

## 4. The enforcement process and administrative sanctions

### Introduction and overview of changes to the complaints process

- 4.1. The introduction of the BSB Handbook has necessitated some significant changes to the way in which complaints are processed and this section sets out an overview of the new processes. In the main, the changes flow from three central provisions of the Handbook which affect the approach taken when taking decisions on enforcement action:
- a) The requirement under Regulation 5.2 of the Complaints Regulations for the Committee to take into account the Enforcement Strategy when determining how to use its powers of enforcement;
  - b) The extension of the power to impose administrative sanctions to all breaches of the Handbook (the power was limited previously to only those breaches set out in paragraph 901.1 of the Code); and,
  - c) The new definition of professional misconduct which stipulates that only breaches which are not appropriate for disposal by means of no further action or administrative will constitute professional misconduct.
- 4.2. **Enforcement Strategy and risk based decision making:** a copy of the Enforcement Strategy can be found in Section 3. It provides the framework for taking decisions on enforcement action. The hallmarks of the strategy are: risk based decision-making; proportionality of action in light of identified risks; consideration of the Handbook outcomes when taking decisions; holding individuals responsible for their conduct; and fairness and openness. Further, paragraph 18 of the Enforcement Strategy sets out the factors that should be considered when determining what enforcement action to take, which includes the risk posed to, or the impact on, one or more the regulatory objectives. It has therefore been necessary to develop new processes to incorporate the assessment of risk when considering individual complaints: this applies at both the preliminary assessment and post-investigation stages.
- 4.3. **Administrative sanctions and professional misconduct:** the combination of the new definition of professional misconduct and the power for the Committee to impose

administrative sanctions in relation to all breaches of the Handbook, means that new post-investigation processes have had to be developed to ensure that the power to impose an administrative sanctions is taken into account in all appropriate cases: only those complaints, where administrative sanctions are not appropriate due to the seriousness of the conduct or its surrounding circumstances, can be referred to disciplinary action. Further, the need for such decisions to be based on the risk posed to the regulatory objectives has also had to be incorporated into the process.

4.4. **Supervision:** the power to refer individuals to the Supervision Team for supervisory action as opposed to enforcement action has also had to be reflected in the new processes.

4.5. While substantial changes to the details of the processes have been made, the fundamental structure of the enforcement system (previously referred to as the “complaints and disciplinary system”) remains the same and the overall process still consists of the following main stages:

- a) Preliminary assessment to determine whether a potential breach of the old Code/Handbook has occurred and whether an investigation is warranted or another disposal is appropriate;
- b) Investigation;
- c) Review of the outcome of an investigation to determine whether there is evidence of a breach of the old Code/Handbook and, if so, what action is appropriate;
- d) Final decision on whether and what action should be taken; and,
- e) Implementation of any enforcement action.

#### **Aims and objectives of the complaints system**

4.6. The Bar Standards Board Business Plan for 2013/14 sets out five strategic aims, one of which, Strategic Aim 4, is to become more evidence and risk based in the regulatory approach. This aim is further underpinned by a specific objective to implement a framework for regulatory standards, which depends on identifying risk and using evidence on which to base all regulatory decisions.

4.7. The BSB is also under a statutory obligation under section 28 of the Legal Services Act 2007 (LSA 2007), when discharging its regulatory functions to act in a way which

is compatible with the regulatory objectives as set out in section 1 of the Act, which are:

- a) protecting and promoting the public interest;
- b) supporting the constitutional principle of the rule of law;
- c) improving access to justice;
- d) protecting and promoting the interests of consumers;
- e) promoting competition in the provision of services;
- f) encouraging an independent, strong, diverse and effective legal profession;
- g) increasing public understanding of the citizen's legal rights and duties; and,
- h) promoting and maintaining adherence to the professional principles.

4.8. The "professional principles" referred to at paragraph 4.7 (h) above are also set in section 1 of the LSA and are:

- a) that authorised persons<sup>1</sup> should act with independence and integrity;
- b) that authorised persons should maintain proper standards of work;
- c) that authorised persons should act in the best interests of their clients;
- d) that persons who exercise before any court a right of audience, or conduct litigation in relation to proceedings in any court, by virtue of being authorised persons should comply with their duty to the court to act with independence in the interests of justice; and,
- e) that the affairs of clients should be kept confidential.

4.9. Not all of the Regulatory Objectives and professional principles apply directly to the enforcement system but it is the potential risk to those that are applicable that is now central to taking decisions on enforcement action. Committee members should therefore have the regulatory objectives at the forefront of their minds when considering what action to take in an individual case.

4.10. In light of the Regulatory Objectives and the BSB's Business Plan, the **aims** of the enforcement system are to:

- act in the public interest;
- protect the public and consumers of legal services;

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<sup>1</sup> The term "authorised person" covers only practising barristers but the BSB's regulatory remit is wider and also covers unregistered barristers.

- maintain high standards of behaviour and performance of the Bar;
- become more evidence, outcomes focussed and risk based in taking enforcement action;
- provide appropriate and fair systems for taking enforcement decisions;
- promote public and professional confidence in the enforcement system; and,
- ensure complaints are dealt with fairly, expeditiously, and consistently.

4.11. In order to achieve these aims, the **objectives** of the enforcement system are to:

- deal with complaints made against barristers promptly, thoroughly and fairly;
- ensure proportionate action is taken in relation to barristers who breach their professional obligations, in accordance with procedures which are outcomes focussed and risk based; and,
- be open, fair, transparent and accessible.

### **Regulations covering the enforcement system**

4.12. Part 5 of the Handbook (Enforcement Regulations) sets out the Regulations applicable to all aspects of the enforcement system (see Section 3 – paragraph 3.32-3.33). The Complaints Regulations and the Disciplinary Tribunals Regulations are those that are most directly applicable to the work of the Committee. The rest of this section provides an overview of the processes set out in, and designed to support, the Complaints Regulations (the Regulations): i.e. initial consideration of complaints, formal investigation, imposition of administrative sanctions and referral to disciplinary action. The disciplinary processes are, on the whole, governed by the Disciplinary Tribunal Regulations and are covered in Section 5 of this pack.

4.13. **Professional Conduct Committee powers:** the Regulations vest all decision making powers in the Committee as a whole. However, it would be impossible to operate the enforcement system effectively if all decisions had to be taken by the full Committee. Therefore, a scheme of authorisations by the Committee under Regulation 3 of the Complaints Regulations has been put in place to allow staff and certain members of the Committee to take decisions on complaints outside full Committee meetings (see paragraph 4.60 - 4.61).

4.14. The Regulations stipulate the decision making framework and process for taking decisions on enforcement action. In particular, Regulation rE5 provides that the Committee and thereby those authorised by it to take decisions) in determining which of its powers to use, will take into account:

- a) the Enforcement Strategy and any other published Bar Standards Board policy that appears to be relevant; and,
- b) any other factor relevant to the issue including whether it is appropriate, sufficient, proportionate and effective, in the public interest to proceed in that manner.

### **Client/non-client complaints**

4.15. The BSB's remit, and by definition that of the Committee, is limited by the terms of the LSA 2007 to considering complaints about conduct only. Complaints about the service provided to clients by barristers fall exclusively within the remit of the Legal Ombudsman (LeO) and the BSB is prohibited from considering or awarding redress to clients of barristers.

4.16. As a result, the emphasis of the enforcement system is on ensuring that the regulatory objectives are met and in particular that standards at the Bar are maintained in the public interest. The needs and views of complainants still remain an important focus but decisions on complaints must be based on the risk to the regulatory objectives and the proportionality of any action, and not on resolving the complaint to the complainant's satisfaction.

4.17. In light of LeO's remit, the BSB has had to make a distinction between "client" complaints and "non-client" complaints. While the BSB is able to deal with conduct complaints from both clients and non-clients, the initial processes for handling complaints from the two sources are slightly different. In relation to client complaints, these must be channelled first through LeO, regardless of their subject matter: any issues of professional conduct will only be formally referred to the BSB once LeO has had an opportunity to consider whether the complaint includes issues of service. (See Section 6 for further information on the process for handling conduct referrals from LeO and the interface with LeO).

4.18. In relation to non-client complaints about the conduct of barristers, LeO has no jurisdiction over such complaints and they must be submitted direct to the BSB. Thereafter the full processes outlined in this section will be followed.

### **Types of conduct complaint**

4.19. Complaints about the conduct of barrister are divided into two types:

- external complaints; and,
- internal complaints.

4.20. External complaints are those made by anyone other the BSB, which can include, but are not limited to clients, members of the public, solicitors and judges.

4.21. Internal complaints are those raised by the BSB of its own motion under Regulation 10. They are raised as a result of information received other than via an external complainant and by definition do not involve a third party complainant. Internal complaints are only raised where there is evidence of a breach of the old Code/Handbook that warrants investigation.

4.22. The power to raise internal complaints can also be used where it is not appropriate for a complainant to be directly involved or the person does not wish to continue with the complaint. In such circumstances, the BSB can “adopt” the complaint by raising it as an internal matter. This happens most often in relation to complaints made by judges.

4.23. Except at the preliminary assessment stage (see paragraphs 4.38 – 4.40 below), the processes for dealing with both internal and external complaints are the same.

### **Types of breaches of the Code**

4.24. The Committee has the power to take enforcement action in relation to any breach of the Handbook. Given the terms of the new definition of professional misconduct in the Handbook, breaches occurring after 6 January 2014 fall into categories:

- i) those which can be appropriately addressed by the Committee by way of no further action or administrative sanctions (i.e. non-disciplinary action) and thereby

are not serious enough to amount to professional misconduct. The standard of proof in relation to such breaches is the balance of probabilities; and,

- ii) those which are serious and would not be appropriate for disposal by means of administrative sanctions and need to be addressed by disciplinary action for professional misconduct (i.e. a referral to the Determination by Consent procedure or a Disciplinary Tribunal). The standard of proof applied in relation to professional misconduct is beyond reasonable doubt.

4.25. The nature of the breach only becomes directly relevant at the post-investigation stage of the process when a decision needs to be taken as to what type of enforcement action, if any, is appropriate. However, it should be noted that the imposition of an administrative sanction is not a disciplinary disposal and details of the decision and the sanction imposed will not be made publically available: this includes communication to the Queen's Counsel Appointment Body and the Judicial Appointments Commission. On the other hand, while no further action decisions are also not formally classed as disciplinary disposals and are not made publically available, they are disclosed in relation to applications for silk or judicial appointment.

### **Risk Assessment**

4.26. As outlined in the Introduction to this section, under the terms of the Enforcement Strategy, a risk based approach is now adopted to taking decisions on individual complaints that reveal a breach of the old Code/Handbook. The purpose is to ensure that enforcement action is focussed on issues that pose the greatest risk to the regulatory objectives. To facilitate this, more formalised preliminary and post-investigation assessments have been developed, which include assessments of risk.

4.27. Risk assessments are only required where a complaint, or information received, reveals a potential breach of the old Code/Handbook which can be fairly investigated (the latter includes the barrister being able to respond fairly and the application of the time limits). Complaints that do not pass these initial thresholds should be dismissed and the risk assessment will not be necessary. Further, if it is determined at the preliminary assessment stage that none of the outcomes set out in the Handbook have been adversely affected and none of the Core Duties have been breached, the complaint can be dismissed without the need for a risk assessment as a matter of policy.

- 4.28. The main vehicles for determining risk levels are two risk matrices which the Assessment Team are required to complete at the preliminary assessment stage in relation, respectively, to external complaints which reveal a potential breach of the old Code/Handbook and information received that may warrant an internal complaint being raised. The risk assessment is designed to allocate the complaint a risk level (low, medium or high). The outcome of the risk assessment is based on the number of affirmative answers to the risk questions, which are designed to assess the risk to the regulatory objective; as well as the Officers judgement of the facts and circumstances of the complaint. The outcome of the risk assessment at the preliminary assessment stage will inform what action is appropriate. At the post investigation stage, the risk assessment will be reviewed by staff in light of the information obtained during the investigation and the risk level will be adjusted, if necessary. The risk level, amongst other factors, will then inform the decision as to what enforcement action is appropriate.
- 4.29. In general, at the preliminary assessment stage, low risk complaints will be dismissed as insufficiently serious to justify further action and medium/high risk complaints will be referred to investigation subject to consideration of other forms of disposal, such as referral to chambers/another body or referral of the barrister to the Supervision Team for supervisory action. At the post-investigation stage, a low or medium risk level would indicate that administrative sanctions would be a proportionate and appropriate response to the conduct whereas a high risk level would indicate that the matter should be referred to disciplinary action on charges of professional misconduct.
- 4.30. **The risk matrices:** there are two risk matrices applicable to external and internal complaints respectively, but both are very similar in their content. The risk matrices consist of a series of questions (approximately 45), to which affirmative or negative answers can be given. Completion of the risk assessment is automated and embedded in the Professional Conduct Department's case management system. The number of affirmative answers will provide an initial indication of the risk level. However, it is essential that risk is assessed according to the facts and circumstances of the individual case, which cannot necessarily be reflected completely by the answers to standard risk questions. Therefore, in all cases the initial risk level can be overridden by the application of the judgement of the Officer, or anyone authorised to review or take decisions on a complaint, where there is a justified reason for doing so. Written reasons for overriding the outcome of the



automatically generated risk level, at any stage, will be recorded in writing on the relevant “form”. The risk level, once arrived at, is not static and it can be adjusted at any point in the process where new or better information is obtained (particularly at the post-investigation stage).

4.31. The questions in the risk matrices cover the following areas:

- Risks that have been identified as a priority under the BSB’s overall risk framework;
- Nature of the conduct;
- Likelihood of repetition/previous history;
- Impact of the conduct on the administration of justice;
- Impact of the conduct on a client and/or others;
- Impact on vulnerable complainants or other potentially vulnerable/vulnerable people;
- Impact on public confidence in the profession;
- The barrister’s attitude; and,
- The barrister’s practice.

4.32. **High risk cases:** the risk matrices allow for complaints to be automatically allocated a high risk level at the preliminary assessment stage without the need to complete the full risk assessment. This applies to cases that involve: convictions for dishonesty or deception; criminal convictions that resulted in a suspended or immediate custodial sentence; convictions related to the supply of drugs, sexual offences and offences of violence; dishonesty on behalf of the barrister; serious misconduct (as set out in the guidance to rules rC65.7– rC68 - see gC96); or barristers who have been struck off by another regulator.

4.33. **Committee role in risk assessments:** risk assessments are carried out by staff: either Officers in the Assessment Team or the Investigations and Hearings Team and Committee members will not be expected to complete them. However, the results of the risk assessment, with the relevant risk level for the complaint, will be recorded on the complaint record and communicated to Committee members when decisions need to be made. When considering an individual case, Committee members are not bound by the risk level allocated to the complaint and can indicate that a different risk level should be applied. Other than in the case of Case Examiner reports, if

Committee members consider that the risk level allocated to a case needs to be adjusted, they should communicate this in writing to the relevant Officer in the case with written reasons. The Officer will then formally record the adjustment to the risk level.

- 4.34. Where a Case Examiner considers that the risk level does not reflect the facts and/or circumstances of the complaint, this should be addressed in the Case Examiner's report to the Committee. The Committee's view on the risk level will be recorded on the decision sheet and appropriate adjustments to the case record will be made by the staff team.
- 4.35. Further information on the role of the risk assessment within the processes can be found under the "The complaints processes" at paragraphs 4.37 – 4.59 below.

#### **Decision making criteria**

- 4.36. In order to ensure consistency in decision making between staff, designated Committee members and the full Committee, "decision making criteria" have been developed which cover most of the decisions that can be taken under the Regulations. The criteria are set out in "PG11 – Decision Making Criteria": a copy of which can be found in Annex 4 of this Information Pack. All decision makers should ensure that they take the criteria into account when making relevant decisions.

#### **The complaints processes**

- 4.37. An overview of the processes for dealing with complaints is set out below. Full details of the processes, including the internal administrative procedures for handling complaints, can be found in "PG09 – Initial Assessment of complaints" and "PG10 – Investigation of complaints": copies of which can be found in Annex 4 of this pack.

#### **Preliminary assessment of external complaints**

- 4.38. All external complaints received from non-clients and referred by LeO will be subject to a preliminary assessment in order to assess:
- a) Whether the complaints discloses a "potential" breach of the old Code/Handbook;

- b) Whether it has been submitted within the 12 month time limit (in accordance with Regulation rE28.2) and, if not, whether further consideration is justified, despite the lapse of time, in the public interest, by reason of the regulatory objectives;
  - c) Whether there is any reason under Regulation rE32.2 why an investigation of the complaint could not be properly or fairly investigated; and,
  - d) Whether the complaint or its consequences are insufficiently serious to justify further action or for any other reason the complaint is not apt for further consideration (Regulation rE32.3 and rE32.4),
- 4.39. If a complaint: does not disclose a potential breach; investigation is not justified in the public interest due to the age of the complaint; or the complaint cannot be properly or fairly investigated, then the complaint will be dismissed. Otherwise the Officer will carry out a risk assessment of the complaint to determine whether it is sufficiently serious to justify further action and/or whether for any reason it is not apt for further consideration.
- 4.40. The outcome of the risk assessment at the preliminary assessment stage will inform what action should be taken. As stated above, in general, low risk complaints will be dismissed as insufficiently serious to justify further action and medium/high risk complaints will be referred to investigation subject to consideration of other forms of disposal such as referral to chambers/another body or referral of the barrister to the Supervision Team for supervisory action.
- 4.41. **Referral to chambers/another person or body:** these disposals will only be appropriate in very few cases, where the final risk level is “low” and it is considered that the matter can be effectively resolved at chambers level or by another body or person.
- 4.42. **Referral to the Supervision Team:** such a referral is unlikely to be appropriate in many cases, but generally will only be made where the final risk category is either “low” or “medium”. The decision as to whether to refer a matter for supervision will be based on affirmative answers to specific questions within the risk assessment relating mainly to issues regarding the barrister’s practice and compliance with the practising requirements, which would indicate that there could be wider issues that would warrant supervisory intervention to mitigate the risk of further and ongoing non-compliance. Information will be submitted by the PCD to the Supervision Team using “intelligence reports” (see paragraphs 4.85 – 4.87 below).

- 4.43. Decisions on what action to take at the preliminary assessment stage will generally be taken by Officers in the Assessment Team under authorisations given by the Committee. However, complaints that, if investigated, would fall into category 3 (see paragraph 4.64.c) will be referred to the full Committee to take the decision on the outcome even if the need for dismissal/investigation is self-evident.
- 4.44. **Interim action:** interim action might be needed in relation to any complaint where it is not possible to carry out a full preliminary assessment immediately. The most common forms of interim action are further enquiries, seeking advice from a member of the Committee and adjourning consideration of the complaint pending the outcome of ongoing legal proceedings. Advice can be sought from any member of the Committee and further information about the process for obtaining advice is set out in Section 9.

#### **Preliminary assessment in relation to internal complaints**

- 4.45. The Complaints Regulations do not provide for a specific process to be followed in relation to raising internal complaints. Nevertheless the same principles as those that apply to external complaints will now be followed in determining whether an internal complaint should be raised based on information or intelligence received to ensure that a risk based approach is taken to all decisions on enforcement action (see paragraph 4.49 – 4.51 in relation to raising complaints based on referrals from other sections of the BSB).
- 4.46. The preliminary assessment process for deciding whether to raise an internal complaint based on information/intelligence received is almost identical to that in relation to the preliminary assessment of external complaints. A risk assessment will only be required where the information/intelligence reveals a breach of the old Code/Handbook that can be properly and fairly investigated. A further consideration will also be whether it is in the public interest to investigate the information in the absence of an external complainant (this is most likely to be relevant in high profile matters where nobody connected with the events has made a complaint to the BSB).
- 4.47. The options for action in relation to information received mirror those in relation to external complaints: i.e. a decision can be taken not to raise an internal complaint (low risk); a referral to the Supervision Team can be made (low/medium risk); the

matter referred to another body/person (low or medium risk); or an internal complaint raised and the matter referred immediately for investigation (medium or high risk).

- 4.48. As with external complaints, most decisions on raising internal complaints will be taken by staff, although authority to raise such complaints is restricted to the Head of Professional Conduct and the managers of the Assessment and Investigations and Hearings Teams. Again, as with external complaints, staff will not take decisions on cases that would fall into category 3 if they were investigated (see paragraph 4.64.c below). However, decisions on raising complaints in these circumstances will be for the Office Holders to take, who can also decide that the decision is best taken by the full Committee.
- 4.49. **Referrals from other sections of the BSB/Bar Council:** internal complaints can also be raised as a result of referrals from other sections of the BSB/Bar Council. A number of sections of the BSB/Bar Council actively monitor compliance with specific requirements of the Handbook and where non-compliance, which cannot be addressed by other regulatory activity, is revealed, a referral will be made to the PCD for enforcement action to be considered. Such referrals could include, but are not limited to, non-compliance with Continuing Professional Development (CPD) requirements, failure to complete the authorisation to practice process satisfactorily and failure to publish equality and diversity information.
- 4.50. The decision by another section about whether to refer an incident of non-compliance to the PCD will normally be based on the regulatory priorities adopted by the BSB under its overall risk framework. Therefore a policy decision on the general risks associated with the particular type of non-compliance will previously have been taken and will support the decision to refer for enforcement action. In these circumstances, the need for detailed preliminary assessment, including a risk assessment, to decide whether an internal complaint should be raised will not be necessary.
- 4.51. Therefore where a referral is received from another section, the Assessment Team will carry out a preliminary check to ensure that the evidence submitted with the referral reveals a potential breach of the old Code/Handbook. If so, an internal complaint will be raised and referred to the Investigations and Hearings Team for investigation.

## **Conduct of investigations**

- 4.52. The purpose of formal investigation is to gather evidence to establish whether the potential breach of the old Code/Handbook can be proved either on the balance of probabilities (to support a decision to impose administrative sanctions) or beyond a reasonable doubt (to support a referral to disciplinary action for professional misconduct).
- 4.53. Investigations are carried out by Case Officers in the Investigations and Hearings Team and allocation depends on the category in which the complaint is placed (see paragraphs 4.62 – 4.65 below). The Case Officer will compile a summary of the aspects of the complaint to be investigated and, where a complainant is involved, forward the summary to the complainant for comments on its accuracy. This summary will then be used as the basis for the investigation.
- 4.54. After the summary has been confirmed, the Case Officer will write to the barrister and other relevant witnesses involved, including, where appropriate, any instructing solicitors. Complainants will normally be sent a copy of the barrister's response to the complaint and, where the complainant's comments are required, copies, or a summary of any responses received from others involved in the investigation.
- 4.55. As with the preliminary assessment, advice on an interim decision can be sought from any member of the Committee (see paragraph 4.44 above).

## **Conclusion of investigation**

- 4.56. At the conclusion of the investigation, the Case Officer will carry out a post investigation assessment to determine what action should be taken. This involves reviewing the evidence to determine whether it is sufficient to prove a breach of the old Code/Handbook. If there is sufficient evidence of a breach, the Case Officer will then review the risk assessment and, if necessary, amend the answers to any of the risk questions in light of the information received during the investigation. As at the preliminary assessment stage, the risk level arising from the number of affirmative answers can be overridden, if there is a justified reason for doing so: the reasons will be recorded on the assessment form.

4.57. **Overriding the risk level at the post-investigation stage:** the decision on whether to override a risk level is based on the evidence and all the circumstances and facts of the case. However, specific individual factors relating to medium risk complaints are likely to result in the risk level being adjusted to high. Such factors relate to whether the imposition of an administrative sanction is proportionate and sufficient in the public interest (see rE50.2). They include but are not limited to:

- i) The barrister having a previous disciplinary history in relation to conduct which is similar or the same;
- ii) The barrister having previously been subject to an administrative sanction which is similar of the same;
- iii) The conduct has wider implications for the administration of justice or public confidence in the regulatory system;
- iv) Information about the breach should be in the public domain in order to protect the public; and,
- v) The Sentencing Guidance indicates that a suspension or disbarment might be imposed by a Disciplinary Tribunal in relation to the conduct.

#### **Outcome of the post-investigation assessment**

4.58. The options for disposal available to staff following a post investigation review are:

- a) Staff dismissal of the complaint on the basis of insufficient evidence of breach of the Handbook;
- b) A recommendation to the Experienced Members of the Committee to dismiss but with formal advice given to the barrister (see paragraphs 4.81 – 4.84);
- c) Staff decision to impose an administrative sanction (see paragraphs 4.66 – 4.76) where there is clear evidence, on the balance of probabilities, that a breach has occurred which is not sufficiently serious to warrant disciplinary action for professional misconduct;
- d) Staff referral direct to disciplinary action (Disciplinary Tribunal or, the Determination by Consent procedure); and,
- e) Referral to the Professional Conduct Committee for a final decision.

4.59. The appropriate option will depend on the circumstances of the complaint, including the outcome of the risk assessment and the categorisation of the complaint (see

paragraphs 4.62 – 4.65). However, breaches with a low or medium risk level will be subject to a presumption that the imposition of an administrative fine would be appropriate. Breaches falling into the high risk category will be subject to the presumption that administrative sanctions are not appropriate and the matter is sufficiently serious to warrant disciplinary action for professional misconduct.

### **Authorisations and categorisation of complaints to be investigated**

- 4.60. **Authorisations:** the processes described above can only operate effectively if staff and certain members of the Committee are authorised to take decisions outside full meetings. Regulation rE3 of the Complaints Regulations allows the Committee or the Chair of the Committee to authorise any person, group or body to fulfil any function or exercise any power given to the Committee under the Regulations. Therefore the Committee has put in place a range of authorisations that allow staff, Experienced Members and Officer Holder(s) to take decision outside meetings and thereby support the processes outlined in this section of the pack. Full details of the authorisations can found in Annex 4 under “P09 - Complaints Regulations – Authorisation of functions/powers”.
- 4.61. It should be emphasised that merely because an authorisation has been given to a member of staff or members of the Committee, this does not mean that the relevant decision must be taken by those authorised to do so. All decisions, at any stage of the complaints or disciplinary processes, can be referred to the full Committee for the decision to be taken
- 4.62. **Categorisation of complaints:** the investigation and post –investigation process described above requires that staff have the ability to take decisions on complaints following an investigation. However, staff do not have the ability to take decisions on all complaints and the extent of their authority depends on the category of the complaint. A summary of the categories and associated decisions staff can take is set out below but full details can be found in “PG11 – Categorisation of complaints and staff authority to take decisions” (see Annex 4).
- 4.63. It should be noted that staff do not have the authority to take decision on complaints, regardless of their category, that:
- a) Have attracted, or are likely to attract, media attention;



- b) May have wider implications for the public interest, the Bar or any section of the Bar or the BSB; and/or
- c) Have been referred to the BSB by another “approved regulator” as defined by the Legal Services Act 2007.

All such complaints must be referred to the full Committee, or in certain circumstances Office Holders, for decisions to be taken.

4.64. There are three categories into which complaints are put at the investigation stage:

- a) **Category 1:** this category covers internal complaints relating to breaches of the practising requirements, convictions for dishonesty or deception and failures to comply with orders of Disciplinary Tribunals or sanctions imposed under the Determination by Consent (DBC) procedure. Staff have the power to dismiss such complaints (except those related to criminal offences which must be referred to disciplinary action), withdraw them, impose administrative sanctions and refer the complaints direct to a Disciplinary Tribunal or the DBC procedure. Category 1 complaints can be allocated to any Case Officer.
- b) **Category 2:** this category is defined by reference to the other categories and covers all external complaints that do not fall into Category 3 and all internal complaints that do not fall into Category 1 or Category 3. Staff are able to dismiss complaints in Category 2, but only where it is clear that no breach of the old Code/Handbook is disclosed or the evidence is so weak that it would not support any type of enforcement action. Staff also have the authority to impose administrative sanctions where there is clear evidence of a breach, based on the balance of probabilities and such action is clearly proportionate and sufficient based on the risk level. All other complaints must be referred to the Committee for a decision. Staff cannot refer Category 2 complaints direct to disciplinary action. Category 2 complaints can be allocated to any Case Officer.
- c) **Category 3:** this category includes both external and internal complaints that: are complex either factually or legally; have or may attract media attention; or involve wider implications for the public interest, the profession or the BSB. All complaints in this category must be referred to the Committee to take the decision whether to dismiss, impose administrative sanctions or refer to

disciplinary action. Category 3 cases can only be allocated to a legally qualified Case Officer to investigate.

- 4.65. The category in which a complaint is placed is not related to the risk level for that complaint. For example, a complaint arising from a criminal conviction for dishonesty would inevitably be high risk but would fall within category 1 as referral of the complaint to disciplinary action is not subject to individual judgement, but is prescribed by the Regulations.

### **Administrative sanctions**

- 4.66. The decision as to whether an administrative sanction is an appropriate disposal in an individual case will be taken as part of the post-investigation assessment stage either by staff or the Committee. Where it is considered that an administrative sanction is appropriate, a decision will be need to be taken either by the staff or the Committee as to what type and level of sanction should be imposed. The following paragraphs set out the approach and procedure for making such decisions.

- 4.67. The Handbook defines administrative sanctions (at Part 6, definition 5) as “*an administrative warning, fixed penalty fine or other administrative fine up to the prescribed maximum, or any combination of the above in accordance with the [Complaints Regulations]*”. The maximum penalty for individual barristers is £1,000.

- 4.68. The Regulations do not prescribe the level of administrative sanction that should be imposed in any particular case, but Regulation 51 stipulates that “*in determining the level of [sanction] the PCC must have due regard to the enforcement strategy and may have due regard to such other matters as the Bar Standards Board may consider relevant from time to time*”.

- 4.69. **Warnings:** these are generally imposed where some or all of the following factors are present:

- The barrister has no previous disciplinary findings or record of administrative sanctions for similar behaviour in the past two years;
- the breach has been remedied or the barrister has taken all reasonable steps to mitigate the impact of the conduct;

- there have been no adverse consequences for any persons;
- there has been no adverse impact on the public confidence in the administration of justice or the profession;
- there are exceptional circumstances that make the imposition of a financial penalty inappropriate.

4.70. **Fixed penalty fines (FPF):** these are generally imposed in relation to referrals from other sections of the BSB/Bar Council (see paragraphs 4.49 – 4.51 above) where the barrister has not previously been subject to an administrative fine for the same or similar conduct. Examples of types of breaches that could attract a FPF include but are not limited to:

- failures to complete the authorisation to practise process;
- failures to complete chambers monitoring or supervisory risk assessments; failures by chambers to publish equality and diversity information, and,
- failures to register for QASA.

4.71. The level of the FPF has been set at £400. However, this is subject to a 50% reduction for early payment if payment is made within 14 days of the fine being imposed.

4.72. **Discretionary fines:** these are based on the individual circumstances and nature of a complaint and the risk factors involved. The starting point is £400 and the amount will be adjusted according to the mitigating and aggravating circumstances of the breach. The aggravating and mitigating factors are assessed based on the post-investigation risk assessment and the circumstances of the conduct including the personal circumstances of the barrister. A list of the non-exhaustive factors that should be taken into account are set out at the end of this section.

4.73. The financial circumstances of the barrister need to be taken into account when deciding on the level of discretionary fine. In order to facilitate this, barristers will be informed when the investigation is commenced that, if at the end of the investigation a decision is taken to impose an administrative sanction, if they want their financial circumstances to be taken into account they should submit evidence in relation to this with their response to the complaint

- 4.74. **Multiple breaches:** where a complaint involves more than one breach, all of which are suitable for disposal by administrative sanctions, separate sanctions for each breach should not be imposed but a global sanction imposed covering all the breaches based on the most serious breach. This in line with the approach taken at the preliminary and post-investigation stages where a “complaint” is risk assessed as whole rather than individually by its constituent aspects. The fact that a complaint involves multiple breaches will be an aggravating factor. Note: this does not prevent different aspects of a complaint being subject to different disposals at the post-investigation assessment stage (see paragraphs 4.58 – 4.59 above).
- 4.75. **Staff authority to take decisions on administrative sanctions:** Staff have the authority to take decisions on the imposition of all types of administrative sanctions including, in theory, up to the maximum of £1,000. However, this authority is restricted by the category of the complaint as set out paragraphs 4.62 – 4.65, above. Therefore in practice, given the nature of the authorities, staff will only be taking decisions in relation to clear cut cases and where the level of sanction is either a warning or fine in the mid-range of the maximum.
- 4.76. **Appeals:** barristers subject to the imposition of administrative sanctions have a right to appeal the decision to an independent panel, appointed by the Bar Tribunal and Adjudication Service. The appeal process is governed by the provisions set in out the Complaints Regulations, rE84 – E89. Barristers have 28 days in which to submit an appeal and appeals can be heard on the papers or, at the request of the barrister, at an oral hearing in front of the panel which consists of three persons: a Queen’s Counsel as chair, a lay member and a barrister member.

### **Committee decisions**

- 4.77. As stated at paragraph 4.13 above, all decision making powers in relation to complaints are vested in the Professional Conduct Committee. While staff are authorised to take some decisions, there is no requirement that they must take those decisions and complaints can be referred to the full Committee at any stage of the process. However, as outlined in the preceding paragraphs, the Committee, or individuals on it, will generally be responsible for the following decisions:

- a) Deciding in relevant cases whether complaints referred by the Legal Ombudsman should be investigated immediately or await the outcome of the Legal Ombudsman's consideration (see Section 6 of this Pack);
- b) Dismissing all Category 3 complaints and also Category 2 complaints where the evidence presents some level of ambiguity and the need for dismissal is not self-evident;
- c) Imposing administrative sanctions in Category 3 complaints and in Category 2 complaints where the evidence presented some level of ambiguity and/or is it not easily apparent what level of sanction would be proportionate;
- d) Referring relevant complaints in Categories 2 and 3 to disciplinary action;
- e) Referring complaints that potentially satisfy the disqualification condition to a Disciplinary Tribunal or the Determination by Consent procedure: and
- f) Generally considering any complaints where the decision on what action to take following an investigation is not clear, or the PCD consider the matter is best decided by the Committee.

4.78. Where a complaint is referred to the Committee, the options available for the disposal of the complaint are, in the main, the same as those available to staff both at the preliminary and post-investigation stages, but with some slight variance. As is reflected by the terms of the Complaints Regulations, the Committee can:

- a) Dismiss complaint, provided that the majority of the lay members present at a meeting consent to the dismissal;
- b) Dismiss complaint but advise the barrister as to his/her future conduct in writing or direct the barrister to attend on the Chair or a Vice Chair for such advice ( the latter is only available to the Committee);
- c) Decide that no further action should be taken on the complaint (only available to the Committee (but see Section 9, paragraph 9.58));
- d) Refer a complaint at the preliminary assessment stage for supervisory action by the Supervision Team;
- e) Impose an administrative sanction;
- f) Where administrative sanctions are not appropriate due to the seriousness of the conduct or its surrounding circumstances, there is a realistic prospect of a finding of professional misconduct being made and the regulatory objectives would be best be served by doing so, refer the complaint to the Determination by Consent procedure or a Disciplinary Tribunal on charges of professional misconduct;

- g) Refer a complaint that potentially satisfies the disqualification condition to a Disciplinary Tribunal (only available to the Committee).

- 4.79. **Process for Committee decisions:** Where a complaint is referred to the Committee for a decision, the file will normally be allocated to a member of the Committee, lay or barrister, who acts as a “Case Examiner” for the case. The Case Examiner is expected to compile a written report for the Committee, including recommendations for the disposal of the complaint based on the options listed at paragraph 4.78 above and, where applicable, draft relevant letters for the complainant and/or the barrister.
- 4.80. The written report by the Case Examiner should be compiled in accordance with a standard template. Sections 8, 9 and 10 of this pack provide further information on the processes related to Case Examiner reports and the preparation of letters.

### **Decisions by Experienced Members**

- 4.81. There are some decisions that are not appropriate for staff to take but are also not of a nature that would require a full Committee decision. Therefore “Experienced Members” of the Committee are authorised to take a number of decisions outside meetings. An “Experienced Member” is defined as “a member of the Committee who has served at least two years or is an Office Holder of the Committee”. The term “Experienced Members” refers to one lay member and one barrister member of the Committee, acting collectively to take decisions.
- 4.82. The decisions EMs can take are:
- a) Whether complaints referred to the BSB by the Legal Ombudsman (LeO) should be investigated immediately or await the outcome of the LeO consideration (see Section 6);
  - b) Whether a complaint should be investigated where staff cannot decide;
  - c) To dismiss complaints with advice; and,
  - d) To refer barristers to the Fitness to Practise or Interim Suspension procedures (see Section 7).
- 4.83. The EMs will be expected to make a joint decision on the complaint. Where they cannot agree or decide on what action to take, the complaint can be referred to the full Committee with the approval of an Office Holder. If referral to the Committee is

necessary, then generally one of the EMs should act as Case Examiner and write a report for the Committee but if this is not possible the complaint should be referred back to the relevant Officer for an alternative Case Examiner to be appointed.

- 4.84. Any complaints referred to Experienced Members (EMs) will be accompanied by a note prepared by the relevant Officer setting out the background to the case, the issues involved, and the reasons why the complaint has been referred for a decision. Experienced members will be expected to make a joint decision and communicate that decision to the relevant Officer. Section 9 provides further information on the role and responsibilities of Experienced Members.

#### **“Intelligence reports” to the Supervision Team**

- 4.85. In order to ensure that the BSB is generally taking a holistic approach to assessing risks arising from the behaviour of the regulatory community, and thereby updating and developing its risk framework, it is important that relevant information is shared between BSB departments/teams. Information on enforcement action is crucial to this and such information, in summary/anonymised form, will be available to other sections. Information in relation to complaints, which have been dismissed and did not result in an internal complaint being raised or is received by the PCD/PCC by any other avenue, could also be relevant to the BSB’s wider assessment of risk, particularly the work of the Supervision Team. Therefore a system for submitting “intelligence reports” from the PCD to the Supervision Team has been put in place.
- 4.86. Staff in the PCD will be responsible for submitting such reports, but the Committee (or individual members dealing with cases) can ask for a report to be submitted. As a guide, the following types of information might warrant the submission of an “intelligence report”:
- Indications of systematic problems with the administration of a chambers;
  - Indications that a chambers may have a widespread problem in relation to the conduct of its members in a specific area;
  - Indications that a chambers is condoning, or facilitating, breaches of the Handbook;
  - Information about potential issues of discrimination or harassment, particularly in relation to pupils, within a chambers.

- 4.87. The submission of an “intelligence report” does not amount to a formal “referral” and it will be for the Supervision Team to decide what use is made of the information (for example, it could inform whether attention needs to be paid to a particular chambers or whether a “thematic” review in a certain area of regulatory activity is warranted).

#### **Checks and balances on staff decision making**

- 4.88. It is not possible to assess at this stage the volume of complaints that will be subject to staff decisions under the new processes. However, the fact that staff are authorised to take decisions does not mean that they have to take such decisions. In the first six months or so of the application of the risk based approach, it is likely that some decisions staff are authorised to take will be referred to the Committee. Further, in relation to the imposition of administrative actions, up until the end of 2014, all final decisions will be taken by the Investigations and Hearings Manager or the Head of Professional Conduct, However, the principle that decisions should be taken at the lowest level appropriate to the case is one that the Legal Services Board is keen that approved regulators abide by and implement.
- 4.89. Several forms of checks and balances are in place to monitor staff decision this includes:
- a) **Regular reports to the Committee** - a summary report of all staff decisions to dismiss complaints and impose administrative sanctions is included in the papers for each Committee meeting.
  - b) **Quality Review Sub Committee of the PCC** - a standing sub-committee of the Committee reviews a percentage of staff decisions on a quarterly basis to consider whether they were taken in line with the procedures and whether, on their merits, the decisions were reasonable (see Section 9 and “PG18 - Review of Staff Decisions by the Quality Review Sub Committee” for full details);
  - c) **Independent Observer (IO)** – the IO has a remit to look at the way in which the agreed processes are being applied and whether the aims and objectives of the system are being met. The IO does not have a role in looking at the merits of individual outcomes of complaints but can take these into account when making



recommendations for improvements in the operation of the wider system (see Section 13, paragraphs 13.10 – 13.12 for more information).