

Details of proposed changes to the Fitness to Practise Regulations and Guidance

The results of the review of and the ensuing revisions to the Fitness to Practise Regulations and Guidance are set out in detail below (*regulation numbers refer to the revised Regulations, found at Annex A*)

Definitions and renaming (Introductory paragraph / Regulation 3)

1. The Regulations now clarify the BSB's powers to amend and impose the Fitness to Practise procedures on the profession, in accordance with Schedule 4 of the LSA 2007. A number of amendments and additions have also been proposed to the definitions included in the Regulations, with the aim of providing increased clarity and ease of reference, and to reflect the definitions that will be used within the Handbook.
2. The 'Medical Panel' has been renamed the 'Fitness to Practise Panel' since the former could inaccurately imply that all Medical Panel members are medical professionals. The titles of the 'Appointed Medical Advisor' (AMA) and 'Medical Expert' have been amended to 'Medical Examiner' and 'Medical Member' respectively, so the roles are more clearly defined and less easily confused. The definition of the Medical Member (and of their role) reflects the fact that only the Medical Examiner is able to provide advice on the medical evidence and/or to perform any independent medical examinations. The Guidance also clarifies that the Medical Examiner may not provide opinion or advice to the Panel in private, as any attempt to do so would create the perception of unfairness and bias on the part of the Panel. The BSB will request of COIC, through the Bar Tribunals and Adjudication Service (BTAS), that Panel training makes it clear the distinction between the role of the Medical Examiner and that of the Medical Member, and specifies that formal medical opinion/advice should always be provided to both parties.
3. The definition of 'unfit to practise' has also been amended to remove the requirement for the impairment to be "serious"; the impairment must, by definition, be sufficiently serious to require action to restrict the barrister's practice. The removal of this word reduces any complexities associated with the application of the threshold test when making a decision on the outcome of a case.

Constitution of Panels (Regulation 4 / Schedule 1)

4. A description of the process by which Panels should be constituted, previously located within the main body of the Rules, has been moved to a separate Schedule at the end of the document to improve readability (Schedule 1).
5. Panels are convened independently of the BSB by the President of COIC to ensure the impartiality of the hearing (in accordance with the Human Rights Act 1998). Schedule 1 provides for the appointment of a pool of panellists by COIC for both Fitness to Practise, and Review Panels, for which the provisions of both have been simplified and unified.

Under the new Schedule, discretion to remove those members no longer meeting the appointments criteria is provided.

6. The parameters of the role of the President (and COIC) have also been set out in the Regulations, and have been limited to the appointment of the Panels and providing assurance of members' eligibility. To maintain independence, all other administrative aspects of the process (such as notifying or updating the barrister), are now conducted by the Chair of the convened Panel (in actuality, however, administrative functions afforded to the Chair can be exercised on their behalf by the Panel secretary).

Referral to Fitness to Practise Panel (Regulations 5 – 10)

7. The referral process has been simplified. This section now refers solely to the receipt of information in writing and is wide enough to include any complaint, self-referral or referral from another body or Committee (Regulation 5).
8. The parameters of the BSB's role have also been defined. The role is now confined to commencing the proceedings, carrying out any investigations (Regulation 6), and referring a complaint, which raises issues about fitness, to a Panel (Regulation 8).
9. To ensure that the process remains non-adversarial in its approach and that the BSB's independence from the final decision is clear, staff from the PCD of the BSB attend each hearing in an administrative capacity only (see Paragraph 89 of the Guidance). For the same reasons, notification obligations regarding a referral to a full hearing now rest with the Chair of the convened Fitness to Practise Panel rather than the Chair of the PCC/BSB (Regulation 7 and see also Regulation 20). The notification process provides the barrister with opportunity to make submissions before any decision to refer the case to a Panel; a process, which adheres with the principles of natural justice.

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

10. The new Regulation 8 provides a single test to be applied by the PCC when referring a matter to a FTP Panel for determination. The test is that the barrister "may be unfit to practise" and imposes a low threshold thereby minimising the risk to the public that appropriate cases are not referred to a panel

Representations and right to appeal (Regulation 9)

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

Preliminary Hearings (Regulation 11)

12. This previous unwieldy process of notifying a barrister of the referral of a case, has been replaced by a simple obligation to notify the barrister of the time and date of the hearing.

More detailed information relating to notification is now included in the Guidance (see Paragraphs 85 – 89).

Medical Examiner (Regulations 13 – 14)

13. The proposed Regulations presuppose that barristers will comply with directions made by a FTP Panel. Regulations 13 and 14 therefore remove the need for a barrister to consent to a direction that he or she submit to a medical examination. Failure to comply may be taken into account by the Panel when considering whether the barrister is unfit to practise (see Regulation 21). The new Regulations also provide the Panel with an express power to indicate what should be included in the instructions to a Medical Examiner and allow the BSB discretionary power to require an examiner to attend a hearing in person.
14. In accordance with the Data Protection Act 1998, the Regulations permit the disclosure of only relevant medical records.

Interim Restrictions (Regulations 15 – 16)

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

Acceptance of Undertakings (Regulation 17)

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

Review of Interim Restrictions (Regulations 18 – 19)

17. Regulation 18 revises the previous Rule 22(g)(i) to give the Panel discretion (rather than an obligation) to direct a review hearing where it has ordered an interim restriction, as it may not be necessary if it is envisaged that the full hearing will take place in short order. For consistency, an obligation on the Chair to record in writing the Panel's decision, together with reasons, is also included (Regulation 19).

Serving notice of a hearing (Regulation 20)

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

Review of decisions made by the Fitness to Practise Panel test for Review Hearing (Regulations 26 – 29)

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

Appeals (Regulation 30)

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

Procedure before a Panel (Regulation 37)

23. Regulation 37 now includes expanded requirements relating to the procedure before a Panel. The wording at Regulation 37(b) of the Regulations has been revised to permit the Panel to proceed in the absence of the barrister, subject to "all reasonable efforts to serve notice" having been made (rather than referring to "all procedures requiring attendance"). Any discretion to commence proceedings in the absence of the barrister will be exercised with the utmost caution (see Paragraph 82 of the revised Guidance for the factors which should be taken into consideration by the Panel members before proceeding in the absence of the barrister).

24. The barrister also remains permitted to appoint their own advocate under Regulation 37(b), where they are unable to represent themselves, perhaps, for instance, because of their medical condition.
25. The Regulations have been amended to specify a 24 hour time limit for clarity, consistency and efficiency of proceedings (Regulation 37(c)(ii)).

Referrals to PCC (Regulation 38)

26. Regulation 38 now allows a Review Panel to refer a case to the PCC if a barrister has failed to comply with a direction or undertaking, in order that it may consider whether or not the barrister's conduct would warrant referral to on a charge of professional misconduct to a Disciplinary Tribunal. This allows the BSB to carry out the function of dealing with complaints of misconduct and taking disciplinary action where appropriate. However, the Regulation also allows flexibility of referral in cases where the failure may be a result of the barrister's ill health.
27. The FTP Regulation are one of the constituent parts of good regulation and will not be applied in isolation. It is intended that they will work to form a cohesive whole. For example, information obtained by a Fitness to Practise Panel may be used as a basis for referral to the PCC, if it considers that the: (a) evidence before it warrants disciplinary action; and, (b) the available sanctions of the Disciplinary Tribunal offer a more appropriate way to deal with that matter (eg disbarment).

Advice for Panel (Regulation 39)

28. In light of the complex issues that may need to be addressed by a Panel, Regulation 39 has been introduced to permit a Panel to appoint a barrister to provide independent advice, where relevant expertise is not readily available within the Panel. The advice should be provided to both parties (either in their presence or copied to them) as soon as reasonably practicable, to give the barrister an opportunity to challenge any point in the advice which he or she considers unjustified. It also ensures that:
 - the process remains fair to both parties;
 - no complex points of law are misinterpreted; and,
 - the Panel does not stray into any error of fact or law.

Equality Act 2010 (Regulation 43)

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

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

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

The new 'BSB Handbook'

31. The Regulations were further amended following the consultation to align with the format and approach of the new BSB Handbook. For example, the Regulations have been extended so that they now apply not just to barristers, but to 'BSB authorised individuals', in line with the definition included under Part 6 of the BSB Handbook. This effectively only extends the remit of the Regulations to pupils and registered European lawyers.

Changes to the Guidance

32. The revised Guidance, which does not require the approval of the LSB and can be found at Annex B, is issued jointly with the Bar Tribunals and Adjudications Service (BTAS), given that the contents apply both to BSB staff and Committee members as well as BTAS panel members. It was revised with the aim of ensuring that it was fit for purpose and reflected the proposed changes to the Regulations. In addition to providing further information about the operation of the Regulations, the Guidance clarifies the BSB's obligations under the Equality Act 2010 and the duty to make reasonable adjustments. It also includes the criteria for decision-making, which comprises:

- when a case should be referred to a Fitness to Practise Panel;
- factors to be taken into account when deciding if a barrister is unfit to practise;
- whether restrictions should be imposed;
- the criteria for determining whether an interim suspension or prohibition order should be made, or for determining whether adjustments to the process are reasonable;
- factors to be taken into account for determining the most suitable restriction; and,
- the nature of the appeal hearing.

33. The provision of clear decision-making criteria within the Guidance ensures that a robust, proportionate and fair decision-making system, mindful of the legal obligations set out in equality legislation, is put in place. It also helps the Panel to determine what is reasonable and prevents any risk to the public. Ultimately, the provision of such guidance allows the potential impact on the regulatory objectives to be measured through an assessment of vulnerability of the public, vulnerability of the barrister, and

suitability of other available remedies (that do not impact on a barrister's ability to practise), based on the likelihood of that impact occurring.