



COUNCIL OF THE INNS OF COURT

RESPONSE TO THE BAR STANDARDS BOARD'S

CONSULTATION PAPER ON

THE REVIEW OF THE DISCIPLINARY TRIBUNAL REGULATIONS

I INTRODUCTION

1. The Council of the Inns of Court (COIC) submits this Response on behalf of the four Inns of Court, after due consultation with them. The Response represents the views which are common ground between all the Inns.
2. To carry this forward COIC has set up a Disciplinary Tribunal Regulations (DTR) Review Working Group on which all the Inns were represented. This Response records the agreed views of the Inns to the questions raised in the Paper.

3. This Working Group invited and took fully into account comments from the members of the Strategic Advisory Board of the Bar Tribunals and Adjudication Service (BTAS). The membership of this Board includes QC, barrister and lay members of the Disciplinary Panel who hear cases of alleged misconduct by barristers (and so are wholly familiar with, and may be seen as regular 'users' of, the DTRs) and other independent lay representatives.
4. COIC and the Inns are exceptionally well-qualified to address the questions raised by the Bar Standards Board (the BSB). The BSB is aware of the central role which the Inns historically and currently play in the discipline of barristers. The Inns discharge a number of important functions prescribed in the existing DTRs, have by statute the exclusive right to Call and Disbar barristers, and through the activities of BTAS are responsible for administering all disciplinary tribunals and hearings.
5. COIC thanks the BSB for providing a clearly written and presented Consultation Paper for discussion. It is referred to in this Response as "the Paper". COIC particularly welcomes the BSB's approach in proactively soliciting views to help guide its thinking towards further changes to the DTRs at a future date, which COIC believes is an open and laudable move which it hopes the BSB will continue to employ in its other Consultations.

II ANSWERS TO THE 19 QUESTIONS

Q1 Do you agree with the changes to terminology and the clarification of roles outlined above? Are there other changes in these areas that you consider would be beneficial?

The Inns agree with the changes outlined. They support the principle that, where a given task is exclusively administrative in nature, the terminology used should accurately identify those responsible and accountable for it.

Paragraph 16.iv (in the Paper) - With regard to the list of the types of Judges, while the Inns have no views regarding the removal of this list from the DTRs into Part 6 of the Handbook, they are of the opinion that it would be beneficial to amend the DTRs to make clear that a Tribunal (whether convened with three or five persons) should generally be Chaired if possible by an individual senior to the respondent.

Paragraph 17.v - With regard to the circulation of bundles, the Inns fully support the proposal that responsibility for this function should be assigned to BTAS, and note that this is common practice elsewhere. The Inns do so fully cognisant that this will also transfer the (relatively modest) costs associated with performing this function to them.

Q2 Do you agree with the changes that have been made to the 'Directions' section (at rE106 – rE126) and the Standard Directions at Annex 6 of the revised Regulations?

Paragraph 23 - The Inns are of the firm opinion that as a matter of principle all Hearings should take place in public, unless there are compelling reasons arising from a particular case which would make this inappropriate. Public hearings are vital towards ensuring confidence in the process as a whole. The Inns accordingly do not agree with the change to the DTRs proposed in the Paper that would see the present practice of holding all Directions Hearings in private expressly included in the DTRs. The DTRs could instead make provision for either party to request that the Directions Hearing be held in private in an appropriate case; for example to consider an application under (new) Regulation rE127.7 for the substantive Hearing itself to be held in private.

Paragraph 24 - The Inns do not agree that Tribunals should be given specific powers to exclude evidence or draw an adverse inference against a party as a sanction for late compliance with a Direction. It is surely not appropriate to have a policy that enables vital evidence to be excluded, regardless of the consequences to a party, simply because it was submitted late. In any event the Inns suggest that Tribunals already have all the powers they need in this area as set out in (new) Regulation rE166. The present proposed provision may increase the risk of Tribunals erring by believing they cannot draw adverse inferences in other situations e.g. where a Respondent declines to answer questions in cross-examination.

Paragraph 27 – The Inns fully support the change to rE145 to remove the prohibition on a Directions Judge from sitting as a Tribunal Chair in a case where they have given directions, and note that this is established practice elsewhere.

The Inns support the remainder of the proposed changes.

Q3 Do you agree with the list of those people who may be treated by the Tribunal as ‘vulnerable witnesses’ (rE176) and should the list be extended to include reference to victims of other types of allegation, and not just allegations of a violent or sexual nature?

The Inns agree that the introduction of specific provisions for the treatment of vulnerable witnesses is an appropriate step.

In terms of extending the list to include reference to victims of other types of allegation, the Inns are of the opinion that a Tribunal’s existing powers to conduct any hearing in accordance with the rules of natural justice (rE165) is sufficient provision for it to do this. Indeed it may be appropriate for rE176 to be amended to make clear that it is without prejudice to a Tribunal’s general powers under rE165 to proceed in such a way. In either case, it is recommended that rE176 be revised to make the six categories of witnesses exemplary, rather than exhaustive.

Q4: Do you have any comments on the changes to the Regulations outlined above in Section B which are not subject to specific questions?

The Inns do not.

Q5: Do you agree that Tribunals should be given the power to refer matters back to the BSB for consideration of the imposition of administrative sanctions? If not, which of the other options above do you consider would be more appropriate?

The Inns do not agree that Tribunals should be given the power to refer matters back to the BSB, and consider that option 'd' – maintaining the status quo – would be more appropriate. This is on the grounds that it would be akin to 'double jeopardy' for a respondent to find themselves twice facing the same charges. It would seem iniquitous for a respondent, having had all the charges against them publicly heard and dismissed by a Tribunal, to then find the matter being restarted for the consideration of administrative sanctions. As in the criminal courts, it is a key responsibility of the prosecutor to determine the most appropriate charge against the respondent, and should that charge be dismissed the case cannot then be re-heard to a lesser charge.

Q6: Do you agree the power to impose deferred sentences should be removed from the Regulations?

The Inns agree with this proposal.

Q7: Do you agree that the formal restrictions on the BSB mounting appeals against decisions of Tribunals should be removed?

The Inns are satisfied that the existing provisions for the BSB to mount appeals are fully adequate, and that the formal restrictions should not be removed. Sufficient information is not available for the Inns to understand in what circumstances, or regarding what mischief, the BSB feels its powers are wanting.

That said, the Inns suggest that the wording used in the current Regulations is inconsistent and may benefit from revision should it be carried forward into the proposed DTRs. Paragraph rE183 of the existing DTRs states that the BSB may only appeal against *sentence*, whereas rE185 assumes that the BSB may appeal against *sentence or dismissal*.

Q8 Do you agree with the removal of the regulations in relation to the involvement of the Inns of Courts in the disciplinary system except in relation to the pronouncement of disbarments?

While acknowledging that the Inns have a direct interest in the outcome of this question, they are strongly of the opinion that this interest does not disqualify them from comment, but rather gives them a profound insight and understanding of the implications that flow from it.

The motivation behind the BSB's recommendation, or the advantage(s) it assumes will result from it, are not defined. It is therefore unclear why or to what end the BSB has concluded that the Inns of Court should be removed from the disciplinary process, when there is *prima facie* considerable worth in them being involved in the disciplinary process, as a means of ensuring the mutual accountability of the profession. The adoption of this proposal would represent a profound change in the discipline of the profession, and one that surely demands a dedicated, stand-alone consultation on its merits. Such a consultation should fully articulate the BSB's aims and rationale to all interested parties, including the profession and the public, so that a wealth of informed input may be assembled and considered, and a proper decision made in possession of all of the different viewpoints.

Q9 Do you agree with the proposed amendments to streamline the reporting process?

The Inns agree that the current number and variety of reports that are required in the DTRs are unnecessary and confusing. It is a sensible step and in the public interest that this be replaced by the publication of one formal 'decision report' (judgement) produced in every case.

The introduction of the single decision report may require other changes to the DTRs however, to ensure that the date the sentence of the Tribunal comes into effect is harmonised with this. Otherwise it would be possible for respondents to be required to submit their appeal to the High Court (within 21 days of the sentence coming into effect) *before* the decision report is available.

Q10 Do you agree with the proposal to remove reference to the full list of bodies to which the final report should be sent and allow the distribution of such reports to be determined at the discretion of BTAS/ the President?

The Inns agree with the proposal to remove reference to a full list of bodies to which any final report should be sent, not least because all have access to the reports which are published on the BTAS website.

If the proposal is approved, BTAS will establish and advertise a policy that decisions are available to all on request, and develop its own distribution list for bodies who wish to receive reports, which can then be added to or amended as necessary, rather than requiring regulatory change in each instance. It is postulated that this regulation pre-dates the internet age when it was a necessary mechanism for disseminating the outcomes of Tribunals, but it now seems rather obsolete.

Q11 Do you agree with the BSB's current approach to the publication of decisions of Disciplinary Tribunals online, or are you of the view that our approach should be amended to allow for the publication of all Tribunal decisions online, regardless of the outcome?

The Inns are of the view that the approach should be amended, so that details of all decisions (*including* cases where all charges are dismissed) should be published.

The current approach to dismissed cases is problematic, in that all mention of the case is removed from the public domain after the decision, which is not transparent and may simply prompt more questions than it answers.

Ultimately the Tribunal itself would have been held in public, and the details potentially reported in the press and discussed online – accurately or not – and it therefore seems highly anomalous that there should be no official record in the public domain that the charges were dismissed against the barrister in question.

Q12 Do you agree with the changes introduced, which allow for the granting of a fresh hearing on application in any circumstance where the respondent has a good reason for not attending the original hearings?

The Inns agree that it is reasonable to allow a Directions Judge to grant a fresh hearing in the circumstances described.

Q13 Do you agree with the amendment to the Regulations limiting the hourly rate that self-representing barristers can claim to the rate applicable to litigants in person under the CPRs?

The Inns do not agree with the amendment, and do not believe that the comparison with the litigants in person rate (CPR 48) is valid, which is the rate used in civil litigation. However disciplinary proceedings, which of course

engage the rights protected by Article 6 of the ECHR, are entirely different, concerning as they do the right of a person to practise his or her profession.

In these circumstances respondents are before their own regulatory body, and should they choose to represent themselves and succeed in having all the charges against them dismissed, it seems wrong that they should still face a potentially significant financial penalty (specifically the non-recovery of their normal hourly rate for the work done) for having done so.

Q14 Do you have any other comments on any of the proposed amendments to the Regulations set out in Section C above which are not specifically covered by specific questions?

None.

Q15 What are your views on potential changes to the current regime for claiming BSB costs, taking into account the alternative approaches set out at paragraphs 75 - 77?

While the Paper (paragraph 73) sets out that BSB representatives provide their services pro bono, the Inns do not believe that this approach is sustainable and indeed are aware of a small but increasing number of hearings where the representatives were paid by the BSB. This could clearly be expected to colour responses received to this question.

The Inns believe that a decision on any costs claimed by the BSB must be a matter of discretion for the Tribunal. There seems no reason why provision for the BSB claiming preparatory costs cannot be added to the DTRs, but any decision to award them must be entirely at the Tribunal's discretion, acting in accordance with its own agreed policy.

Q16 What are your views on removing the jurisdiction of five-person Tribunal panels and replacing them with three person panels potentially Chaired by a Judge?

The Inns find the current DTRs in this area problematic and welcome the BSB's review of the issue.

Standardising the membership of all Tribunal Panels would address the anomaly whereby the BSB currently determines their size; thereby creating a situation whereby the prosecutor telegraphs to all involved – before any evidence is provided – whether it considers disbarment an appropriate outcome for a given case. It is equally unsatisfactory that, when a three-person Panel disagrees with the BSB's assessment of a case and concludes that there *might* be a need to consider disbarment, it is unable to do so, and the matter must be adjourned while a five-person panel is convened to determine the sentence.

The Inns would support a reduction in the membership of all panels to three individuals:

- Such a change would lead to a faster resolution of cases (it being quicker and easier to convene (or reconvene in the event of adjournment) a panel made up of three rather than five individuals, as the likelihood of a diary clash on any given day is greatly reduced).
- It would be in line with the practice of other regulators. It is believed the Medical Practitioners' Tribunals Service has made such a change and there is no suggestion this has in any way reduced the quality of its Tribunals' decisions.

The Inns' support is subject to any such revisions to the DTRs continuing the requirement for the Chair to be legally qualified, and the remainder of the Panel to have an equal number of professional and lay representatives. As mentioned in the response to Question 1 in the Paper, the Inns recommend that the DTRs be amended to make clear that the Panel should ordinarily be Chaired by an individual senior to the respondent.

Q17 Do you agree that the decision to re-admit a barrister to the Bar following disbarment should be a matter for the BSB as the regulator and taken by Tribunals not the Inns of Court?

The Inns do not agree that decisions to re-admit a barrister following disbarment should be a matter for the BSB, and note that as well as 'regulator' the BSB will also have been the *prosecutor* at the Tribunal where the barrister seeking re-admission was originally disbarred. This is surely likely to be perceived by the profession, and the wider public, as a potential conflict of interest.

While the question suggests the decision to re-admit a barrister is currently taken by the Inns of Court, this has not been the case for many years. As the BSB will be aware, the Inns have delegated this responsibility to an independent Tribunal, the Inns Conduct Committee, which includes lay representatives. The choice framed in the question, that it is between the Inns and an independent Tribunal, would therefore be better expressed as being between one independent Tribunal and another independent Tribunal. Furthermore, the BSB has recently approved a proposal from the Inns that members of both the ICC and the Disciplinary Tribunals should come from one and the same pool of individuals, further removing any meaningful distinction between the two.

Q18 Do you support the introduction of “settlement agreements” as an alternative means of determining the outcome of disciplinary cases?

The Inns support the introduction of “settlement agreements” as a sensible step that is in common practice elsewhere, with the caveat that all such agreements must be subject to approval by the Tribunal.

Q19 Do you consider that any of proposed changes to the Regulations could create adverse impacts for any of the equality groups?

The Inns have no grounds to believe that any of the proposed changes to the DTRs would create adverse impacts for any of the equality groups.