

BAR STANDARDS BOARD

REGULATING BARRISTERS

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Introduction

1. This document provides guidance for staff in the Legal and Enforcement Department (LED) and the members of the Independent Decision-Making Body (IDB) in relation to the approach that should be taken when dealing with reports about criminal convictions incurred by BSB regulated persons which includes practising barristers (self-employed or employed), unregistered barristers and Registered European Lawyers.

Background and principles

2. Any individual regulated by the Bar Standards Board (BSB) could become the subject of criminal charges and ultimately a criminal conviction. Such convictions could be associated with their professional life, e.g. convictions for failure to pay tax or VAT, or could arise from the regulated person's private life e.g. convictions for drink driving or harassment in a domestic context.
3. Regardless of the circumstances in which a criminal conviction arises, the BSB takes the view that any criminal conviction against a person or body we regulate, is not compatible with the Core Duties set out in the BSB Handbook (the Handbook). This applies equally to those who are authorised to practise and those who are not (unregistered barristers). Therefore, criminal convictions will inevitably attract some form of enforcement action by the BSB.

4. Such action is not based on “punishing” the offender for a second time but arises from the need to take steps to address the risks to the statutory regulatory objectives set out in the Legal Service Act 2007 (the Act). These objectives include promoting and protecting the public interest and that of consumers as well as upholding the professional principles. In addition all barristers, including unregistered barristers, are subject to a Core Duty (CD5) which requires that they do not behave in a way that is likely to diminish the trust and confidence which the public places in them or the profession.
5. The BSB takes the view that it is almost a foregone conclusion that in incurring a criminal conviction or caution a barrister will be in breach of Core Duty 5.

Reporting of criminal convictions/criminal activity

6. All those regulated by the BSB are under an obligation to report to the BSB when they are charged with an “indictable offence” in England and Wales or with a criminal offence of comparable seriousness in any other jurisdiction (rC65.1). Regulated persons are also required to report when they are convicted of, or accept a caution, for any criminal offence in any jurisdiction except a minor criminal offence. The definition of a “minor criminal offence” is set out in the definitions section, Part 6, of the Handbook and effectively covers offences that are subject to fixed penalty fines or are related to parking offences. An indictable offence is any offence which can be heard in the Crown Court, including those where the defendant can choose Crown Court trial.
7. A failure to report a criminal charge, caution or conviction is in itself a breach of Handbook which could attract enforcement action.

Guidance on approach

8. The enforcement system includes a range of available options for addressing breaches of the Handbook which includes both non-disciplinary enforcement action (imposition of administrative sanctions) and also disciplinary action (referral to the Determination by Consent procedure or a Disciplinary Tribunal on charges of professional misconduct).
9. In relation to criminal convictions, the BSB takes a firm policy stance that no form of criminal conviction is appropriate to be dealt with by non-disciplinary means (administrative sanctions) except where there are exceptional mitigating circumstances, given the risk to public confidence in the profession and thereby the confidence in the administration of justice. Therefore, nearly all criminal convictions, regardless of their nature, will result in disciplinary action for professional misconduct.
10. It is recognised that there may be exceptional circumstances where a criminal conviction might warrant the imposition of an administrative sanction or indeed no enforcement action being taken but these are likely to be rare. Such circumstances would need to involve a background of extreme and adverse personal circumstances in which the criminal activity occurred, with the criminal activity being unintentional and/or not recognised as such and a negligible risk that the behaviour will be repeated.

Nature of the criminal conviction

11. There is of course a wide range of criminal offences, which vary in their level of seriousness as reflected not only by the maximum sentence which they might attract under the law but also by the sentence imposed in the individual circumstances of the case. While the default position is that all criminal convictions should be subject to disciplinary action, the type of disciplinary action will be dependent on the offence in question and the surrounding circumstances. However, the following general principles apply:
- a. **Low level criminal offences** - such as drink driving. where the criminal penalty was a fine or a lesser penalty, there was no element of dishonesty and the facts of the offence are agreed - likely to be suitable for referral to the Determination by Consent procedure because a sanction greater than a fine is unlikely to be necessary to address the risk of the behaviour occurring again. Where there is any disagreement as to the facts of the offence, the case should be referred to a three-person Disciplinary Tribunal.;
 - b. **More serious criminal offences** not involving a custodial sentence but perhaps a community sentence are likely to be suitable for referral to a three person Disciplinary Tribunal which has the ability to suspend a barrister from practise for up to a year.
 - c. **Serious criminal offences** that result in a custodial sentence, regardless of the length (whether suspended or not) are likely to be suitable to be referred to a five person Disciplinary Tribunal which has the powers to suspend for more than 12 months or disbar; and
 - d. **Criminal offences of dishonesty or deception:** under rE48 of the Enforcement Decision Regulations, Part 5, Section A of the Handbook, any convictions for an offence of dishonesty or deception (regardless of the sentence) may be referred to a five person Disciplinary Tribunal. As the Sentencing Guidance indicates that the starting point for offences of dishonesty is disbarment, any decision to refer to a lesser tribunal will be extremely rare and will need to have strong reasons why a panel will depart from the starting point to such a degree to suspend for a maximum of 12 months.

Cautions and other forms of criminal sanctions not amounting to convictions

12. Cautions, which involve the admittance of criminal behaviour, will not in general be treated any differently to formal criminal convictions but should, unless there are aggravating circumstances or the caution relates to an offence of dishonesty, be referred to a three person Disciplinary Tribunal.
13. There are also other forms of criminal sanction that do not amount to a full criminal conviction or indeed an admittance of guilt. These may warrant a different approach based on the individual circumstances. Such sanctions include: binding over; community resolution disposal; absolute and conditional discharge; as well as penalty notices for non-traffic offences (such as disorder or possession of drugs). In these cases it may be appropriate to consider the imposition of administrative sanctions based on the individual

circumstances. However, any form of admitted criminal behaviour is likely to attract disciplinary action as opposed to the imposition of administrative sanctions.

14. It should be noted that a conditional discharge, although a recording of guilt by the criminal court, is not a conviction for the purposes of regulatory proceedings. (See s14(1) Powers of Criminal Courts (Sentencing) Act 2000). It may however still give rise to breaches of the Handbook, in particularly Core Duties 3 and 5.