

# BAR STANDARDS BOARD

REGULATING BARRISTERS

## Contents

1. Purpose of this guidance .....	1
2. The power to reconsider allegations under rE61 .....	1
3. Requests for review .....	3
4. The Independent Reviewers (“IRs”).....	4
5. Review by the IR.....	4
6. Exercising the power to reconsider under rE61 .....	5
Reconsidering staff decisions .....	5
Reconsidering IDP decisions.....	5
7. Reviews of decisions to refer allegations to Disciplinary Action.....	6

## **1. Purpose of this guidance**

- 1.1 This document provides guidance on the exercise of the power to reconsider allegations which have been disposed of (“post-investigation decisions”) under the Enforcement Decision Regulations (“EDRs”) in Part 5A of the BSB Handbook. In accordance with rE61 of the EDRs, the power of reconsideration is vested in the Commissioner (delegated to senior staff in LED in accordance with the BSB Scheme of Delegations) and Independent Decision-making Panels (“IDPs”).
- 1.2 The power to reconsider allegations under rE61 may be triggered following receipt of a request for review, or on the BSB’s own initiative, in accordance with the terms of *BSB28 – Reviews of regulatory decisions and the role of the Independent Reviewers*, which Case Officers should read alongside this guidance.

## **2. The power to reconsider allegations under rE61**

- 2.1 At the conclusion of the investigation of an allegation carried out under the EDRs, the Commissioner<sup>1</sup> or an IDP has the power to decide how to “dispose” of the allegation(s) under rE19 (staff decisions) and rE22 (IDP decisions) of the EDRs.

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<sup>1</sup> In practice, the Commissioner’s powers are exercised by staff with delegated authority under the BSB’s Scheme of Delegations.

This might be, for example, a decision to dismiss an allegation on the basis there is no or insufficient evidence of a breach of the BSB Handbook or a decision to refer an allegation to disciplinary action.

- 2.2 Once a decision has been taken in accordance with rE19 or rE22, the decision is final subject to the power to reconsider allegations under rE61, which provides that:

*“The Commissioner or an Independent Decision-Making Panel may reconsider an allegation which has been disposed of by the Commissioner or an Independent Decision-making Panel respectively where:*

1. new evidence becomes available which leads it to conclude that it should do so; or
2. for some other good reason.”

- 2.3 rE62 goes on to provide that, following such reconsideration, the Commissioner may take any further or different action the Commissioner thinks fit, as if any earlier decision had not been made. Although rE62 is silent in relation to the IDP, the power of an IDP to go on to take a new decision is implicit in the power to reconsider allegations under rE61.

- 2.4 It must be stressed that the power to reconsider an allegation is only engaged where new evidence becomes available or there is “some other good reason”. A decision must therefore be made first on whether either or both of these criteria apply before a decision-maker can go on to reconsider a decision (see paragraphs 6.2-6.10 below for more information).

- 2.5 “Some other good reason” is undefined and, although capable of a broad interpretation, it is subject always to the public law requirement that the BSB acts reasonably and rationally. Good reasons may include, but are not limited to, circumstances where a decision is undermined due to a serious procedural error or where there has been a mistake of fact or law. **Mere disagreement or dissatisfaction with a decision is not, in itself, a good reason to engage the power to reconsider under rE61.2.**

- 2.6 The power to reconsider a decision can be exercised by:

- i. senior staff with delegated authority from the Commissioner under the BSB’s Scheme of Delegations, in relation to staff decisions; and
- ii. an IDP, in relation to IDP decisions.

It is not open to the Executive to reconsider post-investigation decisions taken by an IDP.

- 2.7 The power to reconsider allegations under rE61 ceases to apply once charges have been served. This is because the Disciplinary Tribunal Regulations (Part 5B of the BSB Handbook) apply following a referral to a Disciplinary Tribunal and, once charges are served, the disciplinary proceedings are formally commenced such that

the withdrawal or amendment of charges becomes a matter for a Directions Judge or the Tribunal. Decisions to amend or withdraw charges which have already been served should be taken in accordance with *LED18 – Settling, Reconsidering and Withdrawing Charges*.

### 3. Requests for review

- 3.1 The term “request for review” (RFR) is a term that is used to describe a formal request that a decision be looked at again. The criteria for a request to be considered a valid “request for review” and the process for handling them is set out in *BSB28 – Reviewing regulatory decisions and the role of the Independent Reviewer*, but is summarised in the paragraphs below.
- 3.2 A RFR is an indication from the subject of a decision, or a reporter, that they have concerns about a regulatory decision and would like it looked at again. A communication will be treated as a RFR where it discloses what, in the reasonable opinion of the BSB, may amount to:
- i. a material factual mistake;
  - ii. a material misapplication of the law (including any BSB rules or regulations);
  - iii. a serious procedural error; or
  - iv. new information not previously available which may have led, wholly or partly, to a different decision.
- 3.3 In relation to post-investigation decisions, the BSB has the power to reconsider a decision in accordance with rE61.2 for “*some other good reason*”. That term is not defined but it is anticipated that in most cases the above criteria will be sufficient to capture the range of reasons why a decision may need to be looked at again. There may, however, be circumstances in an individual case where there is a good reason to reconsider a decision which does not fall within the above criteria and the BSB will consider this carefully.
- 3.4 Where it is clear that a communication received amounts to mere disagreement or dissatisfaction with a post-investigation decision, the Case Officer dealing with the case should respond to say that no reason has been presented for the BSB to consider looking at the decision again.
- 3.5 Reviews of regulatory decisions can also be triggered by the Head or Director (and further guidance on this is also available in BSB28).
- 3.6 The power to reconsider a decision under rE61 is freestanding and therefore the BSB is able to take decisions under rE61 without the need for a RFR. For example, the need to reconsider a decision under rE61 could also be triggered where the BSB receives advice from a prosecutor in relation to a decision to refer allegations for disciplinary action, e.g. where the prosecutor is of the view that there is no reasonable prospect of a finding of professional misconduct or there is a flaw in the referral decision.

## 4. The Independent Reviewers (“IRs”)

- 4.1 The IR is a role that has been established as a matter of internal policy to provide quality assurance to the BSB in relation to regulatory decision-making.
- 4.2 The role and functions of the IR are not set out in the BSB Handbook and the IR does not have a formal status within the BSB’s regulatory arrangements. The IRs therefore have no direct decision-making powers and can only make non-binding recommendations which help inform those in regulatory decision-making roles as to the exercise of a discretion that is vested in them. The IR’s role should therefore be viewed as an advisory function.
- 4.3 The power to reconsider allegations under rE61 is vested in the Commissioner (delegated to staff) and an IDP directly, which means that decisions to exercise the power under rE61 do not require the prior involvement of an IR.
- 4.4 Any referral to an IR for a review should be authorised by the Head or Director in accordance with BSB28 and handled in accordance with the terms of that policy.

## 5. Review by the IR

- 5.1 If an IR review is authorised in accordance with BSB28, that review should only be regarded as a first step in an internal process that may, or may not, lead to the exercise of the power under rE61. It should not be regarded as an indication that the thresholds under rE61 have been met. A final decision will not have been taken as to whether there is new evidence or some other good reason to exercise the power of reconsideration under rE61 at this stage.
- 5.2 **Timescales for IR reviews:** Where the IR is asked to undertake a review of a post-investigation decision, the standard timescales will generally be that a review ought to be completed and communicated to the Head of Investigations & Enforcement and/or the Director of Regulatory Enforcement within 35 working days of the date of referral to the IR.
- 5.3 In relation to post-investigation decisions, the IR’s review will be focused on whether there is new evidence which was not previously available to the original decision-maker, or some other good reason (such as material errors of fact or law) which call into question the original decision reached. The IR’s recommendations will either be that:
  - i. There is, in the IR’s view, no new evidence or some other good reason to exercise the power to reconsider a decision and the original decision should stand; or
  - ii. There is, in the IR’s view, new evidence or some other good reason to exercise the power to reconsider a decision (and that a new decision should be taken).
- 5.4 While the outcome of the IR’s review and their recommendations may inform any final decision taken under rE61, including whether to exercise the power at all, the

fact that the IR has reached a view and made recommendations does not mean the outcome is binding and the relevant decision-maker must make a final decision themselves on the evidence.

## **6. Exercising the power to reconsider under rE61**

6.1 The process to be followed in order to exercise the power of reconsideration under rE61 differs in relation to staff decisions and IDP decisions.

### Reconsidering staff decisions

6.2 In relation to staff decisions, the power to reconsider allegations under rE61 is delegated to Casework Managers, the Head of Investigations & Enforcement and the Director of Regulatory Enforcement.

6.3 The process to follow prior to any new decision being taken should broadly follow the relevant processes set out in BSB28 (depending on whether a potential reconsideration is triggered by a RFR or on the BSB's own initiative), subject to any adjustments to the process that may be necessary in the particular case (which should be documented in writing).

6.4 The final decision-maker will need to:

- i. decide whether to exercise the power to reconsider allegations under rE61 on the basis either or both limbs are met; and
- ii. take a new decision on the allegations following such reconsideration.

6.5 The written decision, with reasons, will be communicated to the subject of the decision and the reporter(s).

### Reconsidering IDP decisions

6.6 In relation to IDP decisions, the power to reconsider a decision under rE61 must be taken by an IDP. The process to follow prior to any new decision being taken should broadly follow that set out in BSB28 (depending on whether a potential reconsideration is triggered by a RfR or on the BSB's own initiative), subject to any adjustments to the process that may be necessary in the particular case (which should be documented in writing).

6.7 Where an IDP needs to make a decision as to whether to exercise the power of reconsideration under rE61, whether in accordance with BSB28 or generally, the Case Officer will need to make arrangements for there to be a new meeting of an IDP to decide:

- i. whether the IDP is of the view that there is new information or some other good reason such that it ought to exercise the power to reconsider under rE61; and
- ii. if so, to exercise the power to reconsider and take such other decision in accordance with the EDRs as it considers appropriate in all the circumstances.

- 6.8 An IDP meeting may be held in person, by email, by telephone or via videoconference<sup>2</sup> depending on the circumstances, which will include any timeframes within which a decision needs to be taken as well as the availability of IDB members. Independent Decision-Making Body Panel Team should be asked to assist in the arrangements for setting up a new panel meeting.
- 6.9 The wording of rE61 does not require that the reconsideration must be done by the same IDP that took the original decision. It is necessary therefore to consider all the circumstances of the case in order to decide whether, in the interests of fairness and the public interest, the previous panel or a new panel should be constituted. For example, if an error in the original decision is alleged then there may be good reason for a fresh IDP to be constituted to consider objectively whether there is “some other good reason” to reconsider the original decision. However, in cases where there is new evidence which was not previously available to the original IDP it is likely to be appropriate for the original IDP to reconsider the matter in light of that new evidence to determine whether it changes their decision. Similarly, if the basis for a reconsideration is that it is not clear from the IDP’s reasons whether it had regard to a particular point when reaching the original decision, the original IDP may be best placed to decide whether the threshold for exercising the power of reconsideration under rE61 is met. In all cases, the Head of Investigations & Enforcement and/or Director of Regulatory Enforcement should confirm whether a matter ought to be referred to the original or a newly constituted IDP.
- 6.10 The Panel Secretary should ensure that a decision (with reasons) is captured in writing in relation to the IDP’s (a) decision whether to exercise the power to reconsider allegations under rE61; and (b) any new decision on the allegations following such reconsideration. The written decision of the IDP, with reasons, will be communicated to the subject of the decision and the reporter(s).

## **7. Reviews of decisions to refer allegations to Disciplinary Action**

- 7.1 Where a decision to refer allegations to Disciplinary Action is the subject of review (whether via the IR or any other type of review), time is of the essence given the BSB has ten weeks from the date of referral to serve charges in accordance with rE102 of the Disciplinary Tribunals Regulations (Part 5: Section B of the BSB Handbook).
- 7.2 There may be cases where the timing does not permit the completion of a review before the deadline to serve charges and so the option to take a decision under rE61 is no longer available. In such circumstances, the charges should be served and the review should continue. However, any recommendations following such review will need to be considered by the BSB as part of its duty to keep the prosecution under review and not under rE61.
- 7.3 As the power to reconsider allegations under rE61 ceases to apply once charges have been served, the review processes set out in this document and BSB28 are

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<sup>2</sup> In accordance with paragraph 6 of Schedule 1 to the EDRs.

not available post-service and any question of amending or withdrawing charges which have already been served should be taken in accordance with *LED18 – Settling, Reconsidering and Withdrawing Charges*.

- 7.4 **Confidential legal advice:** There may be cases where a decision to refer allegations for disciplinary action needs to be reconsidered under rE61 because the BSB has received confidential legal advice from the prosecutor which suggests the referral decision may be flawed. In those circumstances, regard will be had to whether in the particular circumstances of the case fairness may not require that the parties be given an opportunity to comment before a new decision is taken. This is most likely to occur where the outcome of any reconsideration is unlikely to be adverse to the barrister.