

BAR STANDARDS BOARD

REGULATING BARRISTERS

Regulatory reports about barristers working for or on behalf of the BSB

1. Introduction

- 1.1. This document sets out the approach the Bar Standards Board (BSB) takes when dealing with “regulatory reports”¹ about the conduct of barristers who are either employed by the BSB or are working on behalf of the BSB. Such regulatory reports could either arise directly from the barrister’s work for the BSB, their professional work as a barrister or from circumstances unconnected with either.
- 1.2. A separate policy “*Complaints against Board members*” applies to complaints about BSB Board members submitted outside the regulatory reporting system. That policy should be read in conjunction with this policy when considering what action to take on regulatory reports.
- 1.3. This policy covers barristers who are:
 - members of the BSB’s Committees, bodies, pools, panels or Board or others engaged to work for or on behalf of the BSB;
 - barristers who represent the BSB at disciplinary tribunals; and
 - members of staff employed by the BSB.

2. General principles

- 2.1. All barristers called to the Bar, whether practising or not, are subject to the obligations set out in the BSB Handbook as applicable to their status. Members of the public and others are entitled to make regulatory reports about the conduct of those working for, or on behalf of, the BSB in the same way as such reports can be made about any other barrister.
- 2.2. The general principle is that regulatory reports involving barristers working for, or on behalf of, the BSB should be handled in the same way as reports about other barristers in accordance with Part 5 of the BSB Handbook and any supporting policies and guidance. This general principle is, however, subject to any adjustments to ensure

¹ “Regulatory reports” refers to reports submitted to, or raised by, the BSB’s Contact and Assessment Team as well as any enforcement action taken on such reports.

the system is, and is seen to be, fair and free from potential bias (see Section 6 below).

- 2.3. When considering reports about barristers working for, or on behalf of, the BSB, two issues need to be addressed:
- i. Whether the report raises matters solely connected to the barrister's role within the BSB and would more appropriately be dealt with under the BSB's internal processes; or
 - ii. Whether, if the report is about matters related to the person's professional obligations as a barrister under the BSB Handbook, adjustments should be made in relation to the decision-makers in the case and/or those responsible for carrying out the operational processes.
- 2.4. In the case of BSB Tribunal representatives, as they will at all times be acting under formal instructions from the BSB in their role as legal service providers they will, by definition, be providing their services as a barrister. Therefore, reports about BSB Tribunal representatives should be dealt with under the regulatory reporting system in the usual way.
- 2.5. In all cases, where a barrister working for, or on behalf of, the BSB is the subject of a regulatory report from an external source, the person making the report should be informed of the barrister's role within the BSB. It may be that the person reporting the matter will already be aware of this, but nevertheless it is important that the BSB formally acknowledges and confirms the role played by the barrister.

3. Regulatory reports arising from a barrister's role within the BSB

- 3.1. Where a regulatory report relates to the performance of the barrister's role within the BSB, the first consideration should be whether the matter should more appropriately be dealt with by the BSB in its role as an employer or in its role in monitoring the performance of Committee/Board/body members. If this is the case, it should be referred, in line with the provisions of rE10 of the Enforcement Decision Regulations², to the BSB to deal with under its internal processes. Such internal processes include, but are not limited to, the processes for addressing complaints about BSB Board members³ or other non-executive members working for the BSB, and the grievance and disciplinary processes for employees.
- 3.2. A referral under rE10 will be appropriate where the report is solely about the way in which the barrister has performed their role for the BSB. This is because most of those working for or on behalf of the BSB are not providing services to the BSB in their capacity as barristers but as people who have practical knowledge and experience of the profession. Therefore, responsibility for overseeing how they perform their role lies more appropriately with the BSB than within the regulatory system. Further, the BSB has more appropriate powers to address performance issues, such as offering redress or terminating an appointment.

² Regulation rE10 provides: "If it appears to the Commissioner that a report in respect of an applicable person might more appropriately be dealt with by another body (e.g. an Inn, Circuit, employer, a complaint handling body or any other professional or regulatory body), the Commissioner may refer the report to such other body."

³ 'Complaints against Board Members'

- 3.3. It should be noted that a referral to the BSB's internal processes does not preclude regulatory action being taken once the outcome of the internal process is known. Where that outcome indicates that a breach of the BSB Handbook may have occurred, it will be appropriate at that stage for the relevant matters to be referred back to the regulatory reporting system for an assessment to be made as to whether regulatory action should be taken (see also sections 4 and 6 below).
- 3.4. A referral under rE10 to the BSB's internal processes could include, but is not limited to, one or more of the following actions:
- a) Referring the matter to the BSB's service complaints procedure, under which the option is available for redress to be provided (redress is prohibited under the BSB's regulatory arrangements) and also for improvements to be made to the BSB's processes. This is most likely to apply in relation to reports about barrister staff members;
 - b) Referring the matter to the BSB's Independent Reviewer where the report is, in essence, a challenge to a previous regulatory decision. This will allow for the original decision to be reviewed and potentially overturned;
 - c) In the case of employees of the BSB, referring the matter to the BSB's Director General for the Director General to consider, in conjunction with the Director of People, whether an investigation of the employee's alleged behaviour is required under the General Council of the Bar's grievance and disciplinary procedure;
 - d) Referring the matter to the BSB's Director General for consideration of what action should be taken in relation to the conduct of a contractor including APEX members, which could result in the person being removed from their role; and/or
 - e) Referring the matter to the Chair of the BSB or the Chair of the relevant BSB Committee/body to consider the issues and, if necessary, arrange for the matter to be investigated and thereafter decide what action, if any, should be taken, which could include the termination of an appointment.

4. Regulatory reports about breaches of barristers' professional obligations

- 4.1. Where a regulatory report is received about a barrister who works for, or on behalf of, the BSB and the subject matter of the report relates to their obligations as a barrister or the provision of legal services, the report should be considered in the normal way, applying the relevant regulatory decision-making criteria.
- 4.2. While the standard processes and decision-making criteria will be followed, consideration will need to be given to whether adjustments should be made in terms of who takes decisions in the case and/or carries out the operational processes. The main reason for adjustments will be to address potential perceptions of bias, but adjustments may be justified for other reasons (see section 6 below). Consideration of such adjustments could arise at any stage of the enforcement process from initial

assessment through to disciplinary action. Section 6 below sets out the approach to deciding whether adjustments should be made and what they might be.

5. Reports covering issues related to both the barrister’s BSB role and their professional obligations

5.1. In some cases, the issues raised in a regulatory report may cover matters that relate both to the barrister’s role within the BSB and their professional obligations. In such circumstances, consideration should be given to whether it is appropriate, and possible, to deal with them separately and in parallel by referring relevant issues to the BSB internal processes and addressing the others under the regulatory system. The need to do this is likely to be rare. However, if it is not possible to separate the matters, it will normally be appropriate for the regulatory matters to be considered first and the internal issues addressed thereafter. The Director General, therefore, should be updated regularly of progress on the regulatory action and the final outcome.

6. Adjustments

6.1. When deciding whether adjustments should be made, the main consideration will be whether a legitimate perception of bias would arise if the operational processes were carried out, or decisions taken, by “relevant staff” i.e. the staff responsible for the initial assessment of reports (the Contact and Assessment Team) or those responsible for investigations and enforcement action (the Investigations and Enforcement Team). See also paragraph 6.18 in relation to decisions taken by the Independent Decision-making Body).

Perceptions of bias

- 6.2. The mere fact that a barrister works for or on behalf of the BSB does not mean that a perception of bias will arise if the executive handles the case in the normal way. The test for determining this is whether a fair minded and informed observer, having considered the facts, would conclude that there is a real possibility of bias (referred to hereafter as a “real possibility of bias”). In assessing this, the issues covered in the paragraphs below should be weighed in the balance. It should be noted that the weight given to the issues may differ according to the stage of the process when adjustments are being considered.
- 6.3. **Proximity of the barrister’s role to the relevant staff:** the closer the role is to the relevant staff, the more likely it is that there will be a real possibility of bias in the way the case is handled, and the decisions that are taken on it, thus requiring adjustments to be made. In this context it is the nature of the role that is important and not necessarily whether the barrister is known to the relevant staff. At one end of the proximity spectrum would be barrister staff members, members of the IDB and barristers representing the BSB at Disciplinary Tribunals, where the close proximity of the roles to the relevant staff is very likely to give rise to a real possibility of bias. At the other end might be an External Examiner who works at arm’s length to the BSB and has no relationship with the relevant staff, thus a real possibility of bias is unlikely to arise that would require adjustments.
- 6.4. **The subject matter and nature of the evidence to support the report:** even where the proximity of the role could create a real possibility of bias, it may be that the subject matter of the report is such that an informed observer would recognise that there is little room, if any, for bias to influence the handling of the case. The type of case where this issue would be relevant are those that are based solely on documentary evidence that is irrefutable. There are limited circumstances where this would apply but an example could be a report of a criminal conviction or a failure to renew a practising certificate.
- 6.5. **The evidence to support the report or subsequent action:** many reports will involve weighing evidence and making value judgements on that evidence as well as assessing the risk it poses, thus creating significant room for bias. However, in some cases the evidence will be so clear that the conclusions arising from it are so obvious that no informed observer could consider there would be a real possibility of bias in the relevant staff taking a decision on it. This is likely to arise rarely, but examples might be: where the wrong barrister has been identified as responsible; the actions alleged are not capable of amounting to a breach of the BSB Handbook or the actions alleged are very clearly a potential breach. This issue is most likely to be relevant at the initial assessment stage.

Other considerations

- 6.6. Even if the assessment is that there is no real possibility of bias in the relevant staff handling a case, there may be other reasons why it is appropriate to make

adjustments. These will usually relate to the position of the relevant executive staff and the BSB's responsibility as an employer for their well-being. Such considerations are more likely to be relevant at the investigation and disciplinary stages of the process, where there will be ongoing and direct contact with the barrister over many months.

- 6.7. Barristers who work for, or on behalf of the BSB, are entitled to take a robust approach to defending themselves against the actions of the BSB, including challenging the processes and the way a case is being handled by the staff member. Further, it may be that sensitive and confidential information might need to be submitted by the barrister in mitigation. Consideration will need to be given to whether it is reasonable and fair to expect relevant staff to deal with the stress and personal exposure this could entail. The main consideration here will be the proximity of the barrister's role to the relevant staff. It is likely, if the role is a close one, regardless of the subject matter and nature of the evidence, adjustments will be appropriate. This is particularly the case in relation to BSB barrister staff members where it is highly unlikely that any circumstances would arise where it is appropriate for the relevant staff to handle a case against a work colleague.

Decisions on adjustments and their nature

- 6.8. All final decisions on whether adjustments should or should not be made must be taken by either the Director of Regulatory Operations or the Director of Legal and Enforcement according to the stage of the process at which the adjustments are being considered.

Initial assessment decisions

- 6.9. As indicated above, in deciding whether adjustments need to be made at the initial assessment stage, the issues set out at paragraphs 6.2- 6.7 need to be considered and weighed before any formal action is taken on the report. This consideration should be undertaken by the Head of the Contact and Assessment Team, or in their absence, a Senior Assessment Officer based on the individual circumstances.
- 6.10. However, it is unlikely that a real possibility of bias would arise in the circumstances listed below, regardless of the role played by the barrister in the BSB, and therefore adjustments are unlikely to be needed.
- i. the matter is one that it is clear should more appropriately be dealt with by another body and referred to that body under rE10 (this would extend to referral to the BSB's internal procedures – see section 3 above);
 - ii. there is clear evidence of a potential breach of the BSB Handbook that warrants investigation e.g. a criminal conviction;
 - iii. the report is clearly vexatious; and
 - iv. the report lacks any substance – this may be because the alleged conduct does not amount to a breach or because the evidence to support the report clearly indicates that no breach has occurred.
- 6.11. **Nature of the adjustments:** the most likely adjustment at the initial assessment stage will be the appointment of a decision maker who is "independent" of the relevant staff, to carry out the formal assessment of the report and, if applicable, take the decision under rE12 to treat any or all aspects of the report as an allegation(s) of a breach(es)

of the BSB Handbook. The latter decision would bind staff in I&E to carrying out an investigation of the allegations identified by the independent decision-maker.

- 6.12. The independent decision-maker could be someone within the BSB, or working on behalf of the BSB, who is suitably qualified but sufficiently distant from the regulatory decision-making process to prevent any perception of bias. However, it is more likely that an external appointee will be necessary. In identifying an appropriate independent person to consider the report and make decisions it is essential that the appointee has the necessary skills and knowledge to perform the task. This does not mean that the appointee must be a barrister, or even a lawyer. The person appointed will be dependent on the nature of the concerns raised in the report and the issues that require consideration.
- 6.13. Where a decision is taken to appoint an independent decision-maker outside the BSB's scheme of delegation, a formal written authorisation for the person to take decisions under rE12 will need to be obtained from the Commissioner in accordance rE3⁴ and they will need to be bound by the obligations of confidentiality imposed on the BSB under rE63.

Investigations

- 6.14. The issues at paragraphs 6.2 – 6.7 above will also need to be considered when deciding, if applicable, whether an investigation should be conducted by relevant staff or whether adjustments should be made. At this stage the subject matter of the allegation(s) and the nature of the evidence will be less relevant and the main factors will be the proximity of the role to the relevant staff as well as the "Other considerations".
- 6.15. The Head of Investigations and Enforcement, or in their absence a Casework Manager, should carry out an initial assessment of the need for adjustments and refer the outcome to the Director of Legal and Enforcement for a decision.
- 6.16. **Nature of the adjustments at the investigation stage:** as the BSB does not have appropriately skilled staff available outside the relevant staff, the adjustment at this stage will involve outsourcing the investigation to a third party. Given the issues that may be involved in investigating allegations of breaches of the BSB Handbook, the third party will normally be a solicitor's firm. The BSB's retained solicitors will usually be the first port of call for outsourcing of investigations, subject to any conflicts, but other solicitors may be appropriate depending on the nature or subject of the investigation.
- 6.17. Where a decision is taken that an investigation should be carried out externally, a formal written authorisation to carry out the investigation under rE14.1 will need to be obtained from the Commissioner in accordance with rE3⁵ and those appointed will need to be bound by the obligations of confidentiality imposed on the BSB under rE63

⁴ rE3 provides that *'The Commissioner shall have the power to authorise any person, group, or body to fulfil any functions or exercise any power given to the Commissioner [under Section 5.A of the BSB Handbook].*

⁵ rE3 provides that *'The Commissioner shall have the power to authorise any person, group, or body to fulfil any functions or exercise any power given to the Commissioner [under Section 5.A of the BSB Handbook].*

6.18. Where an investigation is outsourced, the investigating firm will not be given any decision-making powers and will only be tasked with gathering the evidence and preparing a post-investigation report. A member of BSB staff will be appointed as the formal “Officer” in the case, and act as the liaison point with the firm, but all contact with the barrister during the investigation will be via the appointed firm. The Officer will maintain oversight of the progress of the investigation including ensuring the relevant processes are being followed and the investigation remains proportionate.

Post- investigation decisions

6.19. Adjustments will also need to be considered at this stage based on the issues outlined at paragraphs 6.2 – 6.7 above.

6.20. Post-investigation decisions on cases are based not only on the evidence but on taking a view on the seriousness of the conduct and the appropriate disposal (dismissal of the allegation through to referral to disciplinary action). Therefore a range of value judgements need to be made at this stage that may give rise to a real possibility of bias regardless of the proximity of the role, the subject matter of the allegations or the nature of the evidence.

6.21. As the BSB already has access to independent decision makers (the IDB) at this stage of the process, the default position in all cases for barristers working for or behalf of the BSB, will be to refer the case to an IDB panel for a decision. In some cases, this may amount to an adjustment because the decision on disposal could have been taken by the relevant staff.

6.22. While a referral to the IDB will be the standard approach there may be exceptional circumstances where it would be appropriate for the relevant staff in I&E to take a post-investigation decision. Such circumstances are limited to where the outcome of the investigation shows clearly that there is no other conclusion than that no breach has occurred.

6.23. **Nature of the adjustments at the post-investigation stage:** the adjustment at this stage will be referring cases to the IDB that might normally have been decided by relevant staff in I&E. However, there may be circumstances where the IDB as a whole is conflicted and cannot take a decision without there being a real possibility of bias. This is likely to arise, but is not limited to, where the allegations are against a member of the relevant staff or a member of the IDB. If the IDB are to fairly take a decision, the appointment of temporary IDB members will be required. The power to appoint temporary members in such situations has been given to the Chair of the BSB under the Standing Orders, Annex 3(b), paragraphs 8 and 9.

Disciplinary action

6.24. At this stage of the process the relevant staff have no decision-making functions, and their role is only to prepare the case for consideration either by an IDB panel (under the Determination by Consent procedure) or by a Disciplinary Tribunal. Further, by this stage all relevant evidence will usually have been gathered and assessed with any further evidence being obtained in liaison with the appointed representative. Therefore the likelihood of a real possibility of bias in the preparation of the case will be much reduced, particularly in relation to Disciplinary Tribunal cases, where independent counsel will be instructed to advise and represent the BSB.

- 6.25. Nevertheless, consideration of adjustments still needs to be considered taking into account the issues outlined at paragraphs 6.2-6.7 above. If the case has been subject to adjustments at the earlier stages, then it is highly likely they should also be made at this stage. Even if no adjustments have previously been made, attention should be given to the “other considerations” (see paragraphs 6.6 – 6.7 above). Further, a unique consideration at this stage will be the fact that Disciplinary Tribunal hearings are in public and the potential for a negative impact on the public perception of the BSB of internal staff being seen to be actively engaged in presenting cases to Tribunals against barristers working for or on behalf of the BSB (which may, in some cases, involve colleagues of those presenting the case to the Tribunal).
- 6.26. **Nature of the adjustments at the disciplinary action stage:** the normal adjustment at this stage will be to outsource the case to a third party i.e. a solicitor’s firm (see also paragraph 6.16), who will work with independent counsel to prepare the case, and present it, at the hearing on behalf of the BSB.