse effects that are not justified and cannot be mitigated. The policy is unlawfully discriminatory.	

Reason for decision:

The proposed BSB Handbook amendments should continue to a public consultation, even though we have identified some potential negative impacts on barristers with different protected characteristics from the internal data, because:

- the conclusions drawn from the analysis of the internal data are not reliable because the data pool is very small; and
- there are sufficiently robust criteria and safeguards in the BSB Handbook that provides protection to barristers who may be the subject of interim action from abuse by the BSB or the Disciplinary Tribunal.

There is also no anecdotal evidence which suggests the proposed BSB Handbook amendments will have a negative impact on barristers with certain protected characteristics.

The public consultation will provide an opportunity for members of the profession and the public to raise potential equality concerns regarding the proposed BSB Handbook amendments, which will be considered by the BSB in the decision on whether to proceed with the proposed BSB Handbook amendments.

4. Action Plan for Improvement

Give an outline of the key actions that need taking based on any challenges, gaps and opportunities you have identified. Include here any action to address negative equality impacts or data gaps.			
Action Required	Desired Outcome	Person Responsible	Timescale
Following up with barristers to encourage disclosure of protected characteristic data (even if only to declare that they “prefer not to say”).	Increasing the quantity of data held by the BSB on certain protected characteristics (where the current disclosure rate is low) for registered and unregistered barristers – we need a much smaller proportion in the “no response” category.	BSB	Ongoing
Feedback from groups with certain protected characteristics on the potential impact of these changes.	Additional evidence to inform the final EIA.	BSB	By end July 2023