

**BAR
STANDARDS
BOARD**

REGULATING BARRISTERS

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Table of Contents – Ctrl + click to jump

- 1. Introduction2
- 2. Risk assessment and referral of complaints for investigation.....3
- 3. Establishing the aspects of external complaints for investigation.....5
- 4. Conduct of the investigation6
- 5. Evidence of potential new complaints arising from an investigation..... 12
- 6. Action following the conclusion of an investigation 13
- 7. Application of the risk level to post-investigation decisions 15
- 8. Staff authority to take decisions..... 17
- 9. Reconsideration of decisions..... 18
- 10. Withdrawing complaints.....20
- 11. Informal reports to the Supervision Team21
- 12. Checks and balances on staff decision making22

1. Introduction

- 1.1. The Bar Standards Board (BSB) takes an outcomes-focussed and risk based approach to regulation and this is reflected in the terms of the BSB Handbook which sets out the framework for taking decisions on complaints received or raised about the conduct of applicable persons.
- 1.2. For the purpose of this document, in accordance with definition 8 at Part 6 of the BSB Handbook, the term ‘applicable persons’ is used to refer to:
 - individual barristers (registered or unregistered) or registered European Lawyers;
 - authorised (non-BSB) individuals or BSB regulated managers; and/or,
 - BSB authorised bodies (“entities”); and/or,
 - Persons employed by a practising barrister, registered European lawyer or BSB entity, or managers of a BSB entity.¹
- 1.3. The Complaints Regulations (“the Regulations”) set out in Part 5A of the Handbook, stipulate the decision-making framework and process for taking decisions on enforcement action.
- 1.4. rE2 of the Complaint Regulations provides that the Professional Conduct Committee (PCC), 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 BSB policy that appears to be relevant; and,
 - b) Any other factor relevant to the issue including whether it is appropriate, sufficient, proportionate and effective, and in the public interest to proceed in that manner.
- 1.6. The Enforcement Strategy also stipulates that enforcement action will focus on the issues that pose the greatest risk to the regulatory objectives and be proportionate to the identified risks. Paragraph 18 of the Enforcement Strategy provides a non-exhaustive list of factors that will be considered when determining which enforcement tools to use.
- 1.7. This purpose of this document is to supplement the Complaints Regulations and the Enforcement Strategy by setting out the more detailed procedures and decision making processes applicable to the investigation of complaints following a preliminary assessment (for details of the preliminary assessment process see “*PG09 – Initial assessment of complaints*”).

¹ The full definition of “applicable person” can be found at definition 8 of Part 6 of the BSB Handbook.

2. Risk assessment and referral of complaints for investigation

- 2.1. In line with the Enforcement Strategy, risk assessments of complaints are conducted at two stages of the process: first, on receipt of an external complaint or prior to a decision to raise an internal complaint (preliminary assessment); and second, at the conclusion of an investigation (post-investigation assessment). In addition, the Case Officer should be alive to any incoming information that would alter the level of risk during the course of the investigation.
- 2.2. The procedure for the preliminary assessment of complaints (“*PG09 – Initial assessment of complaints*”) should be read in conjunction with this document. The preliminary assessment process determines if there is evidence of a potential breach of the BSB Handbook or the Code of Conduct 8th Edition², or a potential breach of the Handbook that satisfies the disqualification condition, which warrants investigation.
- 2.3. All complaints requiring formal investigation will be referred to the Investigation and Hearings Team (I&H) by the Assessment Team. The Head of Investigations and Hearings will assign the initial categorisation to the complaint and then allocate it to an appropriate Case Officer (CO)³, in accordance with the guidance in “*PG11 - Categorisation of complaints and staff authority to take decisions*”.
- 2.4. In instances where there are several linked complaints concerning, for example, a number of applicable persons in one entity, the Head of Investigations and Hearings should consider allocating these cases to the same CO wherever possible, keeping in mind their existing case load. In doing so, the Head of Investigations and Hearings should take into account: the need for cases to be dealt with consistently and progressed simultaneously and any issues of confidentiality between the various parties associated with the same entity/complaint(s).
- 2.5. It is the responsibility of the Head of Investigations and Hearings to ensure that the name of the allocated CO and case category is registered on the database.
- 2.6. Once the categorisation and allocation have been decided by the Head of Investigations and Hearings, the file should be passed to the allocated CO. The CO should review the file as soon as possible and confirm that a formal investigation is appropriate. It is not necessary to carry out a formal review of the preliminary risk assessment at this stage. However, the CO should look at

² The BSB Handbook applies to conduct occurring after 6 January 2014, for conducting occurring before that the date the terms of the Code of Conduct 8th Edition will apply.

³ The term “Case Officer” includes all staff with the title Case Officer, Senior Case Officer and Casework Manager. It also includes the Head of Investigations and Hearings if appropriate.

the risk assessment to check that there are no issues which might call into question the basis of the referral.

- 2.7. **Partial dismissals:** in some cases, the outcome of the preliminary assessment will be that only part of the complaint should be investigated and the remaining aspect(s) dismissed. In such cases there will be two or more preliminary assessment forms (PAFs) on the file and the reasons for recommending that aspects should be dismissed should be clear. The CO is responsible for informing the complainant of the decision to dismiss one or more aspects (see paragraph 2.9 below).
- 2.8. Where a CO, on detailed reading of the complaint, disagrees with the decision to refer it to formal investigation and/or dismiss some aspects, he/she should consult with the Head of Investigations and Hearings and, if necessary, the complaint should be referred back to the Assessment Team for discussion and consultation as to whether it should be dismissed in its entirety without investigation or an alternative option followed. Any differences of view as to whether an investigation is necessary and/or aspects dismissed, which cannot be resolved within the PCD, should be referred by the Head of Conduct Assessment (HCA) to the Experienced Members (EMs)⁴ of the PCC for a final decision (see “*PG09 – Initial assessment of complaints*” for details of the referral process).
- 2.9. Following the confirmation that an investigation or partial dismissal is appropriate, the CO should also confirm/amend the aspects of the complaint based on the material available. The CO should then update the enforcement database to register the complaint as “under investigation” and, where relevant, register aspects as dismissed as well as make any other necessary amendments to the database.
- 2.10. If it is necessary to adjourn a complaint at this stage, it should first be accepted for investigation on the enforcement database before formally adjourning the complaint. Consideration should be given to whether the adjournment should be authorised by a Casework Manager, the Professional Support Lawyer or the Head of Investigations and Hearings. This will usually be dependent on the length of any proposed adjournment. A full record of the reasons for an adjournment should be recorded on the file.

⁴ The term “Experienced Member” refers to members of the PCC who have served at least two years on the PCC and covers two members of the PCC, one lay and one barrister, acting together to take decisions.

3. Establishing the aspects of external complaints for investigation

- 3.1. **Initial letter to the complainant and Summary Sheet:** following the registration of the complaint as “under investigation”, the CO should write to the complainant informing them of the decision to investigate, summarising the CO’s understanding of the complaint and listing the aspects of the complaint that will be investigated. Where relevant the letter should also inform the complainant of any decision to dismiss aspects of the complaint and give reasons for that decision (see “G06 – Dismissal letters”).
- 3.2. The summary of complaint and the aspects to be investigated should be set out on a separate “Summary Sheet”, to be enclosed with the initial letter to the complainant. The same Summary Sheet can also be sent to the applicable person(s) complained of and, if necessary, any witnesses or others involved in the complaint. Case Officers are now required to prepare a summary of complaint in all cases, including internal complaints.
- 3.3. When dealing with allegations against a number of applicable persons which have arisen from the same complaint (eg, about an entity) or complaints concerning both an entity and individuals within that entity, careful consideration will need to be given to the contents and format of the Summary Sheet. The CO must determine, on a case-by-case basis, what approach should be taken to completing the Summary Sheet (for example, whether the details of the complaints against multiple applicable persons should be summarised in one sheet, or whether the allegations against each applicable person should be set out in separate Summary Sheets).
- 3.4. The approach that should be taken will be dependent on whether it is necessary for the effective progress of the cases for the details of the complaints to be disclosed to all parties or whether each complaint against separate individuals should remain confidential so as to ensure proceedings are not prejudiced at a later stage.
- 3.5. The initial letter to the complainant should also request that the complainant contact the CO within seven days if they consider the CO’s understanding of the complaint is not accurate. If the complainant does not reply within seven days, the CO should commence the investigation based on their summary of the complaint.
- 3.6. If the complainant indicates that the Summary Sheet(s) is not accurate, the CO should review it and consider whether it should be amended. If necessary, the CO should contact the complainant to clarify any matters. The final decision on the aspects that will be investigated is for the BSB to take based on the potential breaches of the Handbook/Code. There is no requirement to agree the

Summary Sheet(s) with the complainant, but the CO should try, insofar as is possible, to ensure that the complainant is satisfied with the Summary Sheet(s).

- 3.7. **Reasonable adjustments:** the letter should ask the complainant to tell us if they require any reasonable adjustments to enable them to participate fully in the investigation. Any adjustments must be noted on the file and the enforcement database: see “*G01–Reasonable Adjustments*” for further information.
- 3.8. **Vulnerable Complainants:** when the subject matter of the complaint indicates that the complainant might be vulnerable, a witness statement should be taken as early on in the investigation process as reasonably possible. This will be appropriate where the complaint is about bullying or sexual harassment, though it may also be appropriate in other cases where the witness is potentially vulnerable.
- 3.9. **Complaints referred by the Legal Ombudsman (LeO):** where LeO has already addressed any service elements of a complaint, the letter to the complainant should make it clear that the BSB does not have the jurisdiction to reconsider those issues, unless they may also amount to a breach of the Handbook/Code. If necessary, the Summary Sheet should make it clear which issues have already been considered by LeO and therefore will not be included in the investigation.

4. Conduct of the investigation

- 4.1. The purpose of the investigation is to gather any evidence necessary to establish whether or not there has been a breach of the Handbook/Code and, if so, to obtain evidence that will support enforcement action either in the form of the imposition of an administrative sanction or a referral to disciplinary action (Determination by Consent or a Disciplinary Tribunal).
- 4.2. As noted above, Case Officers are now required to prepare a summary of complaint in all cases, including internal complaints.
- 4.3. The CO should write to the applicable person(s) complained of or in the case of a complaint about an entity, the individual responsible for responding to the complaint on the entity’s behalf (the CO may need to make enquiries of the entity in order to establish who this person will be). Within the letter, the CO should also set out the potential breach(es) of the Core Duties or parts of the Handbook identified, enclose the complaint details/complaint form, Summary Sheet and other relevant supporting documentation. The applicable person(s) should be asked to provide:

- a response to each aspect of complaint under investigation;
 - any supporting documents that are relevant to the complaint, such as notes of meetings, skeleton argument and court orders; and,
 - if applicable, responses to any specific requests for evidence the BSB requires or answers to questions.
- 4.4. When sending any enclosures by letter or email, all staff should note in the letter or email what has been enclosed, for future reference. Relying on the attachment filename in an email is generally not sufficient.
- 4.5. **Reasonable adjustments:** the letter should ask the applicable person to tell the BSB if they require any reasonable adjustments to be made to enable them to participate fully in the investigation. Any adjustments must be noted on the file and the enforcement database (in the 'Parties' tab of Flosuite): see "*G01– Reasonable adjustments*" for further information. COs need to be aware that the considerations outlined in "*PG27 – Guidance on working with witnesses*", particularly in relation to vulnerable witnesses, applies equally to applicable persons.
- 4.6. **Deadline for response:** where a complaint concerns a single applicable person, an initial deadline of three weeks for a response should be set, unless there is a clear reason on the papers to reduce or extend this deadline, for example, if there is already a request for a reasonable adjustment due to a disability. Where the complaint concerns a large entity or group of applicable persons within an entity, the CO has the discretion to set the initial deadline for a response at up to six weeks, since these types of complaint may be more complex. There may also be a greater need for an entity to gather information from a range of sources, as well as hold discussions internally, before submitting a response.
- 4.7. The CO may grant reasonable extensions if requested by the applicable person(s) and supported by good reasons. They should consult with their line manager/the Head of Investigations and Hearings if they are unsure whether an extension is reasonable in the circumstances. Guidance on the factors to be applied when considering whether to grant extensions can be found in "*PG12 – Decision making criteria*". The complainant should be informed if an extension has been granted.
- 4.8. **Confidential information:** The applicable person(s) should be informed in the initial investigation letter that they should provide a response to the complaint that can be sent to the complainant. The applicable person(s) should also be informed that if they wish to include confidential or privileged information as part of their response, the information should be provided on a separate sheet,

clearly marked as confidential (or privileged). This would be appropriate where the applicable person(s) wishes to provide information such as copies of instructions, or confidential, personal or medical information. The letter should inform the applicable person(s) that the decision about whether to disclose the information they wish to keep confidential will be for the BSB to take after considering their reasons for wanting to keep it confidential.

- 4.9. At any stage in the investigation, the CO will need to consider sharing with the complainant details of other related complaints, including internal complaints, which they are not already aware of. The decision to share this information will be dependent on the circumstances and should be considered only where it is necessary for the expeditious and fair investigation of a case and/or where comments may be required from the complainant. An appropriate balance will need to be struck between maintaining confidentiality and ensuring that an effective and open investigation is carried out.
- 4.10. From time to time the BSB undertakes internal investigations arising from proceedings where there are other parties affected (for example the defendant client in a successful criminal appeal). In such circumstances, consideration should be given whether to add this party as an interested person so that they can be kept updated of the progress of the complaint. The Case Officer may also wish to contact the affected party as a potential witness.
- 4.11. Disclosing details of a complaint with anyone (including a complainant) associated with, but not involved in, the investigation of a complaint, will be made in accordance with rE93.9 of the Complaints Regulations (that is, "...for any good reason"). Permission will need to be sought from an Office Holder or authorised manager where such action is considered appropriate.
- 4.12. **Additional enquiries and obtaining advice:** it is for the CO to decide, based on the individual facts of the complaint, what further enquiries should be carried out as part of the investigation. If necessary, a member of the PCC or the Prosecution Panel can be asked to provide advice on the enquiries that need to be made. Whether such advice is needed will depend on the individual facts of the case.
- 4.13. As a starting point, consideration should be given to making enquiries of:
 - a) the instructing solicitor, if there is one;
 - b) any potential witnesses, whether or not identified by the complainant (this may include parties who have been affected by an internal complaint, for example clients of a barrister who has been the subject of a judicial referral/ criticism);
 - c) opposing counsel and/or the Judge;

- d) the relevant Court in relation to judgments, evidence of convictions and/or transcripts of hearings; and
 - e) the Police and/or Crown Prosecution Service.
- 4.14. **Investigation Plans:** An investigation plan must be completed in all cases that fall within category 2 or 3. In straightforward category 1 cases this may not be necessary but where there are witnesses and/or points in issue then it ought to be considered. A template investigation plan can be generated from the case management system and it should be used to record the rationale behind the steps in an investigation and what evidence is needed as the case progresses.
- 4.15. Investigation Plans will also be necessary where there is the potential for an application to disqualify arising from the complaint. In such cases, careful consideration should be given to what evidence, if any can be obtained to establish if the causation element of the disqualification condition is satisfied.
- 4.16. Upon receipt of any responses or evidence in the case the CO should review the Investigation Plan and, if the steps are altered or added to, update the plan accordingly.
- 4.17. **Letters to potential witnesses:** communications with potential witnesses should include a summary of the issues on which comments or information is sought and it may be appropriate to send a copy of the “Summary Sheet”. If the potential witness is only involved in a small part of the complaint, the letter and any documents sent with it should be restricted to the specific issue(s) about which comments or information is required. Potential witnesses should be sent a tailored list of questions, rather than a general request for comments, to ensure that the responses provide the information needed to assess whether there has been a breach of the Handbook/Code. All initial letters to the complainant, the applicable person(s), potential witnesses and others must include the standard information on the General Data Protection Regulations, unless this has already been sent i.e. to the complainant.
- 4.18. The normal deadline for potential witnesses to respond to enquiries is two weeks. However, the CO can grant reasonable extensions if there are good reasons to support such a request; extensions should normally be granted where they are required as a reasonable adjustment for someone with a disability. Guidance on factors to take into account when considering requests for extensions can be found in “PG12 – Decision making criteria”.
- 4.19. **Investigation visits:** as a further general investigation tool, visits to chambers/entities for the purposes of collecting evidence can be undertaken where necessary, in accordance with rC70. These visits are distinct to any visits

carried out by the Supervision Team. A visit may be necessary where the complaint concerns, for example, significant administrative failures, accountancy issues, or where the CO suspects that a barrister has handled client money.

- 4.20. **Contact with the complainant during the investigation:** normally, the response to the complaint from the applicable person(s) should be sent to the complainant for information and any necessary comment. However, the BSB retains the discretion not to disclose this response, or parts of it, if there is good reason to do so (see paragraph 4.21 – 4.22). If specific comments are required from the complainant, the CO should clearly explain the issues about which comments are needed by posing relevant questions, rather than asking for general comments.
- 4.21. In some circumstances, it may be appropriate to provide the complainant with a redacted or summarised version of the applicable person’s comments, for example, when the response includes:
- reference to relevant but confidential or legally privileged information;
 - reference to matters irrelevant to the substance of the complaint; and/or,
 - information relating to other complaints not involving the complainant.
- 4.22. Once the final decision has been taken to redact the information, this should be done using **black marker pen** and those doing the redacting should ensure that this is done carefully. Using the electronic facilities to block out text is not effective and the information can be potentially revealed if sent electronically. Therefore, all redactions should be made manually to mitigate this risk.
- 4.23. Since it is possible to read through marker pen, only photocopies of redacted papers should be sent to the person making the request. Photocopies should be done on a dark setting as it is sometime possible to ‘see through’ the marker pen on pages photocopied on a lighter setting. The original copies of the redacted information should be retained on the case file.
- 4.24. If the applicable person does not want all of part of their response sent to the complainant for any other reason, the CO should discuss the case with their line manager or the Head of Investigations and Hearings. It may be necessary to refer the matter to an Office Holder or Experienced Member of the PCC for advice on the issue. In all cases, either the Head of Investigations and Hearings or the Director of Professional Conduct should authorise any decision not to disclose all or part of the applicable person’s response to the complaint.

- 4.25. **Gathering further evidence:** on receipt of any information and responses from the applicable person, the complainant or witnesses, consideration should be given to whether the information identifies further sources of relevant evidence that should be obtained. It is important that all reasonable lines of enquiry are pursued during the investigation to ensure that a robust decision can be made at its conclusion.
- 4.26. When relying upon witness statements given to a third party the Case Officer should be alive as to whether credibility of the witness is in question. Where this is the case, it is likely to be appropriate for the Case Officer to make their own assessment of credibility for the purposes of the investigation. This can be done by taking a further statement or exploring issues. Consideration should be given to the factors within 'PG27 *"Guidance on working with witnesses"*'.
- 4.27. **Updates to the complainant on progress:** the CO must keep the complainant informed of progress of the investigation and take all reasonable steps to manage expectations. The frequency at which updates are given will depend on the stage the investigation has reached. For example, if a significant extension has been granted, the complainant should be informed of this and told that a progress update will be provided once the response is received. In general, complainants should be kept informed of the progress of a complaint on a monthly basis and in any event no later than any date previously communicated. The complainant should be told on each occasion:
- what has been done to date;
 - what is being done now and/or what will be done next; and,
 - when they can expect a further update.
- 4.28. **Seeking advice from the PCC:** at any stage of the investigation, the option is available to refer a complaint to an individual member of the PCC, the Office Holders or to the full PCC for advice or for an interim decision to be made. Where such a referral is made, the CO should ensure that the request for advice/a decision is accompanied by a note/covering email outlining the complaint, the issues and the advice/decision required. Where possible, the CO should include a recommendation as to the appropriate course of action rather than just asking the Office Holders for their views. This information should then be passed to the Professional Conduct Assistant in the Operational Support Team, who will then be responsible for allocating the complaint to a relevant PCC member(s) as directed.
- 4.29. **Disclosure of documents during an investigation:** Although a "Disclosure Log" is to be completed should the matter be referred to the disciplinary stage, consideration should be given by the case officer as to completing a record of which documents have been sent out by the BSB, to whom and when. This will

be particularly useful in cases which are document heavy and there is regular correspondence with other parties, for example an investigation which involves a number of authorised persons. Such a record will also be of importance in the event of a challenge during disciplinary proceedings or a Subject Access Request being made (see “*PG23 Data Protection Act protocol and guidance on handling requests for personal data (“Subject access requests”)*”).

- 4.30. While the investigation of the complaint is still ongoing, disclosure of the fact of a complaint can only be made in accordance with “*P13 – Disclosure of ongoing complaints*”. The Case Examiner’s Report should not be disclosed in advance of its consideration by the PCC. Following the PCC’s consideration, these reports can be disclosed on request but the Case Examiner’s name must be redacted from the report.
- 4.31. **Disclosure in linked cases:** When investigating linked cases, consideration must be given to disclosing the fact of one complaint, or the documents relating to that complaint, to the barrister facing the linked complaint⁵. In particular, if something is submitted in one complaint that undermines our decision in a second complaint, then that should be disclosed to the barrister facing the second complaint. Such disclosure can be authorised by the Head of Investigations and Hearings, Head of Conduct Assessment, or Director of Professional Conduct under rE93.9 (“other good reason”) and the decision and reasoning behind it must be documented on both files.
- 4.32. **Case management meetings:** In keeping with the BSB’s holistic approach to complaints handling, COs should arrange formal case management meetings with other departments in the BSB, where there is an overlap in functions with other departments e.g. with where the Supervision Department is also dealing with issues arising from the circumstances of the complaint (see also paragraph 11.5). Cases concerning entities are more likely to require formal case meetings. A record should be kept of all case management meetings

5. Evidence of potential new complaints arising from an investigation

- 5.1. During the course of investigating a complaint, information may be revealed that shows evidence of a potential breach of the Handbook/Code that was not included in the original complaint. In these circumstances, the Head of Investigations and Hearings, the Professional Support Lawyer and Casework Managers (as well as the Director of Professional Conduct) have the authority to raise an internal complaint as a separate matter.

⁵ When dealing with disclosure in linked cases at disciplinary proceedings stage, see “*PG16 – Disclosure of Documents in Disciplinary Proceedings*”.

- 5.2. Initial consideration needs to be given to whether the new potential breach should be treated as an aspect of the original complaint or whether a new internal complaint should be raised. This question will turn on the particular facts and circumstances of the complaint, but the general test is whether there is a sufficiently similar factual nexus with the original complaint.
- 5.3. In order to determine whether it is appropriate to raise an internal complaint, a preliminary assessment will need to be conducted in line with paragraphs 9.5 – 9.18 of “*PG09 – Initial assessment of complaints*”. There is no necessity for the matter to be referred back to the Assessment Team for such an assessment to be made and it can be carried out by COs in the I&H Team subject to the Head of Investigations and Hearings, the Professional Support Lawyer, a Casework Manager or the Director of Professional Conduct taking the final decision to raise an internal complaint.
- 5.4. Where the CO identifies, during the course of the investigation of an entity-related complaint, other culpable applicable persons within that entity (whether for potential professional misconduct or an application for disqualification), they must open separate complaints (linking these with the existing complaints), and ensure that each person is given the opportunity to respond to the allegations in writing (in compliance with rE40). Any decision to adjourn other aspects of a linked complaint, whilst further investigation takes place, should be taken on a case-by-case basis.

6. Action following the conclusion of an investigation

- 6.1. The investigation will conclude at the stage at which all relevant evidence has been gathered, or the deadlines for responses have expired without a reply.
- 6.2. At the conclusion of the investigation, the CO should review the totality of the evidence to assess what action should be taken in accordance with rE37 of the Handbook. The CO must complete the electronic “Post-Investigation Assessment Form” (PIF). The purpose of the post-investigation assessment is to determine what action should be taken in respect of the complaint.
- 6.3. **Evidence of a breach:** the first step of the post-investigation assessment is to determine whether there is sufficient evidence, on at least the balance of probabilities, to prove that a breach(es) has occurred. If there is insufficient evidence to prove the breach then the complaint must be dismissed, with or without advice and the relevant sections of the PIF completed. If there is insufficient evidence of a breach there is no need to review or update the risk assessment. However, if there is sufficient evidence, then the CO should go on to review the risk assessment.

- 6.4. **Review of the risk level:** where there is evidence of a breach(es) the CO should review all the answers to the risk questions given at the preliminary assessment stage and, if necessary, adjust the answers in light of the information obtained during the investigation or any change in circumstances since the complaint was referred for investigation. Any changes to the answers to the risk questions will be automatically registered on the system and, if applicable, a revised risk level will be automatically calculated.
- 6.5. The CO should consider whether the automatically generated risk level is appropriate to the complaint. The risk level can be overridden by the CO if there are demonstrable and justified reasons for doing so. The decision on whether to override a risk level must be based on the evidence and all the circumstances and facts of the case and the reasons must be recorded on the PIF. The CO should consult with their line manager or the Head of Investigations and Hearings if they are unsure about what risk level is appropriate for a complaint and any adjustment to the risk level should be recorded on the PIF along with reasons for the adjustment.
- 6.6. Following the post-investigation assessment of a complaint, and subject to the categorisation of the complaint (see section 7 below), the options for disposal are:
- a) staff dismissal of the complaint on the basis that there is insufficient evidence of a breach of the Handbook;
 - b) staff or Experienced Members (two EMs acting together) dismissal of the complaint with formal advice given to the applicable person;
 - c) staff referral of the complaint to the Supervision Team where the risk is low or medium and any of the factors indicating that supervisory action, as opposed to enforcement action, would be appropriate. Such factors are highlighted in the risk assessment (see also “*PG20 – Supervision referral process*” for details of the referral process.);
 - d) staff decision to impose an administrative sanction (a warning, fixed penalty fine of £400/£600 for complaints about individuals and entities respectively, or a discretionary fine of up to £1,000/£1,500 for individuals and entities respectively) where there is clear evidence (on the balance of probabilities) that the conduct constitutes a breach of the Handbook (and where the risk is low to medium and in appropriate circumstances). The breach must not be sufficiently serious to warrant disciplinary action for professional misconduct (see “*G02 – Administrative Sanctions and*”

Appeals” for further information on the application of administrative sanctions);⁶

- e) staff referral of the complaint against a regulated person direct to a Disciplinary Tribunal or the Determination by Consent procedure where an administrative sanction is considered not to be appropriate or proportionate in all the circumstances; or,
- f) referral of the complaint to the PCC for a decision.

- 6.7. Where the CO determines that a decision under delegated authority is appropriate, the reasons for any such decisions should be recorded and sent to the next manager in the chain to review the CO’s recommendation and make the final decision. For example, a CO should refer the decision to the Casework Manager, and a Casework Manager should refer to the Head of Investigations and Hearings, or if he/she is unavailable, to the Senior Professional Support Lawyer.
- 6.8. In all cases, the CO should record the decision on what action to take in the appropriate sections of the PIF.
- 6.9. In cases where the matter has been referred back by a Tribunal under rE209, guidance can be found in “G05 - *Guidance on 3 and 5 person disciplinary tribunal cases.*”

7. Application of the risk level to post-investigation decisions

- 7.1. The final risk level, as adjusted if necessary by the CO, will assist with determining what action should be taken on the complaint:
- i. **Low** – where a complaint shows evidence (on the balance of probabilities) of one of more Handbook breaches but the risk level is low, consideration should be given as to whether it is appropriate and proportionate in line with the Enforcement Strategy to take any form of enforcement action. rE37.2 allows complaints to be dismissed post-investigation where in the all the circumstances enforcement action is not warranted, although staff are reminded that Casework Manager sign off is required for this.
 - ii. **Medium** – where a complaint shows evidence (on the balance of probabilities) of one or more Handbook breaches, there is a presumption

⁶ Please note, administrative sanctions cannot be imposed on ‘non-authorised individuals’ (see definition 138 at Part 6 of the Handbook), however, where appropriate, the sanction can instead be imposed on the entity within which the non-authorised individual works.

that an administrative sanction would be appropriate and proportionate to meet the risk (see also paragraph 7.2 below). A referral to the Supervision Team might also be appropriate in such cases if the relevant risk factors are present.

- iii. **High** – where the risk level is high and there is evidence that would meet the applicable standard of proof⁷, there is a presumption that the breach(es) and/or the surrounding circumstances are: serious; administrative sanctions would not be appropriate and/or proportionate; and, therefore the matter should be referred to disciplinary action as professional misconduct.

7.2. **Administrative sanctions:** where the risk level of a complaint is assessed as medium, there may be specific risk factors present that would indicate that the imposition of an administrative sanction is unlikely to be proportionate and sufficient in the public interest. In these circumstances, the CO should consider adjusting the risk level to high. Such factors include, but are not limited to:

- a) the BSB regulated person having a previous disciplinary history in relation to similar conduct;
- b) the BSB regulated person being known to have worked in an entity or entities where previous similar enforcement/disciplinary action has been taken, and the BSB regulated person appears to have contributed substantially to such action being taken;
- c) the BSB regulated person having previously been subject to an administrative sanction for similar conduct;
- d) the conduct has wider implications for the administration of justice or public confidence in the regulatory system;
- e) information about the breach should be in the public domain in order to protect the public; and/or,
- f) the Sentencing Guidance⁸ indicates that a suspension, disbarment or disqualification order might be imposed by a Disciplinary Tribunal in relation to the conduct.

7.3. For clarity's sake, there may be circumstances in which a case is appropriately assessed as medium risk but an administrative sanction is not appropriate, and the case is therefore referred for disciplinary action. Such cases should be rare

⁷ That is, the criminal standard for conduct that commenced prior to 1 April 2019, or the civil standard for conduct that commenced after 31 March 2019 - see 'G24 – Guidance on applying the correct standard of proof'.

⁸ The "Sentencing Guidance" is produced by the Council of the Inns of Court/the Bar Tribunals and Adjudication Service (BTAS) and is available on the BTAS and BSB websites.

and reasons should be documented for both the lower risk rating and the referral.

8. Staff authority to take decisions

8.1. Relevant staff have the authority to take the following post-investigation decisions in accordance with “*PG11 – Categorisation of complaints*”. Staff can⁹:

- a)** dismiss complaints classified as category 1;
- b)** dismiss complaints classified as category 2 where the evidence is weak and is unlikely to be proved on the balance of probabilities;
- c)** impose administrative sanctions in relation to category 1 and 2 complaints; and
- d)** refer complaints classified as category 1 direct to a Disciplinary Tribunal.

8.2. It is good practice and encouraged for Case Officers to send a memo to their line manager before taking a dismissal decision to confirm the approach, even when the delegated authorities permit the decision to be taken by the Case Officer. However, there may be times when it may be necessary to take the decision without checking first, such as where urgency requires it.

8.3. Staff do not have the authority to take decisions on category 3 complaints which must be referred to the PCC. Category 3 complaints include those that:

- have attracted, or are likely to attract, media attention;
- may have wider implications for the public interest, the Bar or a section of the Bar, or the BSB; and/or,
- have been referred to the BSB by another “approved regulator” as defined in the Legal Services Act 2007.

8.4. Staff also do not have the authority to take decisions to refer complaints that potentially satisfy the disqualification condition to a disciplinary tribunal: such decisions must be taken by the PCC.

8.5. In circumstances where an urgent referral decision is needed on a category 3 complaint, or the decision to refer is so clear as to make referral to the full PCC an unnecessary delay, consideration can be given to asking the Chair of the PCC to authorise, under rE3, that in the individual case the decision can be

⁹ For an initial period of one year from the receipt of the first entity-related complaint, all complaints which concern an entity, regardless of their category, will be referred to the PCC to make a final decision on that complaint. This period of review may be subject to extension or reduction, in light of the number and complexity of entity-related complaints received.

taken by the Office Holders. A formal authorisation covering such decisions is in place but the Chair's written authority to override the terms of the policy on categorisation will be required.

8.6. **Referral to the PCC:** while all category 3 complaints must be referred to the PCC and some category 2 (see paragraph 7.1 (b)), the option is always available to refer any complaint in categories 1 and 2 to the PCC to make the final decision¹⁰. The decision to refer a complaint to the PCC will depend on the facts and circumstances but a referral to the PCC is likely to be appropriate where:

- a) the decision on what action to take is not clear;
- b) there is ambiguity in the evidence; and/or,
- c) there are sensitivities surrounding the complaint that mean it would be appropriate for the PCC to consider the matter and take the decision.

9. Reconsideration of decisions

9.1. There is no right of appeal against decisions to dismiss or refer complaints to disciplinary action at the post-investigation stage. However, where the complainant or applicable person writes to the BSB objecting to the decision (known as a "request for review") the actions set out in the paragraphs below should be taken. The term "reopen" applies to any complaints that have been closed as a result of a dismissal or other action: the term "reconsideration" applies to referrals to disciplinary action. When assessing a "reconsideration" reference should be made to "*PG07 – Settling and withdrawing charges*".

9.2. Subject to the terms of PG07, the "request for review" should be referred to the next more senior decision maker based on who took the original decision. The consideration of "requests for review" will be as follows:

- a) CO or SCO original decision – referral to Casework Manager;
- b) Casework Manager original decision – referral to Head of Investigations and Hearings;
- c) Head of Investigations and Hearings original decision – referral to Director of Professional Conduct (DoPC);
- d) DoPC original decision – referral to EMs;

¹⁰ But see Paragraph 8.3. above.

- e) Decisions by any Officer based on advice from a PCC member – referral to an Office Holder, or an EM nominated by an Office Holder;
 - f) EMs original decision – referral to Office Holder;
 - g) Full PCC decision – the CO should consider the contents of the request for review and assess whether it contains material that would warrant the complaint being reopened or reconsidered. The case should then be referred to the original Case Examiner with a recommendation as to what action should be taken. If the new information/evidence indicates that the original complaint should be reopened or reconsidered, subject to the Case Examiner’s views, the matter will need to be put to the full PCC with an accompanying Case Examiner report. In some circumstances (such as unavailability or because of the content of the request) it may be more suitable for a different Case Examiner to consider the request for review. If this situation arises the matter should be discussed with the Investigations and Hearings Team Manager and any rationale for such a decision recorded.
- 9.3. It should be noted that it is possible for individual aspects of a complaint to be reconsidered, even if, say, those aspects were dismissed post-investigation but other aspects have been taken forward for PCC consideration.
- 9.4. Where a “request for review” requires consideration by an Office Holder, EMs or PCC member, the case should be passed to the OST for formal allocation, once the CO has had any necessary discussions with the applicable persons as to whom the case should be allocation. This allows a proper record to be kept of case allocation and ensures that case allocation across the PCC is, as far as possible, evenly distributed.
- 9.5. The person considering the “request for review” will need to decide whether the complaint should be reopened or reconsidered under rE90. Guidance on the factors to be taken into account can be found in “*PG12 – Decision making criteria*”. The basis for such a decision will be whether:
- new evidence has been provided that indicates the original decision may be flawed or no longer applicable/appropriate; or,
 - there is “some other good reason” why the complaint should be reopened or reconsidered.
- 9.6. If it is determined that no action should be taken on the “request for review”, the relevant decision maker should write to the complainant giving reasons for the decision. If a decision is taken to reopen or reconsider the original decision on the complaint, this should be recorded on the database and the complainant and applicable person informed. If the decision is to reopen a dismissed

complaint, the matter should be formally reviewed: further investigation may be required but may not be necessary.

- 9.7. The reopening or reconsideration of a complaint, may or may not result in a different decision being taken but in all cases the complainant, if applicable, and the applicable person should be informed of the outcome and the reasons for it.
- 9.8. The authority to take decisions on reconsiderations or reopened complaints will be the same as the authority to consider “request for reviews” as set out in paragraph 9.2.
- 9.9. As noted in PG07, in cases under 9.2(g) that need to be put back to the full PCC for reconsideration, the Office Holders are authorised under rE3 to take such decisions and may do so in 9.2(g) cases, most commonly if there are significant time pressures but there may be other good reasons to do so. In such circumstances, if the original Case Examiner is also an Office Holder they may be best placed to exercise the power to reconsider the matter, particularly in a complicated matter with a long history and where time constraints are tight, notwithstanding their involvement in the original case.

10. Withdrawing complaints

- 10.1. On rare occasions it may be necessary to “withdraw” an internal complaint either during the course of an investigation or following a referral to disciplinary action. A withdrawal is not a “dismissal” or a final determination of a complaint: it is an indication that for some reason it is not appropriate or possible to proceed with the complaint. The types of situations that might give rise to the need to withdraw a complaint are:
 - where evidence comes to light that an internal complaint has been raised in error e.g. a misunderstanding over a payment of a fine or completion of CPD; or,
 - where a barrister has been disbarred and there is no public interest in proceeding with other outstanding complaints; or
 - where there has been late compliance with a disciplinary order which is corrected shortly after an internal complaint has been raised e.g. a fine is paid in full shortly after an internal complaint for non-compliance has been opened.
- 10.2. Complaints should not be withdrawn where the issues relate to the cogency of the evidence. Advice from a Case Examiner should be sought or, where the complaint has been referred to disciplinary action, it should be put back to the PCC to reconsider under Regulations rE90 and rE91.

- 10.3. Only the Director of Professional Conduct, the Head of Investigations and Hearings, the Professional Support Lawyer and Casework Managers are authorised to withdraw complaints.

11. Informal reports to the Supervision Team

- 11.1. It is important that relevant information is shared between BSB departments/teams. The sharing of information on enforcement issues is crucial and such information, in summary/anonymised form, should be made available to other teams where relevant.
- 11.2. Information in relation to complaints which: have been dismissed; did not result in an internal complaint being raised; or are received by the PCD/PCC by any other avenue, could be relevant to the BSB's wider assessment of risk particularly the work of the Supervision Team. Therefore, a system for submitting "informal reports" from the PCD to the Supervision Team has been put in place (see "*PG20 - Supervision and PCD referrals.*")
- 11.3. Staff in the PCD are responsible for submitting "informal reports" but the PCC (or individual members of the PCC) can ask for a report to be submitted. As a guide, the following types of information might warrant the submission of an "informal 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.
- 11.4. The submission of an "informal 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). For more information on the submission of informal reports see "*PG20 - Supervision and PCD referrals.*"
- 11.5. Staff should also consider holding case management meetings (see paragraph 4.30 above) prior to or following the submission of an informal report, should either Team deem this to be beneficial and particularly where the PCD and

Supervision Team are simultaneously pursuing matters about the same individuals, entities or chambers.

12. Checks and balances on staff decision making

12.1. A number of checks and balances are in place to monitor decisions taken by staff in the PCD at the post-investigation stage. These are:

- a) Regular reports to the PCC** – a summary report of all staff decisions to dismiss complaints or impose administrative sanctions is included in the papers for each PCC meeting.

- b) Quality Review Sub Committee of the PCC** – a standing sub-committee of the PCC reviews a percentage of staff decisions on a six-monthly basis to consider whether they were taken in line with the procedures and whether, on their merits, the decisions were reasonable (see “*PG18 - Review of staff decisions by the Quality Review Sub-Committee*” for full details)¹¹.

¹¹ The QRSC will not be required to review any entity-related complaints for the period that they are being referred to the PCC for a decision (see paragraph 8.1. above).