



PRESIDENT: The Rt. Hon. LORD HOFFMANN, PC
CHAIRMAN: LUCINDA ORR

6th Sept. 2013

Ms Katie Walmsley
Bar Tribunals & Adjudication Service
The Tribunal Suite
9 Gray's Inn Square
Gray's Inn
London
WC1R

Dear Katie,

The Bar Tribunals and Adjudication Service
Sentencing Guidance 2014 Consultation

Please find below the views of the Bar Association for Commerce, Finance and Industry's Professional Issues sub committee on the abovementioned consultation. Please do not hesitate to contact me if there is anything else we can help with.

Q1. Do you agree or disagree with the current aims and approach of BTAS's sentencing guidance?

The Professional Issues Sub-Committee of BACFI agree with the aims and approach of the sentencing guidance and confirm that this is consistent with the approach adopted by other regulatory bodies.

Q2. Do you agree or disagree with the purpose and principles of sentencing set out at paragraph 3.1 – 3.2 of the guidance?

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VICE PRESIDENTS: Stephen Bacon, Michael Blair QC, Stephen Collier, Nicholas Dee, Humphrey Dugan, Helen Fletcher Rogers, Bernard Kelly QC, Sir Sydney Lipworth QC, Harry Mitchell QC, Michele Parnell, Christiane Valansot, Rosalind Wright CB, QC, Derek Wheatley QC.

The purpose and principles of sentencing set out at paragraph 3.1 – 3.2 do not reflect the deterrent nature of applying a sanction to a professional and whilst this is outlined in paragraph 3.3, it should be incorporated into the purpose and principles of sentencing.

- Q3.** Do you agree or disagree that the proposed guidance will:
- a. Enable panels to make appropriate decisions?
 - b. Ensure that the public interest is satisfied?

If you disagree please explain why and briefly outline how you would remedy this. The proposed guidance should assist panels to make appropriate decisions as opposed to enabling them to do so. The requirement to satisfy the public interest should be reflected within the body of the guidance and, again, may assist panels to ensure that the public interest is satisfied as opposed to achieving it as an end in itself.

- Q4.** Should the guidance be called ‘sentencing guidance’ or ‘indicative sanctions guidance’ or an alternative (please suggest)?

BACFI believe that the guidance should be called “indicative sanctions guidance” as that would be more consistent with the approach taken by other regulatory bodies. The word ‘sentencing’ is extremely closely linked with criminality and this seems an inappropriate title for a document that is predominantly directed at cases of misconduct.

- Q5.** Have we included the types of factors you would expect to see in determining sanctions? If not please give reasons.

The factors included in determining sanction are appropriate and whilst the personal circumstances of the individual barrister is mentioned, it may be worthwhile making a specific reference to any health conditions.

- Q6.** Should the panel take into account the barrister’s financial means before making a determination (e.g. imposing a fine)? If so, should this information be collected before the hearing as standard?

The means of a barrister should be considered before making a determination in relation to a fine. BACFI consider it to be unnecessary for that matter to be addressed in advance.

- Q7.** Do you agree that panels should not take into account applications in respect of costs when determining sentence? If not please give reasons.

Many regulatory bodies now have a costs jurisdiction and applications in respect of costs should be dealt with after any sanction has been delivered. This would be consistent with practice elsewhere.

Q8. Taking into account the arguments set out above, do you agree with the current starting point for CPD failures (see Part II of the guidance, section E.3)? If not please give reasons.

BACFI broadly agree with the current starting point for CPD failure, however, alternative methods of dealing with low level breaches should be considered as, historically, cases have come before tribunals in circumstances where there has not been a pattern of default merely a one-off breach.

Q9. Do you consider the distinction between a ‘reprimand’ and ‘advice as to future conduct’ to be clear? If not please give reasons.

It is unclear whether reprimands and advice as to future conduct are sanctions that would be available, either on the face of the barrister’s entry in the register, or would be revealed in the event that a member of the public were to enquire. There also does not appear to be any set time limit for disclosure of this information. In order to serve the public interest it should be clear what sanctions are going to be disclosed and those that will remain private.

Q10. Should advice as to future conduct be reserved for exceptional circumstances? Please briefly explain your answer.

Advice as to future conduct should not be reserved for exceptional circumstances. There may be a number of situations, including where a barrister is suffering from compelling personal difficulties, where advice may be a more appropriate disposal of a case than a more draconian measure. Reasons are given for these decisions so it should be clear whether a case has had an exceptional element.

Q11. Failure to pay Bar Mutual Indemnity Fund (BMIF) is currently charged under breach of practising requirements, should there be separate guidance for this breach?

Failure to pay Bar Mutual Indemnity Fund is currently charged under breach of practising requirements. There should be separate guidance for this breach. The validity of practising rights whilst uninsured has not been adequately addressed in this document.

Q12. Do you have any comments about how far the guidance enables decision makers to appropriately address equalities issues or avoid discrimination?

In due course the sentencing guidance will need to be equality impact assessed and the outcomes should be evaluated to ensure compliance with equalities duties.

Q13. Are there any factors you believe decision makers should take into account that have not been included in the draft guidance?

All factors appear to have been covered.

Q14. Do you have any other comments about the proposed structure and/or content of the guidance?

The guidance would benefit from a flowchart and tables as well as a one-page summary of the sanctions available.

With regard to the content of the guidance, BACFI are surprised at the low level starting point for a number of serious criminal convictions. This would include drinking and driving and offences of drug possession (of any class). Given the critically important role that the Bar play in upholding the rule of law and in both prosecuting and defending those that come before the courts for such offences, it is extremely surprising that under B3, “conviction for drug possession or supply”, that the starting point for a conviction for drug possession of any class is a reprimand and a medium level fine. This appears to be unduly lenient and whilst it constitutes the starting point, this could be easily misconstrued. The approach of setting a starting point is unusual in dealing with indicative sanctions guidance and the Bar Tribunals and Adjudication Service would benefit from considering and potentially adopting the approach of some of the healthcare regulators in this regard.

We are grateful for the chance to respond to this consultation and trust you find our comments useful.

Yours sincerely

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Chairman of Professional Issue sub committee.

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