

**BAR
STANDARDS
BOARD**

REGULATING BARRISTERS

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1. Background

- 1.1. The Complaints Regulations, Part 5, Section A of the BSB Handbook (the Regulations) set out the structure for taking decisions on complaints and provide for a range of decisions to be taken at various stages in the enforcement process. The internal procedures for dealing with complaints are set out in '*PG09 - Initial assessment of complaints*' and '*PG10 - Investigation of complaints*'. There are also a range of other guidance documents that support the processes.
- 1.2. This document provides further guidance on the application of the criteria to apply when taking decisions under the Regulations as well as the internal procedures. These criteria should be taken into account when taking relevant decisions under the Regulations. It does not cover decisions in relation to disciplinary proceedings, except with regard referrals for disciplinary action and adjournments.
- 1.3. Where factors that may be relevant to a decision maker's consideration are listed in this document, they should not be considered an exhaustive list of relevant factors (whether or not they are described as not being exhaustive), nor does the order of listing indicate a scale of preference.
- 1.4. The term "decision maker" is used throughout this document and covers both the Professional Conduct Committee and all those authorised under Rule E3 of the Regulations to take decisions. This includes but is not limited to:
 - a) Office Holders;
 - b) Experienced Members of the Committee ("EMs")¹;
 - c) The Director of Professional Conduct;
 - d) The Head of Conduct Assessment;
 - e) Assessment Officers;
 - f) The Head of Investigations and Hearings;
 - g) The Professional Support Lawyer;
 - h) Casework Managers;
 - i) Senior Case Officers; and
 - j) Case Officers.
- 1.5. For the purpose of this document, the term 'barrister' includes any 'applicable person'. In definition 9 at Part 6 of the BSB Handbook, the term 'applicable person' refers to (as at the time of the conduct complained of):

¹ An "Experienced Member" of the PCC is defined as a member of the PCC who has served at least two years and "Experienced Members" refers to one lay member and one barrister member of the PCC acting collectively to take decisions.

- individual barristers (practising or unregistered) or registered European Lawyers;
 - authorised (non-BSB) individuals or BSB regulated managers; and/or,
 - BSB entities; and/or,
 - non-authorised persons employed by a BSB entity.
- 1.6. This document deals only with complaints relating to conduct that occurred after 6 January 2014, that is, since the implementation of the BSB Handbook. In the event that a complaint relates to conduct that occurred before 6 January 2014, decision makers should refer to the archived policy.

2. General – Regulatory Objectives and the Enforcement Strategy

- 2.1. All decisions taken under the Regulations must take into account the Regulatory Objectives as set out in Section 1 of the Legal Services Act 2007. Those Objectives 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.
- 2.2. The professional principles referred to in paragraph 2.1 (h) above 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 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 the client should be kept confidential.
- 2.3. The decision-making regime is also underpinned by the Bar Standards Board's Enforcement Strategy. Under rE5, the Enforcement Strategy must be taken into account by decision-makers when considering which enforcement powers to use.

- 2.4. In addition, under I6.2, when considering how to respond to alleged breaches of the Handbook, decision makers are required to take into account whether or not a Handbook Outcome has been, or might have been, adversely affected.

3. Equality and reasonable adjustments

- 3.1 It is essential that at every stage of the complaints process, decision makers take into account the need to avoid discrimination and advance equality. Decision makers should pay particular attention to complaints which raise concerns about, or could lead to, discrimination in relation to the those with “protected characteristics” under the Equality Act 2010 (whether complainant or barrister).
- 3.2 The “protected characteristics” are:
- Age
 - Disability
 - Gender assignment
 - Marriage and Civil Partnership
 - Pregnancy and maternity
 - Race
 - Religion and belief
 - Sex
 - Sexual orientation.
- 3.3 If a decision needs to be taken in relation to a complaint that involves discrimination or equality issues and there appears to be evidence to support the allegation, advice can be sought from a member of the PCC with equality and diversity experience. Any decision to seek such advice should be discussed with the Head of Conduct Assessment, Head of Investigations and Hearings or the Director of Professional Conduct. A record of any rationale behind any such decision should be added to the complaint file (manually and electronically).
- 3.4 **Reasonable adjustments:** in relation to people who are disabled, the BSB is subject to a statutory obligation under the Equalities Act 2010 to make “reasonable adjustments” to prevent discrimination arising in relation to the application of our processes (“provision of services”) and the decisions taken (“exercise of a public function”). It is therefore important that reasonable adjustments are taken into account at every stage of the complaints process and in relation to every decision taken. Further guidance on how to apply

reasonable adjustments is available in '*G01 – Reasonable adjustments guidance*'.

4. Complaints in relation to entities

- 4.1. When considering a complaint relating to an entity, care must be taken as to whether the complaint should be registered against the entity, an individual or individuals working in the entity, or both. This will depend largely on the nature of the conduct alleged and how closely it is related to the business of the entity. In relation to individuals working in an entity, see the disqualification section below.
- 4.2. A complaint about an entity that also covers complaints about one or more relevant persons within that entity should be treated (and therefore recorded on the database) as separate, but linked, complaints ("dual complaints"). Wherever possible, dual complaints will be dealt with at the same time, and by the same decision maker. Where appropriate, information about progress of a case and decisions taken on it may be shared with/between the linked parties. For example, where consideration of linked complaints is adjourned.
- 4.3. Complaints about entities may require more ongoing information sharing between the supervision team and the Assessment Team than cases about individuals, and case management meetings should be arranged where necessary.

5. Referrals from the Legal Ombudsman

- 5.1. All client complaints will normally be referred to the Bar Standards Board by the Legal Ombudsman (LeO). The detailed procedure for handling referrals from the Legal Ombudsman can be found in '*PG08 – Referrals from the Legal Ombudsman*'. Most decisions in relation to complaints referred by LeO will be taken in accordance with the criteria or factors set out elsewhere in this document e.g. dismissals (sections 6, 7 and 12), referrals to investigation (section 10) or referrals to disciplinary action (section 15).
- 5.2. However, where a complaint referred by LeO relates to both issues of service and misconduct ("hybrid complaints"), the BSB will need to decide, on receipt of the complaint, whether to await the outcome of the LeO investigation before deciding how to proceed or whether to commence an immediate investigation in parallel with the LeO investigation. The default position is that the BSB will await the outcome of the LeO investigation, but consideration will always need to be given to whether an immediate investigation is appropriate.

- 5.3. Decisions about “hybrid complaints” may be taken by staff or, on request, EMs. They will decide, in line with the guidance provided in ‘PG08 – *Complaint referrals to and from LeO*’:
- a) Whether referrals from LeO on conduct issues should be investigated immediately; and
 - b) What action should be taken in relation to the conduct elements of a complaint following the outcome of a LeO consideration of the service elements of a hybrid complaint (see 9.2 and 9.3 below).
- 5.4. When considering whether to commence an immediate investigation, decision makers should take into account the following factors that might suggest that an immediate investigation is required:
- i. **the impact on, and risk to, the public of not taking immediate action** – is there a significant risk to the public in the barrister being able to continue to offer legal services?
 - ii. **the gravity of the allegations** – is the alleged conduct serious and would a delay in taking action have a negative impact on the interests of the public or consumers or on the reputation of the BSB?
 - iii. **the weight of the evidence** – is there clear evidence of a breach of the BSB Handbook that would not be affected by the outcome of the LeO investigation?
 - iv. **the potential problems that might arise from carrying out a parallel investigation** – is it possible to carry out a parallel investigation without creating undue confusion and unnecessary duplication of work?
 - v. **the length of time LeO is likely to take to investigate the service issues** – does it appear that the LeO investigation will take more than three months to conclude?

6. Dismissal of complaints – pre-investigation

- 6.1. **Threshold test** – in all situations, the decision about whether a complaint should be pursued following the preliminary assessment is ultimately based on whether the complaint potentially discloses a breach of the Handbook which is “apt for further consideration” (Rule E29).
- 6.2. The BSB takes a risk-based approach to enforcement decision making and therefore all complaints that disclose a potential breach of the Handbook will

be subject to a risk assessment to determine the risk to the Regulatory Objectives. The outcome of the risk assessment will result in a high, medium and low rating and this rating provides an indication as to whether, or what, enforcement action may be required. The indication is not binding on the decision maker, and risk ratings can also be overridden at each stage.

- 6.3. At the preliminary assessment stage, a low risk rating indicates that no specific action should be taken on the complaint, although it may be that informal advice would be appropriate if there are concerns about the conduct but it does not amount to a breach. A medium or high-risk rating indicates that the complaint should be referred for formal investigation. The risk rating will be reviewed post-investigation, once all relevant evidence has been gathered.
- 6.4. **Applying the 12 month time limit (rE29.2 and rE31):** the Regulations stipulate that complaints submitted outside the 12 month time limit should only be pursued where consideration is justified in the public interest, having regard to of the Regulatory Objectives (set out in section 2 above). If one or more of the Objectives would be served by proceeding with consideration of the complaint, despite the lapse of time, then the time limit should be waived. Otherwise, the complaint must be dismissed. Aspects that are not out of time can be pursued even if other aspects of the complaint are dismissed as out of time. The time limit only falls to be considered at the pre-investigation stage.
- 6.5. In deciding whether to pursue an out of time complaint, a number of factors should be weighed against each other. Factors that may be relevant include:
- The seriousness of the alleged conduct or its consequences;
 - The potential ongoing risk posed to the public;
 - Whether the delay was due to a delayed referral from the Legal Ombudsman or other body;
 - Whether the complaint can be properly and fairly investigated in light of the delay;
 - Whether or not a Handbook Outcome has been, or might have been, adversely affected; and/or
 - Whether the complaint is likely to evidence a potential breach of the Handbook if it were considered within time.
- 6.6. **Is further consideration justified? (rE32):** where a complaint is within the time limit, or the time limit has been waived, the next step is to consider whether further consideration of the complaints is justified. Further consideration will not be justified where one or more of the criteria set out in rE32 apply and in those cases, the complaint should be dismissed. In assessing whether the criteria apply, decision makers should take into account the following:

a) The complaint lacks substance

A complaint 'lacking substance' would include complaints where;

- the behaviour or act complained of does not disclose an act or conduct capable of being a breach of the Handbook; and/or
- the behaviour or act complained of is based on rumour, gossip, hearsay or speculation.

b) The complaint cannot be properly or fairly investigated

This criterion should not be applied unless there is clear evidence showing that there is no reasonable prospect of either a fair investigation or the barrister being able to respond properly to the complaint. Factors to be taken into account by decision makers when assessing the application of this criterion include:

- Whether the lapse of time would clearly impact on the memories of witnesses or parties to the complaint e.g. solicitors, opposing counsel or judges to the extent that it would be impossible to rely on the evidence provided by such witnesses;
- Relevant documentary evidence is unlikely to be unavailable, or has been lost, due to the lapse of time: this would include the lack of availability of court transcripts;
- Key witnesses have moved away and are not contactable due to the lapse of time; and/or
- The barrister has died or is physically or mentally unable to respond (see also (d) below and "reasonable adjustments" at section 3 above).

c) The complaint is insufficiently serious to justify action

It is theoretically possible to bring almost any type of behaviour by a barrister within the terms of the Handbook and therefore a risk based decision should be taken based upon the Enforcement Strategy and impact upon the Regulatory Objectives. In assessing whether this criterion should be applied, decision makers should take into account the following factors, which are not exhaustive:

- Whether the conduct is trivial and taking any further action would be disproportionate in light of the risk to the Regulatory Objectives and professional principles;
- Whether or not a Handbook Outcome has been, or might have been, adversely affected;

- The outcome of the risk assessment (the higher the category of risk, the less suitable it will be for dismissal at this stage); and/or
- Whether the conduct is not such that a reasonable person would consider it amounts to behaviour that would warrant regulatory action.

The seriousness of the complaint should be considered in the wider context wherever possible, including any particular sensitivities of the complainant or others that the barrister ought to have been aware of – such as if, for example, the complaint related to conduct arising in a discrimination claim.

d) For any other reason the complaint is “not apt for further consideration”

This criterion allows decision makers to take into account any other factors that might lead to the conclusion that further consideration of the complaint is not justified (usually when it is low risk). Where this criterion is applied, there need to be very clear reasons for doing so. The following list provides examples of situations in which the criterion might be applied. The following list is not exhaustive, but provides an indication of the types of issues that might come within this criterion:

- the complainant has died and the estate cannot provide the relevant evidence needed to support further consideration of the complaint (however, this is more likely to fall under rE32.2);
- the barrister is not contactable and it is not possible to prove the complaint in their absence – e.g. it is the complainant’s word against the barrister (again, this is more likely to fall under rE32.2);
- the barrister has died or been disbarred since the events giving rise to the complaint;
- due to mental or physical incapacity, the barrister is unable to respond to the complaint (in these circumstances, consideration should be given to whether a referral to the Fitness to Practise procedure is required);
- another regulator has looked at the complaint in detail, the same issues are involved and the other regulator decided not to take action;
- the complaint is effectively a collateral attack on the court process, i.e. challenging a matter that has already been determined before the courts;
- the complaint would more appropriately be dealt by another body which has the resources to be able to investigate it properly, e.g. the police where the allegations may amount to a criminal offence;
- the complainant has withdrawn the complaint before the initial assessment can be made (in these circumstances, consideration would

need to be given to whether there is sufficient evidence to proceed by raising an internal complaint);

- the complainant has repeatedly made or reiterated complaints which have been found to lack substance and which appear to be vexatious in nature, or which are very similar or related and have been considered not apt for further consideration; and/or
- it does not appear that any Handbook Outcome has been adversely affected.

7. Partial dismissals

- 7.1. In dealing with cases that have multiple aspects, whether at the preliminary assessment stage or later in the investigation or post-investigation stages, it is possible to dismiss one or more aspects while continuing to progress others. The reasons for doing so should be clearly documented.

8. Interim suspension and Disqualification

- 8.1. Decision makers should refer to the guidance contained in '*PG26 - Policy and Guidance on Interim Suspension and Disqualification*' when dealing with these matters.
- 8.2. **Interim suspensions:** Any time information is received, decision makers should bear in mind whether it alters the risk to the Regulatory Objectives sufficiently to meet the criteria of the Interim Suspension Rules. Consideration should also be given to the options of revoking authorisation or obtaining an undertaking (see below). Similarly, an interim panel may impose conditions instead of an interim suspension or disqualification, and the BSB should be live to the need to make submissions on this potential outcome.
- 8.3. *The Interim Suspension and Disqualification Regulations* (Part 5, Section D of the BSB Handbook) envisage that a decision-maker who is considering a referral to an Interim Panel should first consider the option of canvassing voluntary undertakings, with terms that adequately address the elements of risk in the case. In such cases, any attempts to agree such undertakings should be clearly documented so that they can be relied upon if referral for an interim suspension becomes necessary.
- 8.4. When considering the appropriateness of an undertaking, relevant considerations will include: acting proportionately; maintaining public confidence in the BSB as a regulator; and transparency. See '*PG 26 - Policy*

and Guidance on Interim Suspension and Disqualification for more information.

8.5. **Disqualification:** When considering complaints at the pre-investigation stage, it should be borne in mind that Disciplinary Tribunals can, on application, disqualify relevant persons either indefinitely or for a stated period from one or more relevant activities and prohibiting any BSB authorised person from appointing them or directly or indirectly employing them in respect of such relevant activities. The test for disqualification is very specific and must be proven to the criminal standard for conduct that commenced prior to 1 April 2019, or to the civil standard for conduct that commenced after 31 March 2019 - see '*G24 – Guidance on applying the correct standard of proof*'. Interim disqualification can also be sought.

8.6. **Immediate interim suspension (or disqualification):** The Chair of the PCC (or one lay and one barrister Office Holder in the absence of the Chair) has a power to impose an immediate interim suspension prior to a hearing, but only for a maximum period of four weeks. This will only be necessary in very rare cases, however the need for such an order must be considered in all cases when a referral to an Interim Panel is directed (rE270).

8.7. rE272 sets out the test for the imposition of an immediate interim suspension or disqualification:

An immediate interim *suspension* or *disqualification* may only be imposed if the *PCC* is satisfied that such a course of action is justified having considered the risk posed to the *public* if such interim *suspension* or *disqualification* were not implemented and having regard to the *regulatory objectives*.

8.8. **Considerations:** Factors that may be relevant to the range of options set out in this section 8 - namely: considering a referral to an Interim Panel; revoking authorisation; obtaining an undertaking; making submissions to an Interim Panel in relation to the appropriateness of the imposition of conditions; or imposing an immediate interim suspension or disqualification – include (but are not limited to):

- a) The nature and extent of the risk posed to one or more regulatory objectives;
- b) The seriousness and length of the alleged breach(es);
- c) Repetition of similar allegations, including previous disciplinary history;
- d) The impact upon clients (particularly if vulnerable) and/or public confidence in the profession were no order to be made;
- e) Whether the issues relate to a limited area of practice (for example public access work) or more broadly;

- f) Whether clients can be informed of the details and allowed to decide for themselves (for example a criminal charge against the barrister);
- g) The impact upon others (for example employed staff) should an order of suspension or disqualification be made; and
- h) The likelihood of the applicable person to co-operate with any conditions imposed.

9. Referrals to investigation

- 9.1. Where a complaint is not dismissed in accordance with the criteria and factors set out in section 5 above, under rE33 it must be referred to formal investigation
- 9.2. The only exception to this is in relation to referrals of “hybrid” complaints by LeO where the outcome of LeO’s investigation is known. In these circumstances, decision makers will need to consider whether a complaint is “apt for further consideration” based on whether the outcome of the LeO investigation represents a reasonable response to both the service and conduct issues and therefore taking regulatory enforcement action would not be proportionate in the circumstances.
- 9.3. In assessing whether further consideration of the complaint is necessary following action by LeO, decision makers should take into account the following factors:
 - a) whether it is proportionate for the BSB to take any further action; and
 - b) whether regulatory action is required in order to meet the Regulatory Objectives, in particular protecting and promoting the public interest.

10. Post-investigation decision

- 10.1. Following investigation, there are a number of potential outcomes available. These are set out in rE37, namely:
 - a) Dismiss (see section 11);
 - b) No enforcement action (see section 12);
 - c) Imposition of Administrative Sanction (see section 13); or
 - d) Referral to disciplinary action (this includes DBC) (see section 14).

These must be considered in turn.

- 10.2. As noted, decision makers are required to take a risk-based approach to decision making. On conclusion of an investigation, a post-investigation assessment must be undertaken to determine what action should be taken. If there is sufficient evidence on the balance of probabilities that a breach of the Handbook has occurred, the preliminary risk assessment answers and the risk level should be reviewed and adjusted if necessary, with reasons recorded.
- 10.3. The final risk level will assist with determining what action should be taken on the complaint, although other considerations are also likely to be relevant. A low risk rating would suggest that 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. In the case of a medium risk rating, there is a presumption that an administrative sanction would be appropriate and proportionate to meet the risk. A referral to the supervision team might also be appropriate.
- 10.4. Where the risk level is high and: there is evidence that is likely to meet the applicable standard of proof²; the breach(es) and/or the surrounding circumstances are likely to be serious; and administrative sanctions are not likely to be appropriate and/or proportionate, the matter should normally be referred for disciplinary action.
- 10.5. Staff in the PCD will also need to be mindful of the category assigned to the complaint, as this will restrict the potential disposals available under delegated authority. Staff should refer to '*P09 – Authorisations under Part 5*' before taking decisions on the final outcome of complaints to ensure that they are taken by someone authorised to do so.

10.6. **Legal Ombudsman Referrals**

In considering referrals from the Legal Ombudsman the decision maker should have regard to the nature of the complaint. If it is addressing a matter purely related to service which also amounts to a breach of the Handbook then clear reasons as to why the matter requires regulatory action in addition to action already taken by the Ombudsman should be recorded.

² That is, the criminal standard for conduct that commenced prior to 1 April 2019, or to the civil standard for conduct that commenced after 31 March 2019 - see '*G24 – Guidance on applying the correct standard of proof*'.

11. Dismissal of complaints

- 11.1. Where there is insufficient evidence, on the balance of probabilities, that the conduct is a breach of the Handbook, then the matter should be dismissed. See section 7 for information as to partial dismissals. In considering dismissal, decision makers should consider whether formal advice is given, either in writing or by requiring the barrister's attendance on a named person.
- 11.2. For advice to be given, a cause for concern must be clearly identified. Examples where this may be appropriate include, but are not limited to:
- a) Rudeness;
 - b) Poor quality administration of practice;
 - c) Inadvertent behaviour;
 - d) The barrister's poor insight into the impact of their behaviour; and/or
 - e) The barrister's poor understanding of their obligations under the Handbook.

12. No enforcement action despite breach of the Handbook

- 12.1. The decision to take no enforcement action will be used on rare occasions, almost always in low risk cases. It will be taken when there is evidence of a breach of the Handbook on the balance of probabilities, but circumstances are such that marking this breach is not proportionate. Examples include, but are not limited to:
- a) Where a relevant person has been disbarred/disqualified/authorisation has been revoked in relation to another matter;
 - b) Where another complaint regarding the relevant person, relating to very similar conduct at a similar time, has already been disposed of;
 - c) The barrister's physical or mental health is such that any risk to the Regulatory Objectives is negligible and it is highly unlikely that the relevant person will return to practise or be re-authorised;
 - d) Where it is not proportionate to mark the breach by an administrative sanction, as the nature of the breach is not sufficiently serious.
- 12.2. In the case of a decision to take no enforcement action, formal advice can be given as discussed at 11.1 and 11.2 above.

13. Imposition of an administrative sanction

- 13.1. Administrative sanctions may be imposed where there is sufficient evidence, on balance of probabilities, of a breach of the Handbook and the imposition of

an administrative sanction is proportionate and sufficient in the public interest (rE50). Guidance on when and how to impose an administrative sanction, and considerations for determining the appropriate level of sanction to apply, can be found in '*G02 – Administrative Sanctions and Appeals*'.

- 13.2. The BSB has the ability to waive the administrative sanction appeal fee referred to in rE86, if the requirements in r16 are complied with – that is, a request in writing is received, setting out all relevant circumstances relied on and supported by all relevant documentary evidence. This power to waive the fee can only be exercised by the Director of Professional Conduct, the Director of Regulatory Assurance or the Director of Strategy and Policy.
- 13.3. Every waiver application will be assessed on its merits, considering the fairness of the application and taking into account the need for the BSB to defray the expenses of the appeal, and any other relevant factors.

14. Referrals to disciplinary action

14.1. Threshold test for referring complaints to disciplinary action (rE37.4):

conduct will only be referred to disciplinary action where:

- a)** an administrative sanction is not appropriate;
- b)** there is a realistic prospect of a finding of professional misconduct being made to the applicable standard of proof³; and
- c)** it is in the public interest to pursue disciplinary proceedings, having regard to the Regulatory Objectives (rE38).

14.2. In deciding whether there is a realistic prospect of success, or whether it is in the public interest to refer a complaint to disciplinary action, the context and factual background should be taken into account, considering the alleged conduct in a holistic manner rather than in a vacuum. Decision makers should also take into account whether:

- it is possible to set out the facts of the conduct in a manner that clearly supports the contravention of a specific Core Duty or Handbook Rule;
- the central witnesses, including the complainant, are credible and reliable;
- relevant witnesses are prepared to give live evidence at a Tribunal;
- the potential issues in dispute can be supported by documentary or live evidence;

³ That is, the criminal standard for conduct that commenced prior to 1 April 2019, or to the civil standard for conduct that commenced after 31 March 2019 - see '*G24 – Guidance on applying the correct standard of proof*'.

- all the evidence needed to prove the charges against the barrister is available or can be reasonably obtained prior to the hearing; and/or
- Any defence or explanation proffered by the barrister (or any alternative interpretation of the available evidence) is not likely to be accepted as a complete or partial defence to the charges, or to raise doubt as to whether the conduct in its wider context is sufficiently serious to be considered professional misconduct.

14.3. There are three types of disciplinary action:

- Determination by Consent (DBC);
- A three person Disciplinary Tribunal (3DT); or
- A five person Disciplinary Tribunal (5DT).

14.4. In considering which one of these is appropriate, the relevant factors include, but are not limited to:

- Whether the barrister admits the facts
 - If they do not, DBC is not available;
- Seriousness of the breach(es);
 - A breach that may warrant significant suspension or disbarment will need to be referred to a 5DT;
- Whether it is in the public interest for the matter to be held in public;
 - This would indicate a Tribunal hearing is preferable;
- Any previous disciplinary findings;
 - These are likely to result in a higher penalty, potentially requiring a referral to 5DT, particularly if the earlier misconduct was of a similar nature to the current complaint;
- Sentencing powers available in each disciplinary action process;
 - A breach that may warrant significant suspension or disbarment will need to be referred to a 5DT;
- The BTAS Sentencing guidance;⁴ and/or
- Complexity of case (including the need for a broader range of expertise and the need for oral evidence).
 - More complex cases or those requiring oral evidence should be referred to a DT.

14.5. Where there is a conviction of dishonesty or deception, decision makers must refer the matter to a 5DT (rE37.5).

⁴ <http://www.tbta.org.uk/wp-content/uploads/2013/06/BTAS-Sentencing-Guidance-2015-Final.pdf>

15. Reconsideration of complaints - rE90

15.1. rE90 gives the Committee power to reopen or reconsider a complaint where new evidence becomes available, or for some other good reason. A complaint that is closed for whatever reason, other than disposal by a Disciplinary Tribunal, can be reopened under this rule. A complaint that is open, but has been referred to disciplinary action, can be reconsidered under this rule at any time prior to disposal (although note the restrictions in rE91 relating to such cases).

15.2. In making decisions under rE90, the fundamental issue is whether the new evidence, or the good reason, makes a **material** difference to the original decision such that the original decision may be flawed or no longer appropriate. When considering whether a complaint should be reopened and formally reconsidered, decision makers should take into the account the following:

a) New evidence: Submission of evidence which was not before the decision maker at the time the original decision was made which: affects the assessment of whether the behaviour in question may have been a breach of the Handbook; has a significant impact on the level of culpability of the barrister; considerably weakens or strengthens the BSB's ability to prove charges laid against a barrister; or significantly affects the public interest in action being pursued against the barrister.

b) For any other good reason:

It is not possible to give definitive criteria for what would constitute a good reason for reopening a complaint or reconsidering a decision because, by its nature, the provision is designed to be flexible and cover any circumstance that might arise which would warrant reconsideration of a complaint. However, the following provide some examples of the types of factors that should be taken into account:

- (i) Errors by staff e.g. existing evidence/aspects of a complaint were not taken into account or overlooked;
- (ii) Errors by the Committee; e.g. a Case Examiner failed to mention a material fact in a Committee report;
- (iii) Legal provisions or case law that were not taken into account when taking the original decision; and/or

- (iv) Serious illness or incapacity in relation to either the complainant or barrister that calls into question the efficacy or reasonableness of continuing with disciplinary proceedings.

16. Extensions of time to respond – rE4

16.1. Reasonable extensions of time to respond to complaints enquiries should be granted to any party involved in a complaint where there is good reason to do so. “Good reason” will include, but is not limited to, the following:

- The need to make reasonable adjustments for a person who is disabled;
- Short term sickness;
- Serious illness;
- Pre-booked holiday; and/or
- Serious personal problems such as bereavement, family breakdown or unexpected caring responsibilities.

16.2. The length of an extension arising from the need to make reasonable adjustments will depend on the circumstances of the individual and should be for as long as is reasonably needed to accommodate the individual’s impairment. This may require medical evidence in support of the application for an extension (see 16.4). As a rough guide:

- a two-week extension should be granted for sickness or holiday;
- extensions in relation to serious personal problems should not normally exceed a month unless there is clear evidence as to why a longer extension is reasonable; and
- extensions of several months are appropriate in cases of serious illness but only where medical evidence is provided.

16.3. Extensions due to illness should be carefully considered but should be short in length where the barrister is continuing to practise and again, may require the provision of medical evidence. Medical evidence should not be automatically accepted, but should be considered carefully in terms of the specific impact on the barrister of any medical concerns. Clear medical evidence should not be rejected without very good reason, which must be recorded. If the medical evidence is out of date or insufficiently specific, it may be appropriate to request further evidence of the barrister.

16.4. Where extensions are longer than two weeks, this should be discussed with the Case Officer’s line manager. Extensions of more than three weeks on health grounds should be supported by a doctor’s note or medical report.

Where such documentary evidence is provided, the length of the extension should be commensurate with the nature of the condition and the medical advice given. Normally an extension on medical grounds will not require the case to be formally adjourned unless the evidence indicates that it is not possible to determine when the regulated person will be likely to return to a state of health that allows the case to progress. In these circumstances, consideration should be given to formally adjourning the case (see below).

17. Putting complaints on hold / Adjournments – rE6

- 17.1. A complaint can be put ‘on hold’ at any time prior to the referral to disciplinary tribunal. After that point, the complaint can be ‘adjourned’ (rE163), with leave of the tribunal. The same principles apply to both concepts, with the exception that decisions on adjournments of Tribunals are taken by the Tribunal, or a Directions Judge. However, we may be asked to give our views on whether the adjournment should be granted.
- 17.2. Factors that could be taken into account when deciding whether a complaint should be put ‘on hold’, or deciding our position regarding a proposed adjournment include, but are not limited to:
- Whether there are ongoing proceedings (particularly regulatory or criminal proceedings, including appeals, or linked complaints) which relate to similar allegations;
 - Whether there is a real risk that an investigation of the complaint by the BSB would interfere with, prejudice or undermine ongoing proceedings or their outcome;
 - Whether new allegations have arisen (whether in relation to the same barrister or not) that should be investigated and considered in parallel to the current complaint;
 - Whether there is clear evidence of a physical or mental health issue relating to the barrister and an indication of when this may be resolved (but see the considerations listed in paragraphs 16.3-16.4 above); and
 - The public interest in the prompt resolution of the complaint. This may include the impact upon the witnesses or other parties to the complaint.
- 17.3. Similarly, where medical evidence has been provided in support of an application to put a complaint on hold, adjourn proceedings or in support of a request for an extension of time to respond (see 16 above) should not be automatically accepted, but should be considered carefully in terms of the specific impact on the barrister of any medical concerns. Clear medical evidence should not be rejected without very good reason, which must be

recorded. If the medical evidence is out of date or insufficiently specific, it may be appropriate to request further evidence of the barrister.