The Bar Council

Bar Council response to the BTAS Sanctions Guidance Review Consultation

1. This is the response of the General Council of the Bar of England and Wales (the Bar Council) to BTAS's Sanctions Guidance Review Consultation (April 2021).[1]

2. The Bar Council represents approximately 17,000 barristers in England and Wales. It promotes the Bar's high-quality specialist advocacy and advisory services; fair access to justice for all; the highest standards of ethics, equality and diversity across the profession; and the development of business opportunities for barristers at home and abroad.

3. A strong and independent Bar exists to serve the public and is crucial to the administration of justice. As specialist, independent advocates, barristers enable people to uphold their legal rights and duties, often acting on behalf of the most vulnerable members of society. The Bar makes a vital contribution to the efficient operation of criminal and civil courts. It provides a pool of talented men and women from increasingly diverse backgrounds from which a significant proportion of the judiciary is drawn, on whose independence the Rule of Law and our democratic way of life depend. The Bar Council is the Approved Regulator for the Bar of England and Wales. It discharges its regulatory functions through the independent Bar Standards Board (BSB).

INTRODUCTION

4. The Bar Council welcomes the opportunity to participate in this consultation on the disciplinary sanctions. We note that BTAS welcomes comments from those with experience of supporting victims of misconduct more widely from other professional settings rather than simply in relation to barristers.

5. As the representative body for the profession we have experience both promoting good practice in relation to tackling any reported incidents of harassment and bullying at the Bar, and of supporting victims of misconduct, including providing support following incidents of harassment. We are keen to ensure that complaints in

[1] https://www.tbtas.org.uk/wp-content/uploads/2021/04/Sanctions-Guidance-review-Consultation-paper-April-21-FINAL.pdf

this area are dealt with appropriately, recognising the ongoing impact that any incident can have on a victim, and others in a vulnerable position, with respect to both their professional and personal lives.

SECTION ONE

6. We note also that this is the first of two consultations. We hope that in the second round of consultation the voices of those external to the Bar with experience of supporting victims of misconduct and indeed regulating and dealing with allegations of misconduct will be fully represented. In particular, we note that part of the impetus for the consultation is the degree of public outcry concerning the leniency of the sanctions imposed for cases of sexual misconduct; in addition, incidents where barrister conduct has been called into question with comments made on social media.

7. We note that the BTAS focus is on a proposed revised approach to the guidance on sanctions with the focus of this first consultation being on indicative sanctions, and that the intention is to retain the format whereby there is first general guidance on the principles relating to sanctions and then detailed guidance on the indicative sanctions for particular types of misconduct.

8. In relation to this, the way in which the guidance on indicative sanctions and general factors is laid out is slightly confusing. Matters which might properly be thought of as placing a particular case in the middle of a sanctions band are not represented in this way and it might be that someone seeking to administer the guidance could become confused as to whether those matters are in fact mitigating factors. We consider that specific and special training should be given to panel members who sit on cases that involve discrimination or harassment (as is done in the Employment Tribunals which chiefly deal with workplace harassment and discrimination).

9. We take the view that because it is important that the guidance is to promote consistency and transparency in decision-making, the ranking of factors should be rendered very clear and there should be some indication of the starting point for sanctions in relation to those factors.[2]

10. That is in keeping with the purposes of the regulatory sanctions mentioned in paragraph 10[3]. It is only with clarity on the ranking of the factors, that the general public's confidence in the profession in this respect can be maintained. Similarly,

[2] Whilst this can be done by general non-specific banding in relation to most types of misconduct, experience has shown that in relation to discrimination and harassment cases judges have needed to remind themselves that intuition is a poor guide.

[3] https://www.tbtas.org.uk/wp-content/uploads/2021/04/Sanctions-Guidance-review-Consultation-paper-April-21-FINAL.pdf (Para 10)

although the aim of the sanctions is not simply to punish, the sanctions must act as a deterrent to the individual and/or the wider profession from engaging in the misconduct which is subject to the sanction. Inevitably therefore, there must be an element of transparency over this deterrence element.

11. Before entering into any responses to the specific questions we would like to point out that the process of conducting equality impact assessments is simply one part of the duty to observe section 149 of the Equality Act 2010. In particular due regard should be had to the need to ensure good relations between particular protected characteristic groups in the context of this disciplinary process. This in turn requires that full and due weight is given to the views of those who have experienced discriminatory behaviour, whether that is of a sexual nature or otherwise in formulating the final version of the sanctions. We anticipate that BTAS will in the course of conducting further thinking on this area seek to amass more directly the views and experiences of those who have experienced discrimination harassment, including sexual harassment from other professions and from other organisations.

SECTION TWO

12. In general terms we welcome the revisions to the category levels for fines and suspensions. In principle, we welcome a clearer structured approach to guide decision-makers. We welcome the fact that concepts of culpability and harm are to be taken into account in determining seriousness and will be included in a more structured way in the decision-making process to ensure that they are properly taken into account.

13. We have some concerns about the ranking of these factors and what guidance is given to the decision-makers as to the type of case that would fall at the middle of the sentencing band (particularly in relation to harassment cases) and therefore what are aggravating or mitigating factors in terms of their general seriousness.

14. In principle, we welcome the idea of an indicative sanctions range for each group of offences. However, we are clear that this needs some greater thought in terms of guidance (and training of those sitting).

FINES

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

15. In relation to the reasoning at paragraph 35 of the consultation paper we take the view that part of the impact of a regulatory disciplinary system such as this is to modify behaviour at the organisational level and at the individual level. Therefore, we

do not think that it follows from the fact that there have not yet been any fines for entities that there is no need for a structure which would allow for fines against entities. BTAS clearly considered that providing notice of the fine levels for entities at the outset was useful. There is apparently no evidence that this is no longer the case.

16. We therefore recommend that work should be done on maintaining a system of potential fines for entities and thought given to how those fines can be calibrated in relation to the fines for individuals so as to fulfil the aim of the system of deterring behaviour.

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

17. We agree that the proposed system of fines is probably the most appropriate system.

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

18. We agree that the three categories for fine should be retained in the revised guidance.

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

19. Yes. We recognise that the highest level of fine (£50,000) appears to be a matter dictated by regulation. Whilst we consider that serious thought could be given to review of that, we recognise that this is not something within the control of the BTAS.

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

20. We do not agree that a descriptor should be added for each of the fine categories. It would be better for those administering the fine system to have guidance, but we do not consider that these descriptors add any real clarity.

SUSPENSION

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

21. We agree that the categories for suspension should be reduced to 2

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

22. We agree that the categories should be a lower one of up to 12 months, and a higher one of over 12 months.

SECTION 4

23. We welcome the proposed revised guidance on the approach to decisions on sanctions and agree that the first step must be to determine the appropriate group.

24. It is in relation to Step Two that we have some concerns as to the proposed guidance and the way in which they are set out, particularly in relation to cases where there is an element of discrimination, including cases of harassment and sexual harassment.

25. We take the view that the initial assessment of the seriousness of the actual misconduct should be more guided, particularly in relation to harassment, sexual harassment and discrimination.

26. Looking at Annex 1, the list of the proposed general factors that would be used to assess the seriousness of the misconduct, whilst they are said to be non-exhaustive and intended to cover the most common factors that might be applicable in relation to all types of proved misconduct, we have some concerns about the factor "whether the conduct was planned or spontaneous" in the context, in particular, of sexual harassment. The dichotomy that is posed there might suggest to some decision-makers that if the misconduct was "spontaneous" this renders it that much less serious. In the context, in particular, of sexual harassment there is a real need for care in this type of thinking. We recommend the culpability factor being rephrased as, “whether the conduct contained elements of planning.”

27. We recognise of course that these factors are intended to be general factors applicable to all types of misconduct. However, there is a very real danger that the subjective nature of the concept of "spontaneous" will give rise in the context of cases involving harassment, including sexual harassment, to too much variability and subjectivity in sentencing.

28. We have also some concerns about the factor "whether actions of others contributed to the misconduct". It is not clear whether this is a factor that is intended to indicate that the misconduct is of a less serious nature than where a person has committed an act of misconduct to which the actions of others have not contributed.

29. In some cases what might be termed provocation might be a relevant factor however in the context of harassment and in particular in the context of sexual harassment, there is a real risk that this may give rise to attempts by respondents to blame the person who has received the harassment for in some way contributing to the misconduct. In the context of sexual harassment, in particular, it is difficult to reconcile entirely this factor to the concerns that have been expressed by the general public in many different ways about situations in which women who have experienced sexual harassment have been blamed for, in some way, encouraging it.

30. We consider that the defects, or potential defects, in these general factors might be remedied by some very clear and explicit guidance in relation to matters involving sexual harassment and/or harassment. In terms of presentation of these factors we also consider that anything that suggests that a victim might be blamed for an act of sexual harassment which they have experienced (and which has been found to have occurred) will be very difficult for BTAS.

Harm Factors

31. In the context of "the actual harm caused e.g. physical mental financial reputational…", we consider it is important that there should be some guidance which reflects the fact that in cases involving discrimination one of the areas that results in an award of damages is the degree of injury to feelings to the person who has experienced the discrimination. More generally, we would hope that there would be further clarity on the concept of "mental harm" in order to make it clear that even where someone who has experienced harassment and/or discrimination may be very robust mentally, a real harm is caused to them by the injury to their feelings by the act of discrimination or harassment. We think it is important that those who are administering the disciplinary sanctions should have very clear guidance on this point in order to counteract any risk that the concept of "mental harm" should be reduced simply to those cases where there is some evidence of illness.

Aggravating Factors

32. We note that the question of whether there is discrimination or a "discriminatory element" has been included as one of the general factors in relation to the seriousness of the misconduct. We would ask BTAS to consider the presentational issue that this raises. We suggest that in the eyes of the general public the inclusion of a discriminatory element in misconduct would in fact be an aggravating feature of the misconduct. We also note that in many jurisdictions the inclusion of a discriminatory element would be regarded as an aggravating feature both in terms of criminal offences and others

33. We note in this regard that the aggravating factors include "the misconduct involves the commission of a criminal offence" and "whether drug or alcohol misuse was linked to the misconduct"

34. At this stage we are asking BTAS simply to consider whether the discrimination factor should be moved to this aggravating category. We recognise that the BTAS may take the view that given the level at which sanctions start for an offence involving discrimination there is no need for this.

35. However, the fact that the general culpability factor includes a reference to "an element of discrimination" may indicate that the BTAS is considering that there may be cases where although there is not a discriminatory offence being committed there is "an element" of discrimination involved in the offence. If that is the thinking of BTAS, then we would suggest that a discriminatory element of an offence which is not itself discrimination should be considered as an aggravating feature of that offence.

36. However, we would hope that there will be much greater clarity as to the situations in which a "discriminatory element" would be treated simply as part of an offence which was not itself an act of discrimination. There is a risk that the way in which circumstances of discrimination are, or are not, charged as a separate offence will impact on the effectiveness of the tribunal, and on its ability to satisfy the requirement of maintaining public confidence (and of other stakeholders, including protected characteristic groups within the profession).

Mitigating Factors

37. We welcome the fact that in relation to the last three mitigating factors some caution is urged and that there will be guidance on how to approach these given in part one. We consider that it is important that such guidance takes into account the interplay between these factors and the nature of the misconduct that has taken place if it involves, in particular, harassment or sexual harassment, but discrimination more generally.

Aggravating Factors

38. In addition to the matters that are contained in the list of aggravating factors we consider that it is important that the question of whether the respondent has sought directly or indirectly to subject the person who has experienced discrimination/harassment/sexual harassment to any detriment as a result of a complaint being made should be included.

39. We recognise that there are different ways of dealing with such victimisation. One is to treat it as an aggravating factor in a claim of misconduct of this nature and

the other is to treat it as a separate disciplinary offence. However, even if it is treated as a separate disciplinary offence, the fact that the person has sought to victimise the person who made an earlier complaint should itself be taken into account as an aggravating factor in relation to the baseline misconduct which constitutes that victimisation.

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

40. In general, yes, subject to comments above (paras 23-31). Further we agree with Behind the Gown (ref: Behind the Gown response to Q8) who suggest that the wording of 'whether the misconduct was a one-off incident or part of a course of action' as a factor under culpability should be reviewed. This is because one incident of assault, for example, is one too many, and could be equally if not more blameworthy than a course of action. It ought not to be viewed as less serious simply because it does not form part of a series of potentially differing incidents. To reflect the increased culpability of repeated incidents, it is suggested that the wording be amended to 'incident sustained / repeated or attempted to be repeated'.

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

41. In general, yes, subject to comments above (paras 37-39)

42. In relation to Step Three, we would hope that there would be some guidance on the kinds of cases that would fall in the "middle" of a sanction range and that there would be guidance on factors which might mitigate from that mid-range position or raise the case up the scale. The aim of such guidance would be to reduce the element of subjectivity in relation to, particularly, cases involving harassment and discrimination.

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

43. Yes, subject to the above and the following.

44. In relation to Step Five, it is important that sanctions must be proportionate, and decision-makers should consider the totality of the sanctions. However, we suggest that decision makers are provided with clear and transparent guidance so as to ensure that, whilst proportionality is maintained, serious misconduct, such as sexual harassment, harassment and discrimination are dealt with accordingly and recognition is given to the levels of public concern in relation to such offences.

45. Step Six. The remarks we have made above in relation to the totality principle also apply to the written reasons for the sanction imposed. We welcome the structured process. However, we would emphasise that without clear and consistent condemnation of acts of discrimination including harassment and sexual harassment there is a real danger that these reasons may fail to give due weight to the misconduct in these cases. That in turn will have an adverse impact on the ability of the BTAS to achieve its aim of ensuring public confidence in the system of sanctions.

46. We recommend therefore that wherever a case involves sexual harassment or harassment or discrimination this should be dealt with explicitly in the written reasons for the sanction imposed and that the decision-makers should be required to articulate their consideration of the following matters:

(a) the "element" of discrimination involved in the case. This should be set out in the reasons why it is considered to be discrimination clearly articulated.
(b) to the extent that it is known, the impact on the person who has experienced the discrimination should (so far as is consistent with their privacy or their permission) be set out so that it is clear that it has been taken into account.
(c) the mitigating factors that have been considered should be clearly and explicitly set out and in particular how they are *relevant* to the question of the discrimination or harassment that has taken place.
(d) the reasons, in a case involving discrimination or harassment, should include a passage which deals with *the way in which* (and not simply the fact that) *the decision furthers the aim of ensuring public confidence* in the system of sanctions. This is to ensure that the decision-maker expressly considers that sanctions in these types of cases are very much subject to public scrutiny and that the general public, and in particular some of the protected characteristic groups who may be affected by the impact of any publication of a sanction will have greater or less confidence in the system depending on the clarity of the reasoning accompanying the sanction. Such process will act as a reminder to the decision-makers that the decision-making on these issues, in particular, has an impact on the question of how empowered or disempowered various protected characteristic groups, including in particular women in the case of sexual harassment, will feel when starting out a career at the Bar in particular.

47. The Bar Council believes that the incidence of sexual harassment is higher than the number of cases that are brought. Many women who have experienced sexual harassment at the Bar will be influenced by the degree of damage that they perceive a report may do to their career and will also be influenced by the kinds of sanctions that are given out if a report is made. Barristers tend to be very pragmatic people and therefore will consider that if there are insignificant sanctions given where a report is made that it is probably not worth making the report in the first place as the sanctions that are given out are not in effect a deterrent to this type of behaviour and do not outweigh the potential impacts on the victim of making the report.

48. It is therefore very important that decision-makers particularly in relation to the process of expressing their reasons are encouraged to be explicit about how they have balanced the discriminatory/harassment factors in their decision. We have already recommended that any guidance must be accompanied by real and effective training for panel members who sit on cases involving discrimination or harassment. We believe this approach is likely to result in more consistent outcomes.

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

49. We have set out above our suggestions for adaptations to the approach that should be made and in particular have expanded, in some detail, on the question of how written reasons for the sanction should be set out. We have sought to explain why it is worth BTAS putting additional thought into how reasons could be structured so as to ensure that the decision-makers' attention both at the point of making the decision but also at the point of expressing it, can be focused on the questions of harassment and discrimination and their real impact on the person subjected to it (and on public confidence in the system of penalties).

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

50. We have set out the (minor) disagreement with the approach outlined above. However, with slight modifications we believe that this could be a very successful approach to imposing sanctions.

MISCONDUCT GROUPS

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

51. We agree that misconduct involving violence in the absence of a criminal offence should be included in the behaviour towards others category. This is because in relation to harassment and sexual harassment cases in particular there may well be no criminal conviction and including it in the behaviour towards other category would enable all categories of harassment (which form a continuum) to be covered by this category.

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

52. We agree with the concept of creating groups of types of misconduct. We think that this raises however difficult decisions that may need to be made over which offences are charged. We have already referred to the question of whether an offence involving "a discriminatory element" should be treated as an offence with either a factor that increases its culpability or as an offence which involves an aggravating factor, so labelled.

53. There is, of course, another question that precedes all of this which is the degree to which the "discriminatory element" of a piece of misconduct is charged as a separate offence or is simply left to be dealt with by way of an element of an otherwise non-discriminatory offence.

54. A simpler way of dealing with this issue would be to ensure that where there is a more than minor or trivial discriminatory element in an offence including cases of harassment that an offence involving discrimination is to be charged.

55. We recognise that there may be some cases in which it might be felt that doing this would result in a chilling effect on the conviction rate as panels might be reluctant to make a finding of discrimination in some types of cases. However, we consider that the panels' equality training should ensure that such cases are (a) very rare and (b) treated proportionately in relation to the seriousness of the aim of eradicating discrimination at the Bar.

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

56. In broad terms we agree with the proposed groups outlined in the consultation paper. It is useful to have a group focussing on social media related misconduct because this type of misconduct has increased in prevalence in recent years.

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

57. We do not at this stage have any suggestion for amendments to the titles of the group other than the scope of the Financial matters Group seems a little unclear, in the absence of dishonesty. Could it be clarified?

58. In terms of coverage, we would suggest adding, "Behaving in a way that diminishes the trust and confidence the public places in the profession." to the bulleted list of range of contexts in the social media group at annex 7 (p.59). This reflects the relationship to Core Duty 5 in the BSB Handbook.

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

59. In broad terms we agree with the concept of including the guidance bands for sanctions within the ranges.

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

60. We recognise that the descriptors reflect a standard risk matrix. However, we consider that in the absence of greater clarity over the questions of culpability and harm, as outlined above, these descriptors are less effective than they might be. In particular, we consider that the welcome move to provide more guidance as to where in the ranges the sanctions should be pitched, should also include specific guidance on cases involving sexual harassment and harassment in particular, but also cases of discrimination.

61. In essence, the ranges are based on relatively subjective matters and in that context, in cases involving sexual harassment and harassment and indeed all forms of discrimination, further specific guidance should be given as to where kinds of cases should fall.

62. In relation to paragraph 69 of the consultation paper, clarity is very important concerning the distinction between culpability factors and those factors which constitute mitigation.

63. We consider that the proposed descriptors for each band range require some modification and or further explicit guidance in cases involving harassment/sexual harassment/discrimination.

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

64. Subject to the views expressed below we agree with the range for each of the groups. See in particular paragraph 75 below. The Bar Council notes that in relation to use of social media and other forms of digital communications, cases involving discrimination and harassment would attract a higher range of sanction. We welcome this clarity.

CPD orders and restriction on practice.

65. We note the intention to have further consultation on the approach to the sanctions of continuing professional development orders and restrictions on practice. The Bar Council welcomes the future opportunity to address the questions of whether in the case of sexual harassment/harassment /discrimination, such orders or

restrictions should be used to ensure that the respondent on re-entering practice has sufficient practical guidance in order to be able to avoid future incidents of discrimination.

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

66. This deals with Annexes 4-6. Subject to the comments below we agree with the specific culpability and harm factors included for these groups and have commented on the additional factors that should be included.

67. The seriousness factors mentioned on page 50 may require either further guidance or better definition. Obviously, there is some overlap between concepts such as abuse of trust etc. and misconduct directed at a person in a vulnerable situation or place in relation. However, there is a specific mischief which needs to be addressed: the position of those protected characteristic group members starting out at the Bar. We recommend that either generally or in relation to discrimination sexual harassment and harassment cases, this mischief should be singled out as a specific factor of seriousness.

68. Under the heading of harm, we consider that there should be reference to injury to feelings as well as the references to impact on mental health and well-being of those affected by the misconduct. This would have the effect of recognising injury to feeling as a significant component of the harm that almost all persons who have been subjected to sexual harassment at whatever level of experience (as it is in civil cases, including those relating to the workplace).

69. In relation to aggravating factors, we consider that one factor which ought to be included is where the perpetrator has engaged in discrimination on the basis of multiple characteristics as part of the sexual harassment. Thus, if sexual harassment occurs but there is also an element of racial harassment involved in the sexual harassment itself this should be considered as an aggravating feature. The same, of course, would apply where other protected characteristics are concerned.

70. The concept of harassment under the Equality Act 2010 also includes, effectively, a prohibition on victimising someone because they have refused to engage in activities of a sexual nature (see section 26 (3)). We consider that this should either be made clearly a species of sexual misconduct or be included as an aggravating factor in and of itself. It will deal with the situation in which one has engaged in unwanted conduct of a sexual nature (and which would constitute harassment) and because of the other person's rejection of (or submission to) the conduct, the perpetrator treats

them less favourably than they would treat them if they had not rejected or submitted to the conduct.

71. We consider that victimisation of the person who has either submitted to or rejected such conduct should be regarded as an explicit aggravating feature of the case.

72. Within the Misconduct of a sexual nature Group, the Bar Council recommends that consideration should be given to adding 'conduct committed within a professional setting' to the list of culpability factors.

73. We have some concerns about the way in which mitigating factors are expressed. An "immediate apology" could be seen as a purely formalistic matter. We consider that it is important that panels when considering this feature should be directed to assess how genuine such an apology is. One aspect of harassment, and particularly sexual harassment, which renders it difficult for the person experiencing it, is the way in which a perpetrator can distance themselves from their own actions either by referring to the conduct as "banter" or by doing something and then immediately apologising. It is very important therefore that the question of any apology be properly scrutinised to see whether it has any mitigating impact at all in this area.

74. We do not consider that "isolated incident of short duration with low risk of repetition" should properly be seen as a mitigating factor. It may be a factor which it is appropriate to take into account in determining the degree of initial culpability. But we consider that it is quite wrong for it to be considered in the context of mitigation. Neither should it be seen as a factor which mitigates in terms of the situation of the respondent to the case. We consider that this would send entirely the wrong message to the general public about how the Profession and the Regulator regards incidences of sexual harassment which can have a devastating effect on the confidence of the person who is subjected to them in the context in particular of professional relationships between barristers in Chambers, even in one-off cases. There is also a risk that conduct may be wrongly categorised as "one-off" in relation to a particular complainant, when in fact the conduct may be repeated in relation to multiple complainants who have not yet come forward or have decided not to report it. Evidence of this factor would seem to be difficult to obtain, either way.

75. In addition, the question of whether there is a low risk of repetition is not immediately apparent as a mitigating factor. Instead we consider that the reasons why there is a low risk of repetition need properly to be assessed before it can be said to be a "mitigating" factor. We again consider this as a matter that might properly be considered in relation to culpability (where again it would need to be assessed in terms of the reason why there is a low risk of repetition) but we consider that it is not

appropriate to consider it as a specific mitigating factor over and above mitigating factors which apply generally to offences which we consider to be entirely sufficient.

76. We therefore consider that it should be made clear that these mitigating factors (page 51) will be subject to a high degree of scrutiny.

77. We note that at Step Six (page 51–52) there is intended to be further guidance on the giving of reasons. We refer to our earlier remarks on the giving of reasons in the context of discrimination, harassment and sexual harassment.

78. Under Annex Five we note that non-sexual harassment appears to be intended to cover "unwanted behaviour that is offensive or makes the recipient feel intimidated degraded and/or humiliated." We consider that it would be more appropriate to have something more akin to the Equality Act 2010 definition of harassment in this place. As a misconduct group, we consider that it ought to cover a broad spectrum of behaviour, whereas the behaviour indicated Annex Five would involve a panel finding that the recipient felt intimidated degraded and/or humiliated.

79. We consider that the disciplinary scheme ought at least to mirror the civil legislation in this area, so as to be able to capture discrimination and non-sexual harassment behaviour properly and in a way that the general public would expect.

80. In Annex Six, we note under the culpability factors that discriminatory motivation is taken into account. If a person carries out an act of misconduct for a discriminatory motive it is a very clear case of an act of discrimination. We do not consider that it is appropriate to include discriminatory motivation as simply a culpability factor (not even an aggravating factor), in relation to behaviour towards others. If this category is used to cover non-sexual harassment and discrimination it should include under the category of harm, injury to feelings as we have previously.

81. We note that in the aggravating and mitigating factors in relation to this category, the mitigating factors include matters that could be better articulated in relation to Annex Four and Annex Five. Some of these would need considerably more guidance to be effective in relation to cases involving harassment or discrimination. However, the concept of "isolated incident in difficult or unusual circumstances" perhaps introduces a sufficient connection between the circumstances of the perpetrator and the fact that the event is "isolated" and therefore could more properly be regarded as a mitigating factor.

82. Under mitigating factors on page 57 is listed "no evidence that the behaviour may be repeated" if this category is to be used for non-sexual harassment and discrimination cases that fall below the level of seriousness for which separate category is to be used then it would be advisable to strengthen this mitigating factor

so that it requires some evidence of the reasons why the behaviour will not be repeated in the future before it can be considered as a mitigating factor.

83. Within the social media group at Annex 7 we suggest the addition to the penultimate harm of "intrusion into another's private life" on the list of harms at step 2, of the following text, in italics; "intrusion into another's private life…. *and the level of seriousness of the intrusion*." This reflects that there may be very different levels of breach of privacy.

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

84. We have set out above why it is that we do not agree with specific aggravating and mitigating factors being included for each of the groups that might potentially involve discrimination or harassment. We have also indicated additional factors that could be included and have recommended that clear guidance be given to panels on how, in the cases of discrimination harassment and sexual harassment, these factors should be applied.

85. We agree with Behind the Gown in their response which suggests that 'Behaviour resulted in a criminal conviction or court order' listed as an aggravating factor within the Misconduct of a sexual nature Group should not apply to instances of sexual assault or sexual harassment. Whether or not a victim chooses to go to the police to report sexual assault or harassment should not elevate the seriousness of the sanction. To do so would mean that two similar instances of sexual assault are sanctioned differently simply because one victim reported the matter to the Police and the other did not. This means that one sanction is more serious than the other, yet the harm caused to each victim might be the same. There are many reasons why a victim does not report the misconduct which amounts to a criminal offence, and this should not be a factor reflected in a lesser sanction.

86. In terms of the social media group at Annex 7, we consider that the following should be added as a mitigating factor; "The public interest in freedom of expression and the right to receive and impart information, including whether the material highlighted is a matter of public interest." This takes into account Article 10 of the European Convention on Human Rights. As such matters may be highly complex, sensitive and contentious, specific guidance should address how such matters should be approached and the balancing of competing rights.

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

87. In broad terms we agree with where the lower middle and upper bands for ranges have been pitched for each group. We have indicated the further guidance that we consider would be necessary in order to make these types of bands workable and effective in the case of sexual harassment, harassment and discrimination cases. We do not consider that adjustments should be made to the bands as such, but we do consider that specific guidance is essential for panels who are seeking to apply the bands, given their current descriptors.

EQUALITY IMPACTS

88. We consider that the preliminary equality impact assessment that has been carried out may have failed to consider all of the requirements of section 149 of the Equality Act 2010. If BTAS is applying the requirements of s. 149 then it should also be considering not just the impact on those who may be made the subject of disciplinary sanctions, but also the impact on those members of the Bar who have particular protected characteristics in relation to their likelihood of experiencing the kinds of discrimination and harassment that the proposal seeks to assist in eliminating. There also does not appear to have been a preliminary impact assessment conducted in relation to the way in which these proposals may affect relations between various protected characteristic groups and in particular how these proposals may impact on the confidence of the various protected characteristic groups in wider society.

89. In conducting further equality impact assessment work on these proposals we consider that it is important that the full terms of s.149 be taken into account and that evidence be gathered which will indicate the potential impact on all aspects of that duty and the protected characteristic groups that are covered by it. Thus, whilst the number of cases decided by BTAS panels in the last three years may be very small, there is clear evidence that the way in which sentencing has been carried out has had a detrimental impact on the confidence of sectors of the general public, and in particular women, on the seriousness with which these matters are taken by the Profession and the Regulator.

90. Due regard should be had to the need for these proposals to ensure equality of opportunity for the various protected characteristic groups at the Bar and in terms of public confidence in the Bar. Consideration should be given to exactly how these proposals ought to provide support to members of protected characteristics groups whose needs are different to those of other groups. An example of this specific

consideration would be how these proposals will impact on female pupils at the Bar and the effect that the way in which sanctions are approached will have.

91. As we have said, in the context of the guidance, the understanding of those administering the system of penalties of the position and needs of the various protected characteristic groups who are supposed to be supported by the system of penalties for discrimination, harassment and sexual harassment is an important factor. This can only be partially achieved by providing guidance.

92. Experience of the Employment Tribunals suggests that training is a vital component for those who are to administer guidance on penalties in these types of cases. The training which the HMCTS has adopted goes well beyond training on the letter of guidance and extends to trying to convey an understanding of the lived experience of various protected characteristic groups. Due consideration should be given to whether any guidance ought to be accompanied by such training for those panellists who are to be asked to take on this category of disciplinary cases.

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

93. We do not consider that the equality impact assessment conducted in the consultation paper provides a basis for departing from any of the proposals in the paper. However, we do consider that it will be necessary to consider further the impacts on the different protected characteristic groups in more detail and in respect of potential impacts on complainants before the second round of consultation.

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

94. There are other equality issues that BTAS should take into account when developing further the contents of the sanctions guidance. These are as follows:

(a) the need for explicit and specific guidance on sexual misconduct cases and the factors involved in sexual misconduct cases for panels;
(b) the need for training, including awareness training, for the members of the panels (as part of training on the guidance mentioned above);
(c) the impact on the protected characteristic groups in wider society and not simply at the Bar of the proposed sanctions;
(d) the degree to which the calibration of sanctions can aid or inhibit good relations between members of different protected characteristic groups both at the Bar and in wider society;
(e) guidance in relation to the impact of use of social media;
(f) that non-sexual harassment and discrimination can include failure to make reasonable adjustments for disabled persons; consideration should be given to

how such cases are to be dealt with in terms of disciplinary sanctions (given the very wide range of reasonable adjustments that an individual barrister or a set of chambers may fail to make in respect of a person with disabilities). Some explicit guidance should be given in relation to failures to make reasonable adjustments in terms of sentencing for misconduct involving discrimination of this nature.

The Bar Council
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