

Mental Health & Wellbeing at the Bar

Fitness to Practice
Guidance



Wellbeing
at the Bar

Fitness to Practice

The BSB use the term fitness to practice to refer to the procedure followed when there are health concerns about a barrister.

It only applies to barristers with a current practising certificate. If a barrister revokes their certificate then the process stops.

The health condition also has to have an impact on the barrister's practice, rather than being a concern generally.

Under the definition in the BSB Handbook, '*unfit to practice*' means that a barrister is:

"incapacitated due to his or her physical or mental condition (including any addiction); and, as a result, the Individual's fitness to practice is impaired and the imposition of a restriction; or the acceptance of undertakings in lieu, is necessary for the protection of the public, is otherwise in the public interest or is in the individual's own interests"

The provisions in the BSB Handbook relating to fitness to practice are the [Fitness to Practice Regulations](#) – Section E of the Handbook.

Fitness to Practice procedures are less formal than a disciplinary tribunal and are held in private. The independent panel are concerned with the impact of any health condition upon the public, the public interest or on the barrister his/herself if there were no restrictions upon practice.

Some important things to note about fitness to practise

1. The question whether a barrister is or is not fit to practise is not a disciplinary one. Questions of fitness to practise may flow from, relate to, or be causative of misconduct, but they are not the same thing.
2. The Handbook does not require a barrister to report a fitness to practise concern relating to another barrister to the BSB. This does not mean that a report should not be made, but barristers (and their staff) are able to exercise their judgement in deciding how best to help others to deal with fitness to practise issues. On the other hand, any serious misconduct must be reported, even if it flows from, relates to, or has been caused or contributed to by, a fitness to practise issue.
3. If, as a barrister, you are aware of any 'incapacity' (as defined) which may affect your own fitness to practise, then:

- a. You are not under an obligation to report this to the BSB.
- b. You must, though, take whatever steps may be necessary to ensure that, despite your 'incapacity', you can and do comply with your Core Duties and the Conduct Rules.
- c. If relevant, you should seek appropriate medical advice about what modifications you should make to your practice as necessary in order to minimise any risk to the public which may flow from your 'incapacity'.
- d. A failure to follow appropriate medical advice about modifying your practice as necessary to minimise such risk may in itself indicate that you are unfit to practise (see para.15 of the Joint BSB/COIC Guidance, see below).
- e. There will be circumstances in which a self-referral will be in your own best interests.

3.1 It is understood that the BSB accepts that chambers retain their freedom of action unless and until a situation or risk arises (including a barrister becoming unfit to practise) which is of concern to the BSB as regulator. This is understood to be where (1) there is a risk to any duties under the BSB Handbook, (2) the public interest is compromised, or (3) there is a significant risk for clients, the public, the profession or members of chambers. As stated above, however, the BSB's expectation is not matched by any obligation in the BSB Handbook, except where serious misconduct is involved. Accordingly, except in that latter situation, the Bar Council suggests that the BSB's expectation is a matter for chambers to consider, acting in accordance with both the letter and the spirit of the Handbook, particularly the Core Duties.

4. The BSB is obliged to refer a case to a Fitness to Practise Panel if it considers that a barrister may be unfit to practise, but the affected barrister will be given the information obtained and a reasonable opportunity to make representations: see below. It will then be for the Panel to decide what further investigations to make (pursuant to the Fitness to Practise Regulations).

5. The term 'fitness to practise' might suggest that the question of fitness is one with an 'all or nothing' outcome: either being allowed to practise or not being allowed to practise. This is not the case.

In particular:

- a. There are many ways in which, and many degrees to which, a barrister may incapacitated due to his or her physical or mental condition or an addiction.
 - b. In many cases, the Panel's response to finding that a barrister is unfit to practise will be to impose restrictions or conditions on practice, or to accept undertakings along similar lines. In deciding on the appropriate restrictions or conditions, the Panel will weigh the interests of the public against the interests of the individual, will have regard both to mitigating and aggravating factors, and will act proportionately and only to the extent necessary to protect the public or in the interests of the individual barrister.
 - c. In general terms, suspension is reserved for those cases in which no conditions can be formulated which are sufficient to protect the public or the barrister's interests, and where a complete suspension is thus necessary for protecting members of the public and the wider public interest.
 - d. The extent to which a barrister has sought and acted upon appropriate medical advice will be a significant consideration for any Fitness to Practice Panel. However, the Panel's primary duty will be to protect members of the public and the wider public interest: it is not the role of a Panel to assume responsibility for, or to give priority to, the treatment or rehabilitation of the individual barrister.
6. The BSB has stated that it is its intention to seek to deal with fitness to practise issues sensitively, and confidentially so far as possible, bearing in mind any wider risks (to clients, the public, chambers, or the profession) associated with an individual barrister.

To whom do the Fitness to Practise Regulations apply?

The definition of 'BSB-authorized individual' covers practising barristers, second six pupils and registered European lawyers (all as defined in the Handbook).

One consequence of the first part of that definition is that the Fitness to Practise Regulations are not engaged if and for so long as a fully qualified barrister:

- i. is not practising, and
- ii. no longer maintains a practising certificate.

Thus, if such a barrister is proposing to take a break from practice for the duration of any incident which may make the barrister unfit to practise, it may sometimes be an appropriate course to give notice to the Bar Council to revoke the barrister's practising certificate.

On the other hand, if a barrister no longer maintains a practising certificate, then the BSB is not able to decide to deal with that barrister through a fitness to practise route, rather than a supervisory or disciplinary route. This could be to a barrister's detriment in some less serious cases of misconduct, because the BSB might choose to follow a fitness to practise route rather than a disciplinary one, or in combination with dealing with any disciplinary aspect at a lower level.

Formal Guidance about the fitness to practise procedure

Formal guidance about the fitness to practise procedure has been issued jointly by the BSB and COIC (the Council of the Inns of Court), the latter of which is responsible (through the Bar Tribunals and Adjudication Service) for establishing Fitness to Practise Panels and Appeal Panels.

For this Guidance, please see:

https://www.barstandardsboard.org.uk/media/31052/131210_-_guidance_on_the_fitness_to_practise_regulations_section_5.e_-_final_updated_jul_14_.pdf.

To find out more go to:

<https://www.barstandardsboard.org.uk/complaints-and-professional-conduct/fitness-to-practise/>