4. The Complaints Process

Aims and objectives of the complaints system

4.1 The Bar Standards Board Business Plan for 2011/12 sets out 13 aims, one of which is to ensure that all those who are regulated by the BSB live up to its standards as set out in the Code of Conduct. This aim is underpinned by a specific objective relating to the work of the Committee which is to ensure that fair and rigorous processes are in place to protect the public when barristers fail to live up to the standards.

4.2 The BSB is also under a statutory obligation under section 28 of the Legal Services Act 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.

4.3 The “professional principles” referred to at paragraph 4.2 (h) above are also set in section 1 of the LSA and are:

   a. that authorised persons 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.

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1 The term “authorised person” covers only practising barristers but the BSB’s regulatory remit is wider and also covers unregistered barristers.
4.4 Not all of the Regulatory Objectives and professional principles apply directly to the complaints system but those that are applicable should always be taken into account when making decisions in relation to complaints.

4.5 In light of the Regulatory Objectives and the BSB’s Business Plan, the aims of the complaints and disciplinary system are to:

- act in the public interest;
- protect the public and consumers of legal services;
- maintain high standards of behaviour and performance of the Bar;
- provide appropriate and fair systems for dealing with complaints and disciplinary action;
- promote public and professional confidence in the complaints and disciplinary process; and
- ensure complaints are dealt with fairly, expeditiously, and consistently.

4.6 In order to achieve these aims, the objectives of the complaints and disciplinary system are to:

- deal with complaints made against barristers promptly, thoroughly and fairly;
- ensure proportionate action is taken in relation to barristers who breach the Code of Conduct; and
- be open, fair, transparent and accessible.

Rules and Regulations covering the complaints and disciplinary system

4.7 The Rules and Regulations covering the complaints and disciplinary processes are set out in the Complaints Rules 2011 (Annex J to the Code) and the Disciplinary Tribunal Regulations 2009 (Annex K to the Code). This section of the Pack covers only the processes outlined in the Complaints Rules 2011 (the Rules) i.e. initial consideration of complaints, formal investigation and referral to disciplinary action: the disciplinary processes are covered in Section 5.

4.8 The Complaints Rules provide the outline structure for processing complaints, investigating them and taking decisions on them. They are underpinned by detailed procedural, policy and guidance documents, some of which are included in Annex 4 of this Pack “Guidance and Policy” and cross-referenced in the text below.
Regulatory responsibility for dealing with complaints – client/non-client complaints

4.9 Prior to 6 October 2010, this section of the Pack represents a sea change in approach. Prior to that date, the BSB’s complaints handling remit extended to dealing with complaints about both the conduct of barristers (i.e. breaches of the Code of Conduct) as well as complaints about the service barristers provided to their clients (i.e. complaints about “inadequate professional service” (IPS)). However, the Legal Services Act 2007 removed the BSB’s jurisdiction over “service” complaints and transferred it to the Legal Ombudsman who commenced operation on 6 October 2010. As from that date the BSB’s remit, and by definition the Professional Conduct Committee’s remit, is now limited by statute to considering complaints about conduct only.

4.10 The change in the BSB’s remit necessitated a shift in emphasis in relation to dealing with complaints. The main emphasis is now towards 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 Regulatory Objectives as well as the aims and objectives of the system as set out at paragraph 4.2 -4.6 above and not necessarily resolving the complaint to the complainant’s satisfaction.

4.11 The change in remit has also led to the need to distinguish between “client” complaints and “non-client” complaints. While the BSB can 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 the Legal Ombudsman (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 initial process for handling conduct referrals from LeO and the interface with LeO).

4.12 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.
The Professional Conduct Committee's role in the complaints process

4.13 The Complaints Rules 2011 vest all decision making powers in the Committee. Therefore the Committee’s functions and powers now extend to cover those previously exercised by the Complaints Commissioner\(^2\). However, it would be impossible to operate the complaints system effectively if all decisions had to be taken by the full Committee. Therefore, a scheme of authorisations under Rule 4 of the Rules 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 4.50). The scheme of authorisations reflects and facilitates the operation of the processes described below.

Decision making criteria

4.14 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 Rules. The criteria are set out in “PG11 – Decision Making Criteria”: a copy of which can be found in Annex 4. All decision makers should ensure that they take the criteria into account when making relevant decisions.

Types of conduct complaint

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

- external complaints; and
- internal complaints.

4.16 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.

4.17 Internal complaints are those raised by the BSB of its own motion and can be brought for any breach of the Code. However, internal complaints are most often raised when a barrister has failed to comply with the practising requirements set out in the Code such as: completing Continuing Professional Development; paying Practising Certificate fees; and/or obtaining professional indemnity insurance. Internal

\(^2\) The role of the Complaints Commissioner was to provide an independent and lay “sifting” mechanism, identifying those complaints where there is sufficient evidence to warrant referral to the Committee for consideration of further action, and dismissing all others. This role was removed as of January 2011 and replaced with staff and Committee decision making.
complaints are also raised where a barrister has been convicted of a criminal offence or has been struck off the register of another professional body.

4.18 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.

Types of breaches of the Code

4.19 The Committee has the power to take action in relation to any breach of the Code but the options available depend on whether or not the breach is classed as “professional misconduct” under the Code.

4.20 Professional misconduct is defined under paragraph 901.7 of the Code as “any failure by a barrister to comply with any provision of [the] Code other than those referred to in paragraph 901.1...

4.21 Paragraph 901.1 lists a number of Code provisions, breaches of which do not amount to professional misconduct unless the failure to comply is considered to be “serious” due to the nature or extent of the failure or its combination with other failures to comply with the Code: in which case, under paragraph 901.5 of the Code, the breach will amount to professional misconduct. Otherwise, breaches of the provisions listed in paragraph 901.1 can only be dealt with by means of an administrative warning and/or fixed fine (currently £300). These administrative penalties are not classed as “disciplinary findings”: therefore they are not made public and are not posted on the BSB website.

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Continuing Professional Development (‘CPD’), paying practising certificate fees and obtaining insurance, as well as failures to respond to BSB communication. These administrative penalties are not classed as “disciplinary findings”: therefore they are not made public and are not posted on the BSB website.

Threshold tests

4.22 There are two main stages when decisions need to be made as to whether to dismiss a complaint or proceed with further action. The first is on initial receipt of a complaint, or information when a decision needs to be taken about whether to carry out formal investigation. The second is at the conclusion of a formal investigation when the decision needs to be taken about whether to refer a complaint to disciplinary action. At each stage a “threshold test” is applied as set out below and also in the Rules.

4.23 Test for referral to investigation: on initial receipt of an external complaint, or notification of information that might be give rise to an internal complaint, the primary test for deciding whether to refer the complaint to formal investigation is whether the complaint discloses a “potential” breach of the Code and/or professional misconduct (Rules 7 (c) and 24). A “potential” breach is defined as an allegation or allegations that, if proved, would or might amount to a breach of the Code. Two other factors are also taken into account when deciding whether an external complaint should be referred to formal investigation: whether the complaint has been submitted within time and whether further consideration is justified (see paragraph 4.28 below).

4.24 Test for referral to disciplinary action: complaints cannot be referred to disciplinary action unless a formal investigation has been conducted. Following such an investigation, the test for deciding whether a complaint should be referred to disciplinary action is whether there is “a realistic prospect of a finding of professional misconduct being made” and whether “the regulatory objectives would be best served by pursuing disciplinary action”. The standard of proof for findings of professional misconduct is the criminal standard i.e. “beyond a reasonable doubt”.

4.25 The above tests apply regardless of whether the decision is being taken by staff, members of the Committee or the full Committee and the decisions must be taken in accordance with the Decision Making Criteria (see Annex 4).
The complaints processes

4.26 An overview of the processes for dealing with complaints is set out below. Full details of 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.

4.27 The same processes are applied to both internal and external complaints although the preliminary assessment (see paragraph 4.28 below) is not necessary in relation to internal complaints as such complaints are only raised where there is sufficient evidence to justify a formal investigation. As previously stated at paragraph 4.11, the preliminary assessment stage is also different for client complaints referred by LeO (see Section 6). However, the process for conducting investigations applies to all complaints whether internal/external or client/non-client.

4.28 Preliminary assessment: all external complaints received from non-clients will be subject to a preliminary assessment conducted by the Assessment Team Manager (ATM) in order to assess:

a. Whether the complaints discloses a “potential” breach of the Code and/or professional misconduct:

b. Whether it has been submitted within the 12 month time limit and, if not, whether further consideration is justified, despite the lapse of time, by reason of the regulatory objectives;

c. Whether there is any reason under Rule 26 why formal investigation of the complaint would not be justified e.g. it lacks substance, cannot be properly or fairly investigated or is insufficiently serious to justify further action; and

d. Whether the complaint is suitable for referral to chambers to resolve.

4.29 If the complaint reveals a potential breach of the Code and further consideration is justified, then it will normally be referred immediately to formal investigation unless a referral to chambers is considered appropriate.

4.30 Referral to chambers will only be appropriate in very few cases and only where: the potential breach is minor; if proved, disciplinary action would be disproportionate; and the chambers has the ability to resolve the complaint.

4.31 Dismissal of complaints following preliminary assessment: where the preliminary assessment indicates that the complaint does not disclose a breach of the
Code, is out of time or further consideration is not justified, the complaint will be dismissed. In most cases, the decision to dismiss will be taken by the ATM or one of the Assessment Officers who will send the dismissal letters. However, some complaints cannot be dismissed by staff and must be referred to the Committee for a final decision (see paragraph 4.38 below).

4.32 **Investigation:** If a complaint warrants formal investigation it will be forwarded to the Investigations and Hearings Team and allocated to an appropriate Case Officer for the investigation to be conducted. 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 and any subsequent decisions on the disposal of the complaint.

4.33 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 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.

4.34 **Decisions following an investigation:** at the conclusion of the investigation the Case Officer will compile a written report of the investigation with recommendations as to its disposal. The options for disposal are:

- a. Staff dismissal of the complaint;
- b. A recommendation to the Experienced Members of the Committee to dismiss but with formal advice given to the barrister (see paragraphs 4.46-4.49);
- c. Staff referral direct to disciplinary action (Disciplinary Tribunal or, the Determination by Consent procedure); and
- d. Referral to the Professional Conduct Committee for a decision.

4.35 The option chosen will depend on the outcome of the investigation and the categorisation of the complaint (see paragraphs 4.37 – 4.40) and all decisions will be taken in accordance with the Decision Making Criteria (see Annex 4).

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3 The term "Staff" refers only to those members of staff who are authorised to take decisions under the Complaints Rules – see Annex 4 "Complaints Rules – Authorisations".
Advice from the Committee

4.36 At any stage in the above process, advice can be sought from a member of the Committee. In most cases, the advice will be sought from a barrister member of the Committee as it will usually relate to issues of law or legal procedure. However, lay members can be called on to provide advice where their experience or expertise is relevant to the issues.

Categorisation of complaints to be investigated

4.37 The investigation process described above requires that staff have the ability to take decisions on complaints following an investigation including dismissing them and referring them direct to disciplinary action. Staff do not have the ability to take decisions on all complaints and a system of categorising complaints which require formal investigation has been developed. The category the complaint is placed in determines the extent to which staff can take decisions. 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).

4.38 It should be noted that staff do not have the authority to dismiss or refer to disciplinary action any 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.

4.39 All such complaints must be referred to the full Committee for the decisions to be taken.

4.40 There are three categories of complaint:

   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 warning or fines under paragraph
901.1 of the Code and refer the complaints direct to a Disciplinary Tribunal or the DBC procedure.

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 on the face of the investigation papers that no breach of the Code is disclosed by the evidence. All other complaints must be referred to the Committee for a decision. Staff cannot refer Category 2 complaints direct to disciplinary action.

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 implication for the public interest, the Bar or the BSB. All complaints in this category must be referred to the Professional Conduct Committee to take the decision whether to dismiss or refer to disciplinary action. They can only be allocated to a legally qualified Case Officer to investigate.

**Committee decisions**

4.41 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:

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 paragraphs 4.46-4.49 below and Section 6 of this Pack)

b. Dismissing complaints that require advice (see paragraph 4.46-4.49 below)

c. Dismissing all Category 3 complaints and also Category 2 complaints where there is evidence of a breach of the Code; and

d. Referring complaints in Categories 2 and 3 to disciplinary action.
4.42 Where a complaint is referred to the Committee, the options available for the disposal of the complaint are:

a. Dismiss the complaint, provided that the majority of the lay members present consent to the dismissal;
b. Dismiss the 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;
c. Decide that no further action should be taken on the complaint;
d. Direct that a formal written warning or financial penalty be imposed under paragraph 901.1 of the Code of Conduct;
e. Where there is a realistic prospect of a finding of professional misconduct, refer the complaint to the Determination by Consent procedure or a Disciplinary Tribunal disciplinary action as long as the regulatory objectives would be best served by doing so; or
f. Decide that further information is required before making a decision.

Referral of Complaints to the Committee

4.43 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 above 4.42 and, where applicable a draft dismissal letter. The report is then presented orally by the Case Examiner at a full Committee meeting.

4.44 The written report by the Case Examiner should be compiled in accordance with the standard format. Sections 8 and 9 of this Pack provide further information on the format of Case Examiner reports and dismissal letters.

4.45 Case Examiner reports should be sent to the Operational Support Team who will arrange for of the report to be included in the agenda for the first available Committee meeting. Case Examiners are expected to attend the meeting at which their report is due to be presented. Further details of the expectations of Committee members can be found at sections 9 and 10 of this Pack.
Decisions by Experienced Members

4.46 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.

4.47 The decisions EMs can take are:

a. Whether complaints referred to the BSB by the Legal Ombudsman should be investigated immediately or await the outcome of the Ombudsman’s consideration (see Section 6);

b. Whether a complaint should be investigated where staff cannot decide; and

c. To refer barristers to the Fitness to Practise or Interim Suspension procedures (see Section 7).

4.48 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. If this 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 then the complaint should be referred back to the relevant Officer for an alternative Case Examiner to be appointed.

4.49 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.

Authorisations
4.50 The processes described above can only operate effectively if staff and certain members of the Committee are authorised to take decisions outside full meetings. Rule 4 of the Complaints Rules allows “the Complaints Committee\(^4\) and the Chairman of the Committee [...] to authorise any person, group or body to fulfil any function or exercise any power given to them by [the] Rules”.

4.51 The Committee has authorised a range of staff and members of the Committee to perform functions and take decisions under the Rules and the Office Holders are authorised to take most decisions outside of the Committee. These authorisations reflect the processes described above and are set out in a Table of Authorisations which lists the Rule under which the authorisation has been given and the people who are authorised to take decisions under that Rule. The Table can be found in Annex 4 under “P09 - Complaints Rules – Authorisation of functions/powers”.

4.52 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.

\(^{4}\)References to the Complaints Committee in the Complaints Rules have yet to be updated but will be when the new Code of Conduct is issued.