

3. Regulatory framework

The Code of Conduct and the BSB Handbook – transitional arrangements

- 3.1. On 6 January 2014, the BSB Handbook came into effect and replaced the Code of Conduct of the Bar Council of England and Wales (“the Code”). The Handbook applies to all **conduct** occurring after 6 January 2014, but the Code remains in force in relation to conduct prior to that date.
- 3.2. While the structure of the Handbook is very different to that of the old Code and the wording of many provisions has changed, the large majority of the old Code is still reflected within the Handbook. To assist with understanding where the old provisions, or their equivalent, can be found in the Handbook, a destinations table has been set out at the end of this section, which maps provisions of the old Code with those of the Handbook.
- 3.3. The transitional arrangements in relation to the “Enforcement Regulations” contained in Part 5 of the Handbook, are different. From 6 January 2014, the Enforcement Regulations (see paragraph 3.31 below), and any associated operational processes supporting the various regulations, will apply to all cases, including those that were already under consideration prior to 6 January 2014 - the old Annexes to the previous Code relevant to enforcement are therefore no longer applicable. The only exception is in relation to the sanctions that can be imposed for conduct occurring before 6 January 2014: these will be subject to the sanction regime stipulated under the old Code as opposed to the Handbook i.e. administrative fines limited to a fixed £300 fine and the maximum level of a disciplinary fine limited to £15,000 (under the Handbook, the latter is set at £50,000 for individuals, and a policy decision has been taken to set the former at £400).
- 3.4. This section of the Information Pack refers to the regulatory framework that applies under the BSB Handbook. For information on the regulatory framework under the old Code, please see the document at the end of this section – the previous version of section 3 of this pack - which should be referred to when dealing with conduct occurring before 6 January 2014.

The BSB Handbook

- 3.5. The BSB Handbook sets out the professional obligations to which persons or bodies regulated by the BSB are subject. Its general purpose is to stipulate the requirements for practice and the rules and standards of conduct applicable to “BSB regulated persons”.
- 3.6. **“BSB Regulated Persons” and “Relevant Persons”**: “BSB regulated persons” are defined in the Handbook at definition 38 of Part 6 and the term is used to refer to barristers (including, for the avoidance of doubt, unregistered barristers) and registered European lawyers (although in future, the term will have wider applicability (see paragraphs 3.8 - 3.9 below)).
- 3.7. Whereas the old Code was applicable to barristers only, the BSB Handbook will, on rare occasions, have wider applicability: direct or indirect employees of barristers also now fall within the scope of the BSB’s regulation and under the BSB Handbook, they are referred to as “non-authorized persons” (see definition 143 of Part 6). The Handbook also now applies to persons who were BSB regulated persons at the time of the conduct complained of, but are no longer regulated persons. Collectively, these two categories are referred to as “relevant persons” under the Handbook (see definition 196 of Part 6). Please note, however, this Information Pack generally refers to the term ‘barristers’ throughout, for simplicity.
- 3.8. In due course, the intention is that the Handbook will cover entities and their employees who may, or may not be, barristers. This extension is subject to approval by the Legal Services Board of the BSB’s application to become an entity regulator. It is anticipated that such approval will be given during the first half of 2014 and the jurisdiction over relevant entities will be operational as soon as possible thereafter.
- 3.9. In light of the pending extension to the BSB regulatory remit, the published Handbook contains scored through text, which is only applicable to entities. It is included in order to give those interested in operating as an entity regulated by the BSB, information about the relevant requirements. Once approval has been obtained for the BSB to regulate entities, the scored through text (subject to amendments) will be fully incorporated into the Handbook.

Handbook - Changes to the approach to disciplinary action

3.10. The structure of the Handbook is fundamentally different to that of the old Code: it is based on an outcomes focused and risk-based system of regulation, which centres on Core Duties supplemented by “rules” and guidance (see paragraphs 3.27 – 3.32 below).

3.11. **Professional misconduct and administrative sanctions:** as of 6 January 2014, the definition of professional misconduct will be:

“...a breach of [the] Handbook by a BSB regulated person which is not appropriate for disposal by way of no further action or the imposition of administrative sanctions....”

3.12. Administrative sanctions will only be imposed following the completion of a formal investigation. Decisions about whether to impose an administrative sanction, as opposed to referring a matter to disciplinary action as professional misconduct, will be informed by the risk posed by the conduct to the regulatory objectives (see section 4, paragraphs 4.4 and 4.40 – 4.42).

3.13. This means that all complaints that reveal a breach of the Handbook and warrant further action, will be amenable to the imposition of administrative sanctions and thereby treated as a “breach” of the Handbook rather than “professional misconduct”. This will require an assessment of every such complaint to determine whether the imposition of administrative sanctions is appropriate (see section 4 of this Pack). If administrative sanctions are not appropriate (due to the seriousness of the conduct or its surrounding circumstances) then the matter will be referred to disciplinary action as professional misconduct (either to the Determination by Consent procedure or to a Disciplinary Tribunal).

3.14. **Enforcement strategy:** the approach to enforcement under the Handbook is now underpinned by a written Enforcement Strategy. Regulation rE5 of the Complaints Regulations requires the PCC to take into account this strategy when determining which of its powers to use when considering what action to take in relation to complaints. A copy of the Enforcement Strategy can be found at the end of this section and it has been a central consideration in developing the new risk based processes for assessing complaints, and thereafter considering the appropriate

enforcement action to take (see section 4). The Enforcement Strategy provides that it should be applied in conjunction with the Supervision Strategy (see paragraph 3.15 below).

- 3.15. **Supervision:** the new Handbook introduces the concept of “Supervision” which replaces the previous chambers monitoring regime and creates the basis for monitoring entities. A Supervision Strategy has been developed, which is mainly targeted at risk assessing chambers, and in due course entities, in order to determine the level of supervision required. Supervision will allow for more constructive engagement with the BSB, aimed at assisting chambers and entities to identify and address risks before non-compliance materialises. BSB resources will therefore be targeted at those chambers/entities who are potentially managing risk less effectively, with disciplinary action being reserved for more serious incidents of non-compliance, in accordance with the Enforcement Strategy. A copy of the Supervision Strategy can be found at the end of this section.
- 3.16. The Supervision Strategy also includes provision for supervision of individuals in appropriate circumstances and the Complaints Regulations provide the PCC with the option to refer barristers for supervision rather than taking formal enforcement action (see section 4, paragraph 4.55). In a similar way, potential conduct issues that are revealed via supervisory activity can, where appropriate, be referred to the PCD for consideration of enforcement action.
- 3.17. **“Unregistered barristers”:** The old Code, in the main, does not apply to those barristers who are not practising or are not entitled to practise (known as “unregistered barristers” but previously “non-practising”). The new Handbook places an obligation on all those who are called to the Bar, whether practising or not, to abide by the terms of *“Part 2 – the Code of Conduct”* when they are offering, or engaged in, providing legal services which includes the provision of advice (see definition 122 in Part 6 of the Handbook and r17 (c) of the Handbook). This is a significant change: it brings all those called to the Bar who are actively involved in the provision of legal services within the scope of BSB regulation and thereby enforcement action, when previously their conduct was not covered other than in very general terms, by the Code.

3.18. **Disqualification orders:** Under the new Handbook, “relevant persons” can be subject to a disqualification order if either of the following disqualification conditions apply:

- They have breached a relevant duty to which the “BSB regulated person” is subject under the Handbook, or under applicable rules of another Approved Regulator; or,
- Their actions are a significant contributory factor in a “BSB regulated person” breaching the terms of the Handbook.

3.19. When considering complaints in respect of disqualification orders, the PCC can decide to: dismiss the complaint; take no further action; or, make an application to the Disciplinary Tribunal that the relevant person be subject to a disqualification order.

3.20. Where there is a realistic prospect of a disqualification condition being satisfied, the PCC must refer the complaint to a Disciplinary Tribunal, having regard to the public interest and regulatory objectives. If upheld, the Tribunal can disqualify a relevant person from acting as an employee of a BSB regulated person and can prohibit any BSB regulated person from appointing them or directly or indirectly employing them in respect of relevant activities, either indefinitely or for a stated period.

3.21. **Other changes:** Other significant changes to the Handbook, which have an impact on the enforcement processes in relation to conduct occurring after 6 January 2014 (except ‘d’) below), are as follows:

- a) The maximum level of fine that can be imposed by a tribunal has increased from £15,000 to £50,000;
- b) Three person panels have the ability to suspend barristers for up to 12 months (previously, they were only able to impose a suspension of up to 3 months);
- c) There is a new requirement to self-report serious misconduct, and to report the serious misconduct of others; and,
- d) Appeals from findings and sentences of Disciplinary Tribunals in relation to decisions taken on or after 6 January 2014 come under the jurisdiction of the High Court. The Visitors continue to deal with appeals submitted before 6 January 2014 until their conclusion.

Structure of the Handbook

3.22. The Handbook brings together all the BSB's rules, regulations and guidance into one publication and explicitly states the outcomes that the regulatory requirements are designed to achieve. It is divided into six sections:

- **Part 1** – Overview;
- **Part 2** – The Code of Conduct;
- **Part 3** – Scope of Practice and Authorisation Rules;
- **Part 4** – Qualification Rules;
- **Part 5** – Enforcement Regulations;
- **Part 6** – Definitions.

3.23. As members of the BSB's Prosecution Panel, you should be most familiar with Part 2 (the Code of Conduct), Part 3 in relation to the practising requirements and Part 5. The Enforcement Regulations (Part 5) include revised forms of all the previous Annexes to the Code in relation to enforcement, including:

- the Complaints Regulations;
- the Disciplinary Tribunal Regulations;
- the Fitness to Practise Regulations; and,
- the Interim Suspension and Disqualification Regulations.

The Code of Conduct (Part 2)

3.24. Part 2 of the Handbook (the Code of Conduct) sets out the rules and standards of conduct. This section of the Handbook provides the main basis for any enforcement action (whether administrative or disciplinary), but breaches of relevant rules in Parts 3 and 4 may also provide a basis for enforcement action (for further details of the application of Code of Conduct, see Part 1 of the Handbook).

3.25. Part 2 is divided into the following sections:

A - APPLICATION: Explains to whom and when the various regulatory requirements set out in the Code apply.

B - CORE DUTIES: Sets out the Code Duties that apply to all barristers and provides further guidance about their application.

C - CONDUCT RULES: Sets out the conduct rules with which barristers must comply. For ease of reference, this section is further divided into the following sub-sections relating to barristers' relationships with others and the conduct of their business:

- a) You and the court
- b) Your behaviour towards others
- c) You and your client (the QASA Rules are included here)
- d) You and your regulator
- e) You and your practice

D - RULES APPLYING TO SPECIFIC REGULATED INDIVIDUALS: Sets out the rules which apply to the following types of regulated person as well as highlighting cross border activities within the European Union and the European Economic Area:

- a) Self- employed barristers and chambers;
- b) Barristers undertaking Public Access or licensed access work;
- c) Registered European Lawyers; and,
- d) Unregistered barristers.

Core Duties, Outcomes, Conduct Rules and Guidance

- 3.26. Part 2 contains the ten Core Duties, the outcomes and the Conduct Rules which apply to regulated persons. To assist in the interpretation of the Core Duties and Rules, Part 2 also includes non-binding guidance. These terms, and their inter-relationship, are explained below.

Core duties

- 3.27. The ten Core Duties underpin the entire regulatory framework and set out the mandatory standards that all BSB regulated persons (including unregistered barristers) are required to meet. Enforcement action can be taken based solely on a breach of the Core Duties, even if no specific rule has been breached.

Outcomes

- 3.28. At the beginning of each section of the Code of Conduct (Part 2) are identified outcomes, which explain the reasons behind the regulatory scheme and what it is designed to achieve. The outcomes are derived from the regulatory objectives and the risks which must be managed if those objectives are to be achieved. They are designed to put the Rules into context and, together with the Core Duties, help barristers to determine how they should act if a specific situation is not covered by the Rules or it is not clear how a Rule should be applied in a specific situation. The outcomes are not mandatory, but the PCD/PCC must take them into account when considering how to address alleged breaches of the Core Duties or Rules.

Rules

- 3.29. The Rules supplement the Core Duties and are similarly mandatory. The rules are not intended to be exhaustive and therefore, in any situation where no specific rule applies, the Core Duties can be invoked by themselves as a basis for enforcement action: compliance with the Rules alone will not necessarily be sufficient to comply with the Core Duties.

Guidance

- 3.30. The Handbook includes relevant guidance to support the associated Rules in each section of the Code of Conduct (and to a more limited extent the Rules in Part 3). The guidance, by definition, is not mandatory but it provides further explanation as to how to interpret or apply the Core Duties/Rules. When considering how to address a complaint, the PCD/PCC should take into account the Guidance, but failure to follow it will not in itself be proof of a breach. However, where the guidance has not been followed, evidence will be obtained from the regulated person by the PCD during an investigation about why the person considers his/her obligations have been met under the Code notwithstanding any departure from the guidance.

The Enforcement Regulations (Part 5)

3.31. Part 5 of the Handbook – the Enforcement Regulations – contains the enforcement procedures that apply if a regulated person fails to act in accordance with the requirements of the Handbook (or the old Code where a case is being considered on or after 6 January 2014). It is divided into the following sections:

Section A – The Complaints Regulations

Section B – The Disciplinary Tribunals Regulations

Section C – The Hearings before the Visitors Regulations

Section D – The Interim Suspension and Disqualification Regulations

Section E – The Fitness to Practise Regulations¹

3.32. As a member of the BSB’s Prosecution Panel, you should be familiar with all the above Sections: Section B (The Disciplinary Tribunal Regulations) being the most important.

Regulatory responsibilities in relation to disciplinary action

3.33. The PCC and authorised staff in the PCD are responsible for deciding whether or not to bring disciplinary proceedings against a regulated person. Where a decision is taken either by the PCC, or staff under the standing authorisations, to refer a case to the Determination by Consent procedure, the final decision on the case will be taken by the full PCC (see section 5, paragraphs 5.2 – 5.6 for details).

3.34. Where a case is referred by the PCC or PCD staff to a Disciplinary Tribunal, staff in the Investigations and Hearings Team are responsible for preparing and presenting the “prosecution” case in conjunction with you, so that you are in a position to represent the BSB at Tribunals, (subject to any appropriate advice or direction by the Office Holders or the PCC). However, the final determination of a case is the responsibility of independent Disciplinary Tribunal panels appointed and convened by the Bar Tribunals and Adjudication Service (BTAS). This ensures that the final determination process is independent of the BSB and compliant with the Human Rights Act.

¹ Part 5 of the Handbook also contains one further section, Section F – ‘Interventions and Divestiture’, which is awaiting approval by the Legal Services Board.

- 3.35. BTAS is an independent body set up, and operating under the auspices of the Council of the Inns of Court (COIC), to appoint and administer Disciplinary Tribunals and other relevant panels required under the terms of Part 5 of the Handbook. Such panels include not only Disciplinary Tribunals but also: Appeal Panels to consider challenges to the imposition of administrative sanctions; Fitness to Practise Panels (FTP); Interim Suspension and Disqualification Panels (ISD); and, the associated appeal panels for FTP and ISD.
- 3.36. BTAS is also responsible for appointing Directions Judges, and providing the Clerks to the Tribunal and shorthand writers.