



Approval of the revised Fitness to Practise Regulations

For approval by the Legal Services Board

November 2013

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This application for a change to a regulatory arrangement is made in accordance with the requirements set out in the Legal Services Board's Rules for Rule Change applications.

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The Bar Standards Board (BSB) wishes to provide the information below in support of the application.

1. Details of proposed alteration

- 1.1. The purpose of this paper is to request that the Legal Services Board (LSB) approve the proposed amendments to the Fitness to Practise Regulations, which feature at Part V Section E¹ of the new 'BSB Handbook'.
- 1.2. A review of these Regulations represents a number of years of work, the need for which arose from an individual Fitness to Practise (FTP) case in 2010 which became subject to Employment Tribunal proceedings. While it transpired that the Regulations themselves were not being called into issue (although the absence of guidance was), the case was a catalyst for a fundamental review.
- 1.3. A decision was taken jointly by the BSB and Council of the Inns of Court (COIC) in 2010 to amend the Regulations and develop guidance in the interim, to address the more pressing issues. As a result, the Regulations were revised in 2011 to reflect the

¹ A change to the Handbook numbering system (assumed since the receipt of LSB approval of the Handbook) means that the Regulations will, in future, appear at Part 5 Section E of the Handbook.

changes that resulted from a restructure of the BSB's Professional Conduct Department (PCD) in 2011, and to remove the term "defendant" from the Regulations, given that the FTP process is not disciplinary in nature (addressing some of the issues set out at Paragraph 3.1 below). Interim Guidance was also produced. These changes came into effect on 1 January 2011 and were published on the BSB's website. Thereafter, a combined Working Group of the BSB and COIC took forward a more substantive review of the Regulations with the assistance of legal advice from independent solicitors.

- 1.4. Following the completion of this review, the BSB issued a short consultation from March – May 2013 on the revisions to the Regulations and accompanying Guidance (please see Annex C). Having considered the responses to this consultation and the overall revisions made, the Standards Committee of the BSB and the BSB Board have approved the amendments to the Regulations and noted the contents of the Guidance. The approved version of both documents can be found at Annexes A and B respectively.
- 1.5. It is hoped that the introduction of the revised Regulations, if agreed, can dovetail with the publication of the new 'BSB Handbook', on 6 January 2014, which has already received full LSB approval.

2. Details of existing arrangements

- 2.1. The aim of the Fitness to Practise (FTP) Regulations is to prescribe the manner in which any issues concerning a barrister's fitness (ability) to practise for health reasons should be managed under the BSB's regulatory arrangements. They are designed to cover a range of circumstances, including where a barrister has a physical or mental condition that affects their ability to practise as a barrister as a result of any underlying condition (such as drug or alcohol addiction). The Regulations in the Handbook, (which simply carry over the 'Fitness to Practise *Rules*' in the previous Code of Conduct) therefore give the BSB the ability to refer a practising barrister to a Panel where there are concerns that he/she may be:
 - i) incapacitated due to a physical or mental condition (including addiction); and,
 - ii) as a result, the barrister's fitness to practise may be seriously impaired; and,
 - iii) suspension from practice, or the imposition of conditions on their practise, may be necessary to protect the public.
- 2.2. The current FTP process comprises a referral system whereby a case is referred to a Medical Panel ("a Panel") by the Professional Conduct Committee (PCC), where health issues come to the attention of the PCD. The President of COIC then convenes a Panel. The ensuing preliminary hearing may give directions for a full hearing in which a Medical Panel will decide if a barrister is unfit to practise and take action accordingly.
- 2.3. The BSB has statutory responsibility for ensuring that the Bar's regulatory arrangements are robust, carried out in accordance with the LSA 2007 and meet the

regulatory objectives, as well as the Legal Services Board's regulatory standards framework. The BSB and Bar Tribunals and Adjudication Service (BTAS) have recently developed a legally binding contract (Services Agreement), which formally sets out the arrangements for the administration of disciplinary and other proceedings between the BSB and members of the Bar in England and Wales (including Fitness to Practise cases). It also provides an ongoing means by which BTAS' performance can be measured, to provide assurances to the BSB that they are meeting performance requirements.

Outcomes achieved by new Regulations

2.4. The Regulations are designed to achieve the following outcomes:

- High level public protection from the risk of being exposed to barristers who, by reason of an incapacity, are not fit to provide legal services to the standard expected, that is, to understand instructions and to act appropriately for their client;
- A supportive system that encourages affected barristers to address any physical or mental health issue, and return to practice as soon as possible, or continue to practise alongside the provision of adequate safeguards/supervision where necessary;
- Full clarity of processes for determining whether a barrister's fitness to practise is impaired by reason of his or her health for complainants and members of the public, barristers and their representatives, members of Panels, as well as members of the PCC, and COIC and BSB staff;
- Consistency of approach in the application of the FTP processes;
- Fairness and transparency in dealing with cases concerning a barrister's fitness to practise; and,
- Promotion of adherence to the professional principles, including maintaining proper standards of work within a profession that acts in the best interests of the public and in accordance with the regulatory objectives.

3. Rational for the alterations

3.1. The existing Regulations, having been in operation since 2005, had not been substantively revised since their original publication, and clarification was required to determine whether they continued to be fit for purpose. The following concerns were also identified:

- a) Areas of the Regulations were antiquated and used an outmoded and overly adversarial drafting style (the proceedings are not intended to be disciplinary in nature);
- b) The criteria for decision making required clarification;
- c) Some of the terms used in the Regulations, on which Panel decisions are based, had not been properly defined; for example, the expression "seriously impaired", which comprises the definition of 'unfit to practise', could create ambiguity and

leave the BSB exposed to challenges, given that the seriousness of an impairment is an opinion;

- d) The role of the medical practitioner (appointed by a Panel to advise on medical issues and conduct medical examinations), had not been defined within the Regulations;
- e) The Equality Act 2010 overhauled and enlarged the general law on, among other areas, discrimination. Clarification was needed as to whether the powers granted to the Panel, as set out in the Regulations, and the Fitness to Practise process operated by the BSB, remained reasonable and fully compliant with Human Rights and Equality legislation; and,
- f) Clarification was needed as to whether the procedure, as set out in the Regulations, is an example of best practice, and continued to be fit for purpose; and,
- g) No supplementary guidance was available to support the Regulations, and therefore no further information was available regarding the operation of the Regulations or the criteria to be taken into account by panels when taking decisions.

3.2. As explained at paragraph 1.3 above, a number of issues were addressed during an interim review of the Regulations, principally those covered by a), f) and h) above, which led to the publication of revised set of Regulations and new Guidance note in 2011.

4. Nature and effect of proposed changes

4.1. Due to the often complex nature of the issues being dealt with under these Regulations, barristers require clarity surrounding the conduct required of them, so that decisions can, if needed, be made in tight timeframes. Clients also need to be clear about what they can and cannot expect of their barrister. For these reasons, the format of the Regulations has remained relatively prescriptive. Additionally, the BSB was of the view that the processes did not fundamentally need to change in light of the review, given the general consistency of our approach with other regulators, the fact the Regulations will continue to address the same issues as the existing Regulations, and the necessity to retain the Regulations in light of the risks they address (see paragraph 5 below, and Annex E for a process map).

4.2. However, in order to ensure clarity, the Regulations have been rewritten and the BSB is therefore applying for approval of the entirety of Part V Section E of the BSB Handbook, and of the following key amendments (regulation numbers below refer to the revised Regulations, found at Annex A):

- a) References to technical complexities have been removed, where possible. For example, the descriptions of the application of interim suspensions and interim prohibitions have been unified into one concept, now named 'interim restriction';
- b) The drafting style and terminology have been modernised and streamlined, for example, replacing "Chairman" for "Chair", and replacing "Complaints Committee" with "Professional Conduct Committee" (in light of the name change, effective from January 2012);

- c) The 'Medical Panel' has been renamed the 'Fitness to Practise Panel' since the former could inaccurately imply that all Panel members are medical professionals;
- d) 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;
- e) The definition of 'unfit to practise' has been amended to remove the requirement for the impairment to be "serious", since the impairment must, by definition, be sufficiently serious to require action to restrict the barrister's practice;
- f) A description of the process by which Panels should be constituted, previously located within the Regulations, has been moved to a separate Schedule at the end of the Regulations to improve readability (Schedule 1);
- g) 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;
- h) In compliance with public law principles, the Regulations now include an express requirement to provide reasons for the decision to the barrister;
- i) 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;
- j) The wording at Regulation 37(b) 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;
- k) 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;
- l) In light of increasingly complex issues that may need to be considered, 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; and,
- m) Where possible, details of administrative matters that might more appropriately appear in Guidance, have been removed.

4.3. The amendments to Regulations are set out in some further detail at Annex F.

4.4. As a consequence of the amendments to the FTP Regulations, and in accordance with the definitions included at Regulation 3 of the revised Regulations, the BSB is also seeking approval from the LSB of amendments to the following terms in 'Part 6 – Definitions' of the Handbook:

- "Fitness to Practise Panel" (formerly known as a 'Medical Panel');
- "Medical Examiner";
- "Review Panel"; and,
- "unfit to practise".

Powers of immediate suspension and expedition

- 4.5. While developing the Regulations and Guidance, the BSB considered the need to include powers for the PCC to suspend immediately a barrister, where the available evidence suggests that the case should be dealt with more urgently than the standard process allows, due to the level of risk that the person presents to themselves or the public. The inclusion of this power would mirror the powers that are incorporated into new Interim Suspension Regulations (included at Part V D2.9²).
- 4.6. It was, however, not considered appropriate to allow the PCC to make a determination to immediately suspend a barrister from practise for the following reasons:
- Unlike the new Interim Suspension Regulations, which give the PCC powers to suspend someone on the basis of evidence that has already been judged to have some validity by an appropriate body, no such judgement will have been made at this stage in relation to an individual's medical condition. Given the serious impact of an immediate suspension on a barrister's practice such a decision would only be reasonable if an effective medical assessment of the available evidence had been made;
 - Unlike other regulators such as the General Medical Council, the BSB does not have ready access to medical expertise. Therefore the delay inherent in obtaining such a medical opinion to support an immediate suspension could be greater than a referral to a Panel;
 - It would be very difficult to define which types of cases should or should not be subject to immediate suspension, given that all cases, by definition of the need for referral to the process, would potentially be considered 'serious' or 'urgent'.
- 4.7. The review also considered whether it would be necessary to include the provision to expedite the most serious cases. The Regulations and Guidance state that a preliminary Panel (at which a barrister can be suspended) should be convened "as soon as is reasonably practicable" (Regulation 11) and include no specific timeframes. Therefore, by definition, discretion will always lie with COIC to convene a Preliminary Panel urgently and as expeditiously as possible.
- 4.8. The Regulations and Guidance seek flexibility in proceedings wherever possible (see Paragraph 7 of the Guidance), and encourage the case to be progressed within a timeframe appropriate to the risk associated with an individual case, rather than specifying a timeframe at every stage. Specifically, Paragraph 19 of the Guidance makes it clear that, although barristers should normally be required to make representations within 14 days, this timeframe should be applied flexibly, depending on the seriousness of the case, and the necessity to progress the case more expeditiously based on whether it is in the interests of the public or whether the barrister requires more time as a reasonable adjustment. Regulation 18(b) also allows an interim Fitness to Practise Panel to direct an expedited full hearing of the

² A change to the Handbook numbering system (assumed since the receipt of LSB approval of the Handbook) means that this reference will now be found at *Part 5 D* of the Handbook, *Regulation rE259*

Fitness to Practise Panel at the request of the barrister.

- 4.9. The BSB is of the view that its approach strikes the right balance between limiting any immediate risk to the public by ensuring that a Panel is convened in short order where necessary, and fairness to a barrister and their right to make representations.

5. Risk

- 5.1. The BSB aims to identify areas of risk and take action to mitigate against any risk to the public or consumers in the provision of legal services. This includes taking action where the BSB becomes aware of issues that call into question a barrister's ability (fitness) to practise on physical or mental health grounds.
- 5.2. The BSB only referred 35 cases to FTP proceedings between 2000 and 2012. As the cases are few in number, this would indicate that the likelihood of risk to members of the public occurring is relatively low. However, the potential impact could be substantial, whether that be in terms of physical risk, impairment of the barrister's judgement or their competence to such an extent that they are unable to adequately protect their client's interests. The risk posed to the individual barrister, whether personally or professionally, must also be considered.
- 5.3. Given the circumstances outlined above, the Regulations are designed to address low probability/high impact scenarios and are specifically designed to mitigate any risk to the public through their application.
- 5.4. The review of the Regulations therefore took into account the need to continue to manage risks to the public connected with barristers' fitness to practise in the most effective way. The BSB also took into account the risks to public confidence in both the BSB as a regulator and the standards in the profession, as well as the risks to the courts and the legal system if modern and efficient processes are not in place to deal with issues of fitness to practise.

6. Statement in respect of the LSA Regulatory Objectives

- 6.1. The BSB has not identified any significant adverse impacts on any of the regulatory objectives as a result of making these changes to the Regulations. We do not consider that the proposed revision will have an impact on the constitutional principles of the Rule of Law or access to justice. Neither will they restrict the promotion of competition in the provision of services or the public understanding of the citizen's legal rights and duties.
- 6.2. In particular, the revisions to the Regulations and Guidance will support the Regulatory Objectives in the following ways:

Protecting and promoting the public and consumer interest

- 6.3. Improving the clarity of the Regulations, and ensuring that they meet best practice is critical to protecting both the public and consumer interest. The Regulations offer high level public and consumer protection from the risk of being exposed to barristers who, by reason of an incapacity, are not fit to provide legal services to the standard expected.

Encouraging an independent, strong, diverse and effective legal profession

- 6.4. The BSB has undertaken an Equality Analysis of the Regulations, attached at Annex G, which indicates that the proposed changes will not impact negatively on the diversity of the Bar. The Regulations assist with maintaining the strength of the legal profession by ensuring those who lack the capacity to practise effectively are subject to appropriate restrictions and can return to practise as soon as reasonable.

Promoting and maintaining adherence to the professional principles

- 6.5. The amendments to the Regulations ensure that the BSB has in place effective processes to maintain standards at the Bar by, if necessary, preventing those who are unable to meet those standards from practising.

7. Statement in respect of the Better Regulation Principles

- 7.1. The BSB considers that the detail of the Regulations fulfils our obligation to have regard to the Better Regulation Principles. The following section summarises how the Regulations meet these principles.

- **Transparent:** A consultation paper was issued on the proposed Regulations (Rules) in March 2013 and a summary of responses has been published on the BSB's website (see Annex D). The intention is for the revised Regulations and Guidance to be published on the websites of both BTAS and the BSB from 6 January 2014 and consideration is being given to producing a public information leaflet about the Fitness to Practice process.
- **Accountable:** The Regulations stipulate that written reasons for decisions under the process should be provided. Given the nature of the proceedings, hearings are held in private but any restrictions placed on a barristers practice will be recorded on the publicly available Barrister's Register.
- **Proportionate:** The Regulations and the proposed amendments provide for a proportionate approach to issues of fitness to practice. They allow Panels to arrive at an outcome that is proportionate to the risk presented, ranging from agreed undertakings through to full suspension from practice.
- **Consistent:** The BSB is satisfied that the amendments to the regulations are

consistent with the approach taken by other regulators. In themselves they create a strong basis for consistency in approach to individual cases, and combined with the guidance and planned training of both staff and panel members, consistency in application should be achieved. The BSB, via the contract with BTAS, will monitor the outcomes to ensure that this is the case.

- **Targeted:** The Regulations ensure that the fitness to practice process is only targeted at those who present a risk to the public or consumers. Their application will be monitored to ensure that this is the case via the contract with BTAS and the work of the BSB's Independent Observer

8. Statement in relation to desired outcomes

- 8.1. Through this review, the BSB has sought to improve and provide for better regulatory practice. The redrafting of the Regulations and the additional clarity they provide should ensure the outcomes set out at paragraph 2.4 are achieved. However, their application will be monitored to ensure they are being applied consistently and effectively without difficulty or challenge.

9. Consultation process undertaken

- 9.1. It was considered best practice to consult on both the proposed revised Regulations and Guidance and to obtain the views of any party who has an interest in, or will potentially be impacted by the changes to ensure that no areas have been overlooked.
- 9.2. A consultation paper on the revisions was issued between March and May 2013. It was sent direct to relevant interested parties³, including other regulators and relevant charities, and published on the BSB website. The consultation paper set out: the purpose of the review; research on the approaches adopted by other regulators; analysis of the types of previous cases; how the issues of fitness to practise came to light; the identified issues with the current Regulations and Guidance (as above); an analysis of the risks associated with not conducting a review; and an equality assessment.
- 9.3. Since the changes to both the Regulations and Guidance were not considered controversial or wide-reaching, the BSB did not expect to receive a wide response to the consultation paper and this was the outcome: only one substantive response from the Bar Council was received, as well as an informal response from COIC. The responses did not raise any significant issues and did not lead to substantive changes to the BSB's proposed course. A 'consultation response paper' was drafted and published on the BSB website (see Annex D). This sets out the analysis of the responses received and identifies the small number of areas where proposed

³ A full list of consultees can be found on the BSB's website here: https://www.barstandardsboard.org.uk/media/1461012/annex_6_-_130320_-_list_of_consultees_-_ftp_rules_guidance_-_final.pdf

changes to the Regulations and Guidance have been made as a result of the consultation.

10. Other Regulators

- 10.1. The BSB's FTP process is consistent with the processes applied by other regulators; most regulators employ a 'health' Panel to take decisions on whether or not a professional is deemed unfit to practise, based on available evidence and expert advice. These Panels have the authority to impose conditions on a professional's practice or to suspend them where significant concerns about their fitness to practise and/or public safety are raised, or where there is evidence that the professional is not following medical advice. Further, most regulators offer the professional the opportunity to sign an undertaking not to practise or to have certain conditions imposed upon their practice, until the underlying issues have been fully resolved and investigated.
- 10.2. All approved regulators were invited to provide comments on the consultation paper on the revisions to the Fitness to Practise Regulations and the Guidance; no responses were received. The BSB does not consider that the proposed changes to the BSB Handbook, as outlined at paragraph 4.2 – 4.3, above will impact on any of the other Approved Regulators under the Legal Services Act 2007.

11. Implementation timetable and operational readiness

- 11.1. The BSB would like to have the new Regulations in place from 6 January 2014; the same time as the introduction of the new BSB Handbook. However, should approval not be received by this date, the current Regulations, issued in January 2011, can remain in place until such time as approval is received, given that cases can still be processed efficiently and present no risk. In any event, given the small number of FTP cases received each year, the BSB is unlikely to have to impose the Regulations before approval is received.
- 11.2. The BSB will, nonetheless, be operationally ready to implement the Regulations by 6 January 2014. Existing staff are already trained to handle Fitness to Practise cases and the revisions to the Regulations will be incorporated in the general Handbook training scheduled for November 2013. Arrangements are in hand to ensure the Regulations and Guidance are posted on the website and made available to the profession and the public as from 6 January 2014.
- 11.3. The changes will be publicised in accordance with the wider and ongoing BSB Handbook Implementation project publicity strategy, which includes running a range of daytime workshops and evening roadshows across all circuits.

Annexes

A – PART 5 SECTION E - THE FITNESS TO PRACTISE REGULATIONS (Revised)

B – JOINT GUIDANCE ON THE FITNESS TO PRACTISE PROCEDURE (Revised)

C – REVIEW OF THE FITNESS TO PRACTISE RULES - CONSULTATION PAPER

D – REVIEW OF THE FITNESS TO PRACTISE RULES – CONSULTATION
RESPONSE PAPER

E – FITNESS TO PRACTISE PROCESS MAP

F – DETAILS OF PROPOSED CHANGES TO THE FITNESS TO PRACTISE
REGULATIONS AND GUIDANCE

G – EQUALITY ANALYSIS