

# BAR STANDARDS BOARD

REGULATING BARRISTERS

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## 1. Introduction

1.1. All allegations accepted for investigation must be categorised in order to determine who has authority to take the final decision on the allegation and also to which staff member within the Investigations and Enforcement Team (I&E) the case should be allocated. This document sets out the policy and guidance on:

- a) The categories of allegation;
- b) The categorisation process; and
- c) The criteria for categorisation and authority to take decisions.

## 2. The categories of allegation

2.1. There are **three** categories of allegation as set out in the table below<sup>1</sup>:

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<sup>1</sup> The types of allegation that fall under each category will remain under review.

Category	Types of allegation
1.	<ul style="list-style-type: none"> <li>- Allegations relating to:               <ul style="list-style-type: none"> <li>• a conviction for an offence of dishonesty or deception; or</li> <li>• a conviction for an offence under Section 4, Section 5 or Section 5A Road Traffic Act 1988 (Driving or being in charge of a motor vehicle with alcohol concentration/ concentration of a controlled drug above prescribed limit); or</li> <li>• a breach of Part 3 or 4 of the <i>Handbook</i>; or</li> <li>• any failure to pay an administrative fine within the relevant time; or a failure to comply with any requirements of a sanction imposed following <i>Disciplinary Action</i>; or</li> <li>• Failures to co-operate with the regulator and/or respond to enquiries when combined with the above;</li> </ul> </li> </ul>
2.	- Allegations that do not fall into category 1 or 3.
3.	<ul style="list-style-type: none"> <li>- Allegations that:               <ul style="list-style-type: none"> <li>• Are complex either factually or legally;</li> <li>• That have or may attract media attention;</li> <li>• Involve wider implications for the public interest, the Bar or the BSB; or</li> <li>• relate to entities.</li> </ul> </li> </ul>

### 3. The categorisation process

- 3.1. On receipt of a report referral from the Contact and Assessment Team, the Head of I&E will determine the category of report (taking into account the contents of this document), record that categorisation on the case management system, and allocate the case to an appropriate Case Officer in accordance with the requirements of Annex 1. Further information about the referral and allocation process can be found in *ROD02 - Initial Assessment of Reports (Assessment of incoming information)* and *LED04 - Investigation of Allegations (Guidance on conduct of Investigations)*.
- 3.2. **Changing categorisations:** a categorisation can be changed at any stage during an investigation or after referral to disciplinary action. In the main, re-categorisation will need to be considered where, during the course of an investigation, the issues become more complex than originally assessed and move the case from Category 2 into Category 3. It might also be that the case becomes more high profile and therefore falls into Category 3. There will be other reasons for re-categorisation either

up or down and this will depend on the individual circumstances of the case. The Head of I&E and the Casework Managers should keep categorisations under review throughout the course of an investigation and Case Officers should inform their manager if any issues arise that might affect the categorisation.

#### 4. The criteria for categorisation and authority to take decisions

##### General

4.1. Annex 1 provides details of the final decisions staff are authorised to take in relation each category. All decisions must be taken in line with relevant policies and procedures. There is no requirement that the decisions listed in Annex 1 must be taken by staff. **Allegations placed in Category 1 and 2 always remain subject to referral to an Independent Decision-Making Panel (IDP) at the discretion of staff. The decision to refer to an IDP will depend on the facts and circumstances of each case but is likely to be appropriate where (for example):**

- the decision on which action to take is not clear, or there are legal issues that are more appropriately considered independently;
- there is ambiguity in the evidence; and/or,
- there are sensitivities surrounding the allegation that mean it would be appropriate for the IDB to consider the matter and take the decision.

4.2. Staff do not have the authority to take decisions to dismiss, impose administrative sanctions or refer to disciplinary action any allegation placed in Category 3 (see Annex 1)<sup>2</sup>.

##### Category 1:

4.3. Category 1 allegations are defined according to what their subject matter involves. The following should be noted:

- a. "Failure to co-operate with the regulator or respond" covers any situation where the LED or any other section of the BSB has requested a response from an applicable person who has failed to respond adequately or at all within the timescale set, without good reason. For this to be treated as falling within category 1 it **must** be linked to one of the other types of allegation within this category, for example a failure to respond during the investigation of a criminal conviction for dishonesty.
- b. Criminal convictions for offences of dishonesty or deception cannot be dismissed or made subject to an administrative sanction by staff, unless extremely rare circumstances exist and the authorisation of the Head of I&E or the Director of

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<sup>2</sup> For an initial period of one year from the receipt of the first entity-related allegation, all allegations which concern an entity, regardless of its category, will be referred to an IDP to make a final decision on that allegation. This period of review may be subject to extension or reduction, in light of the number and complexity of entity-related allegations received.

Legal and Enforcement to do so has been obtained. Under rE48.4, the Commissioner or the IDP may direct that allegations relating to Criminal convictions for offences of dishonesty are referred to a five person Disciplinary Tribunal.

- c. Similarly, criminal convictions for drink driving or drunk in charge (s.5 of the Road Traffic Act 1988) will only be suitable for disposal other than by disciplinary action of some form in extremely rare circumstances. Therefore, they are usually likely to be referred to the Determination by Consent procedure or a Disciplinary Tribunal. This category also includes similar criminal convictions for being impaired due to drugs.
- 4.4. Staff have the ability to dismiss allegations in Category 1, impose administrative sanctions up to the maximums set out in the Enforcement Decision Regulations<sup>3</sup> and also refer allegations direct to disciplinary action when they involve the matters listed in rE19.4 (either the Determination by Consent procedure or a Disciplinary Tribunal where appropriate). Such decisions must be taken in accordance with the applicable policies and procedures. Allegations in Category 1 can be allocated to any Case Officer.

## **Category 2**

- 4.5. This Category is defined by reference to the other two categories, therefore specific criteria are not necessary in order to place complaints in this category. If an allegation does not fall into Category 1 or 3, then by definition it should be categorised as Category 2.
- 4.6. Both staff and an IDP can dismiss allegations in Category 2 and impose administrative sanctions but only an IDP can refer Category 2 allegations to disciplinary action. The question as to whether an IDP or staff member should dismiss the allegation or impose an administrative sanction will only arise at the end of an investigation and is therefore not an issue to take into account on initial categorisation.
- 4.7. Staff can only dismiss Category 2 allegations post-investigation where the investigation reveals that there is no credible evidence of a breach of the Code of Conduct/Handbook or the risk is low and it would clearly be disproportionate to take enforcement action and/or the evidence is so weak that it is obvious that any attempt to take enforcement action would not meet the standard of proof based on the balance of probabilities.
- 4.8. Cases should still be referred to an IDP for a decision in 'borderline' situations or where there is any uncertainty, as well as in instances where it is more appropriate for an IDP to take the decision given the individual circumstances and facts of the case. All other Category 2 allegations must be referred to an IDP.

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<sup>3</sup> Or the Complaints Rules 2011, in respect of conduct before 6 January 2014.

- 4.9. Allegations in Category 2 can be allocated to any Case Officer and allocation will depend on the Head of I&E's assessment of the capacity and capability of the individual Case Officers.

### **Category 3**

- 4.10. Where a case falls within rE19.4 then staff can take a decision to refer category 3 cases to disciplinary action unless there is an ambiguity in or significant challenge to the evidence, In all other cases, an IDP should take final decisions in relation to Category 3 cases.
- 4.11. Category 3 allegations can only be allocated to a legally qualified Case Officer of the I&E. If any of the following factors apply, the report should be placed in Category 3:
- a. The report is complex either factually or legally;
  - b. The subject matter of the report has attracted or are likely to attract media attention; or
  - c. The report has wider implications for the public, the Bar, a section of the Bar or the BSB.

## **5. Administrative sanctions**

- 5.1 Under rE26 of the Enforcement Decision Regulations, all breaches of the BSB Handbook are capable of being dealt with by means of administrative sanctions. All LED managers from Casework Manager level up to the Director of Legal and Enforcement have the authority to impose administrative sanctions in relation to Category 1 and 2 allegations. No staff member has the authority to impose an administrative sanction in relation to Category 3 allegations. For further information on the application of administrative sanctions see *LED04 - Investigation of Allegations (Guidance on conduct of Investigations)* and *LED08 - Administrative Sanctions and Appeals (Internal)*.

## **6. Transitional arrangements**

- 6.1. The first edition of the BSB Handbook came into force on 6 January 2014. The power to impose administrative sanctions for all breaches of the Handbook only applies to conduct that occurred on or after 6 January 2014. Where the conduct occurred before 6 January 2014, the BSB is limited to imposing administrative sanctions only in relation to breaches of the previous provisions of the Code of Conduct i.e. breaches falling under paragraph 901.1 of the previous Code. Staff authority to impose administrative sanctions in relation to conduct occurring before 6 January 2014 is therefore limited to the parameters of the previous version of this document and the terms of paragraph 901.1 of the 8<sup>th</sup> Edition of the Code of Conduct.
- 6.2. The second edition of the BSB Handbook came into force on 30 April 2015 encompassing similar powers in respect of entities.

- 6.3. For any allegation where the conduct took place on or after 1 April 2019, the standard of proof to be applied for both considerations of imposing an administrative sanction and whether there is a reasonable prospect of proving the matter in disciplinary action is the balance of probabilities (the civil standard). See *LED19 - Applying the correct standard of proof* for more details.