

BAR STANDARDS BOARD

REGULATING BARRISTERS

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1. Introduction

- 1.1. The Bar Standards Board ('BSB') Handbook imposes at 'Part 2: C4' a requirement on regulated persons to:
 - a) report promptly to the BSB if they have committed serious misconduct (rC65.7); and,
 - b) report to the BSB if they have reasonable grounds to believe that another barrister or registered European lawyer has committed serious misconduct (rC66).
- 1.2. This obligation applies to all BSB regulated persons, whether or not they are authorised to practise, and whether or not it relates to their conduct or the conduct of another BSB regulated person.
- 1.3. A failure to report could arise in respect of the regulated person, whose original conduct raised concerns of serious misconduct; it may also arise in respect of a regulated person who witnessed the original conduct and was under a duty to report it but failed to do so.

- 1.4. These obligations intended to meet outcomes oC21-oC23 of the Handbook, which are that:
- a) BSB regulated persons are effectively regulated;
 - b) The public have confidence in the proper regulation by the BSB; and,
 - c) The BSB has the information it needs to be able to assess risk and regulate effectively in accordance with the regulatory objectives.
- 1.5. The rules arise because it is in the public interest that the BSB is made aware of and able to consider what action to take in relation to potential instances of serious misconduct. The purpose of the obligations are to assist the BSB in undertaking its regulatory obligation to maintain standards at the Bar.

2. Further provisions and guidance

- 2.1. **Definition of “serious misconduct”:** The obligation to report is only in respect of “serious misconduct” and was specifically drafted to exclude some types of misconduct. “Serious misconduct” is not defined; however, an indicative list of examples is provided (see gC96), which includes, but is not limited to:
- a) Dishonesty;
 - b) Assault or harassment;
 - c) Seeking to gain access to confidential information without consent (including about the opposing party’s case or information about another member of chambers, staff or a pupil);
 - d) Encouraging a witness to give untruthful or misleading evidence;
 - e) Knowingly or recklessly misleading the court or an opponent;
 - f) Being drunk or under the influence of drugs in court;
 - g) Failing to report serious misconduct by another barrister;
 - h) Failing to permit the Bar Council or the BSB, on request, reasonable access to inspect chambers, premises and documents relating to a barrister’s practice; and,
 - i) Conduct that poses a serious risk to the public.
- 2.2. **Self-reporting serious misconduct:** The obligation is to report “promptly” to the BSB if a regulated person has committed serious misconduct. “Promptly” is not defined; however, a reasonable period is within 28 days of the conduct and/or the appreciation by the regulated person that the conduct amounted to “serious misconduct”. If there has been a delay in reporting, an additional aspect of the BSB’s consideration of the report may relate to the delay (or failure) in reporting the misconduct, as this may be a breach of the Handbook.
- 2.3. Where a regulated person has committed serious misconduct, they are under an obligation to take all reasonable steps to mitigate the effects of the misconduct (gC94).

- 2.4. **Reporting serious misconduct of others:** The duty to report serious misconduct by others is subject to a regulated person's duty to keep the affairs of their clients confidential (rC66). Further, a regulated person is prohibited from making (or threatening to make) a report of serious misconduct unless they genuinely and reasonably believe there has been serious misconduct (rC67).
- 2.5. A regulated person is not required to report serious misconduct by others if:
- a) they become aware of the facts giving rise to the belief that there has been serious misconduct from matters that are in the public domain and the regulated person reasonably believes that it is likely that the facts will have come to the attention of the BSB by other means;
 - b) they are aware that another person has already reported the matter to the BSB;
 - c) the events leading to the regulated person becoming aware of the other person's conduct are subject to legal professional privilege; and/or,
 - d) they become aware of the conduct as a result of working on a Bar Council advice line (rC69).
- 2.6. Further guidance to assist regulated persons in considering whether or not they should make a report is included in the Handbook at gC97-gC101.

3. Process for reporting serious misconduct and actions to be taken by the Contact and Assessment Team

- 3.1. Reports of serious misconduct should be made directly to the Contact and Assessment Team (CAT). Regulated persons should make reports of serious misconduct through the online reporting form. However, they can also make the report by email or letter. In some circumstances, a report can be made over the telephone, for example if reasonable adjustments are required but the expectation is that reports will be made in writing.
- 3.2. Where a report is received a member of CAT staff will open a case in the CMS. Reports submitted through the online portal will automatically have a case opened. The report should formally be acknowledged. CAT staff should explain when the individual will be contacted with an update or request for further information.
- 3.3. The report will then be assessed in line with the CAT assessment process. See the CAT Assessment Policy and Guidance document.
- 3.4. **Failure to report:**
- 3.5. Where it is apparent that there is also an issue about whether the 'subject' regulated person failed to report promptly (or at all) serious misconduct, this will need to be assessed by the CAT assessor. If the matter is allocated to enforcement, the Case Officer will consider whether this aspect should be treated as an allegation. Any

decisions as to whether the aspect needs to be added to the complaint should be taken in the light of an assessment, in line with the regulatory objectives and in accordance with the BSB's enforcement strategy..

- 3.6. When considering, what action (if any) to take in respect of a failure to report, the Assessment Officer in CAT or Case Officer ('CO') in the Investigations and Enforcement Team should take the following into account, in addition to the general risk assessment considerations:
- a) the seriousness of the original unreported conduct;
 - b) the means by which the conduct eventually came to light;
 - c) whether client confidentiality and/or legal professional privilege provided a legitimate reason for failure to report;
 - d) the facts as they were known to the individual at the time of the conduct;
 - e) whether the failure to report was deliberate or reckless (rather than careless or inadvertent);
 - f) whether early reporting of the original conduct would have assisted the investigation of the complaint or mitigated risks by referral to Supervision; and,
 - g) whether the conduct was not reported, despite receiving advice that it should be reported.

Reports of misconduct about others

4. **Confidentiality:** The process for considering reports of serious misconduct by others is the same individual self-reports. However, there will be additional sensitivities in respect of confidentiality for the person making the report. Those sensitivities are discussed in more detail in the BSB document, 'Reporting Serious Misconduct of others'¹. However, in general, The Bar functions on a system based on trust and confidence between colleagues, and individual barristers depend to a large extent on the reputation they hold amongst their colleagues. In this context it is understandable that some barristers may be concerned about the personal impact of reporting serious misconduct.
5. All reports made to the BSB will be treated sensitively. If the information provider wishes to provide information confidentially, we may be able to take reasonable steps to protect the identity of the individual making the report. However, depending on the facts of the case, it may be difficult to take enforcement action without identifying that person.
6. The person making a report about another will not be kept informed of the progress of the case as a matter of course. However, the BSB may need to contact the person who

¹ This can be found on the BSB's website here:

https://www.barstandardsboard.org.uk/media/1594778/bsb_guidance_on_reporting_serious_misconduct_of_others_-_external.pdf

reported the misconduct to request further information or documents to allow the BSB to conduct a proper assessment and/or to request a witness statement. The Investigations and Enforcement team may also decide to keep the information provider updated as an interesting party.

- 6.1. Reports by others should be treated sensitively. It should be clarified with the individual at the earliest possible stage whether the information is being provided on a confidential basis or openly. When information is provided on a confidential basis, steps should ordinarily be taken to protect the identity of the person making the report if possible; however, it should be made clear that the BSB cannot guarantee that their identity will not be disclosed as part of any investigation, if it is necessary to allow for a fair and proper investigation of a complaint.
- 6.2. It is hoped that in most cases, appropriate regulatory action can be taken without disclosing the identity of the person making the report. However, if (following a risk assessment) the BSB would have difficulty taking appropriate enforcement action without formally and openly relying on the evidence from the person making the report, CAT must consider whether the public interest and the promotion of the regulatory objectives overrides the normal approach of the BSB not to identify (without their consent) the person who has reported the serious misconduct. In such cases, the AO should consult with HoCA before making such a decision.
- 6.3. If an individual's identity and any information or documents they provide are to be disclosed to anyone as part of the assessment of a report, that individual should be informed in advance that this may will be done.

7. Improper reporting of serious misconduct about others

- 7.1. Reports of serious misconduct by others should always be made in good faith and on the basis of a genuine and reasonably held belief that the conduct was serious misconduct. Where CAT receives evidence to suggest that a report has been made for improper means (for example: as a litigation tactic; and/or; to pressure or threaten an individual; and/or, for any personal gain; and/or, to obtain an advantage for their client), the matter should be treated very seriously as it can amount to a breach of rC67. A new case of making a false report should be opened against the individual who made the report and assessed in the normal way. If there is sufficient evidence and the risk assessment supports it, the matter should be referred to the Investigations and Enforcement Team as a potential allegation.