

<p>BAR STANDARDS BOARD</p>

REGULATING BARRISTERS

Draft BSB Enforcement Strategy

Introduction

1. This document sets out our strategy in relation to enforcing the regulatory requirements in our Handbook. It seeks to provide clear information about:
 - a. the outcomes we are trying to achieve through enforcement action;
 - b. to whom this strategy applies;
 - c. our approach to promoting regulatory compliance; and
 - d. how we will determine what action to take.

2. This strategy does not focus upon our approach to supervision and monitoring, although reference is made to this where appropriate. Reference is also made, as appropriate, to the Enforcement Regulations which are set out in full at Part V of our Handbook. Nothing in this strategy is intended to override these rules or to limit any discretion which they confer.

The outcomes of enforcement

3. The objective of this strategy is to achieve compliance with the regulatory arrangements set out in our Handbook. Enforcement is intended to:
 - a. promote adherence to our regulatory arrangements;
 - b. manage individuals, entities and chambers that represent a risk to clients, the wider public and the regulatory objectives set out in the Legal Services Act 2007;
 - c. provide credible deterrence of non-compliance with our regulatory arrangements; and
 - d. prevent further breaches.

Scope of the BSB's enforcement powers

4. We may take enforcement action against:
 - a) individual barristers;
 - b) Registered European lawyers;
 - c) BSB authorised bodies (including barrister only entities (BoEs), legal disciplinary practices (LDPs) and alternative business structures (ABSs));
 - d) BSB regulated managers; and
 - e) authorised (non-BSB) individuals working in BSB authorised bodies;
 - f) non-authorised individuals working for BSB authorised individuals or bodies.

The standards of professional conduct

5. The BSB's Code of Conduct, Part II of our Handbook, requires those we regulate to comply with the following core duties:
 - You must observe your duty to the court in the administration of justice.
 - You must act in the best interests of each client.
 - You must act with honesty and integrity.

- You must maintain your independence.
 - You must not behave in a way which is likely to diminish the trust and confidence which the public places in you or the profession.
 - You must keep the affairs of each client confidential.
 - You must provide a competent standard of work and service to each client.
 - You must not discriminate unlawfully in relation to any person.
 - You must be open and co-operative with your regulators.
 - You must take reasonable steps to manage your business, or carry out your role within your business, competently and in such a way as to achieve compliance with your legal and regulatory obligations.
6. These core duties set out the standards that all those we regulate are required to meet, define the core elements of professional practice and provide a baseline for professional conduct. The duties are underpinned by a series of outcomes and rules designed to ensure appropriate standards of professional conduct are maintained.

Promoting regulatory compliance

7. We seek to promote appropriate professional conduct and to deter inappropriate behaviour. The hallmarks of our regulatory approach are as follows:
- a) **Risk-based** – We shall focus our resources on the issues that pose the greatest risk to the regulatory objectives. We will consider the nature of any alleged regulatory breach and assess the level of risk posed to determine what action we should take.
 - b) **Proportionality** – We will take proportionate action in the light of identified risks to ensure the stated outcomes are met and compliance with the regulatory objectives is achieved.
 - c) **Individual responsibility** – Individual responsibility is at the heart of our regulatory regime. Typically, we will take action against an individual but action will be targeted at an entity alone or at an entity and individuals as appropriate.
 - d) **Flexibility** – We will use a range of measures, including informal guidance and support, supervision, monitoring, and enforcement to ensure compliance with our regulatory arrangements.
 - e) **Outcomes-based** – The outcomes identified in the Handbook, although not themselves enforceable, will be considered when deciding what action to take.
 - f) **Fairness and openness** – When taking enforcement action, we will be as fair and open as practicable and will give regulated persons a reasonable opportunity to respond.

Equality considerations

8. The application of this strategy should be fair and equitable and not disadvantage anyone because of their age, disability, gender reassignment, marital and civil partnership status, pregnancy and maternity, race, religion or faith, sex or sexual orientation. BSB regulated persons subject to enforcement action should advise us of any specific requirements they have which need to be considered. These will be accommodated as far as is reasonably practicable and on a case by case basis.
9. We will monitor any enforcement action taken to ensure there is no disproportionate impact on any sections of those we regulate.

Graduated approach to non-compliance

10. We will engage in dialogue with BSB regulated individuals, entities and chambers to encourage good practice through guidance and support. Wherever appropriate, we will

seek to achieve an informal resolution to issues in order to provide more timely, proportionate and helpful outcomes for complainants, those complained against and in the wider public interest.

11. We shall adopt a graduated approach having regard to the considerations at paragraph 16. This approach will give those we regulate an incentive to achieve compliance.

Supervising and monitoring chambers and entities

12. As part of our regulatory measures we will monitor entities and chambers. We will seek to resolve any non-compliance issues through non-enforcement measures by working constructively with the entity or chambers in question. Where appropriate, we will set in place supervisory arrangements to promote compliance and monitor progress. Where this approach is unsuccessful cases will be considered for enforcement action.

Dealing with possible non-compliance

13. We may receive intelligence about possible non-compliance from a number of sources, for example an individual or entity may admit non-compliance, a client, other member of the public, a lawyer or judge may complain, a law enforcement agency or other regulator may pass a case to us, or we may collect our own information that suggests a breach has occurred.
14. We will only consider complaints that disclose possible breaches of our regulatory arrangements. There are therefore some types of complaint, for example about an individual's private life or about disputes within an entity or chambers that we would not normally consider unless intelligence suggests that these have involved a regulatory breach.
15. In every case which we investigate, we will endeavour to ensure that we obtain and consider all relevant information reasonably available before determining what action to take.

Considering enforcement options

16. Having investigated, in determining what enforcement action, if any, to take we will consider a number of factors, including but not limited to:
 - a. whether any of the outcomes in our Code of Conduct have been breached;
 - b. the impact, if any, on one or more of the regulatory objectives;
 - c. the seriousness and complexity of any potential breach;
 - d. whether the breach, if proved, would amount to a criminal offence;
 - e. the impact of the act or omission taking into account the BSB's regulatory priorities as stated from time to time;
 - f. the impact on clients of the BSB's taking action compared with the impact of not taking action;
 - g. the impact on public confidence in the profession and the administration of justice;
 - h. the period of time over which the act or omission took place;
 - i. the number of clients affected and the seriousness of the adverse impact (or potential adverse impact) on those clients (particularly if the clients are vulnerable);
 - j. evidence or a record of insufficient care being taken over compliance or of recklessness, deliberate breaches, or dishonest behaviour;
 - k. whether the regulated person self-reported and has taken, or intends to take, steps to correct the breach and to provide appropriate redress; and/or

- I. whether the resources required are disproportionate to the likely sanction.
17. In some cases intelligence gathered may be inconclusive, or a complaint may be one we cannot investigate despite indicating the potential for regulatory breaches. In such cases we may retain the intelligence and, in the case of chambers and entities, it may be taken into account when assessing the risk posed by these bodies and the appropriate level of ongoing supervision and monitoring required.

Dismissing a case

18. One course of action open to us, following investigation, is to dismiss a case. This may occur when:
 - a. the intelligence suggests that no regulatory breach has occurred;
 - b. where non-compliance was so minor that no further action is warranted;
 - c. the breach was inadvertent, has been remedied and is unlikely to be repeated.
19. In dismissing a case, the PCD may notify the Supervision Department so that additional supervision and enforcement arrangements can be considered and/or any relevant information can be included in future risk assessments.

Referring a case

20. Having reviewed all the evidence we may decide that enforcement action would, in the circumstances, be inappropriate. However, we may refer a complaint to another body for consideration. For example, we may refer an authorised (non-BSB) individual to their Approved Regulator for action.

Regulatory breaches that involve no professional misconduct

21. Where we determine that there has been a regulatory breach worthy of enforcement action, but not so serious as to justify a charge of professional misconduct, the matter will be dealt with by the application of an administrative sanction.
22. In such cases we will apply the civil standard of proof ('balance of probabilities') to the evidence available. Administrative sanctions involve imposing a proportionate fine and/or warning. The Complaints Regulations at Part V of our Handbook identify the full procedure and sanctions that can be applied.

Regulatory breaches that involve serious professional misconduct

23. We will refer the most serious cases, which involve alleged professional misconduct to a Disciplinary Tribunal. These are cases where it would be inappropriate to apply an administrative sanction, where if proved they are likely to lead to disbarment, suspension or disqualification and/or the imposition of a significant fine (or revocation of the licence in the case of an entity). Cases will only be referred where there is a realistic prospect of a finding being made applying the criminal standard of evidence ('beyond reasonable doubt') and where there is a significant impact on the regulatory objectives.
24. The procedures for Disciplinary Tribunals, including their sentencing powers and appeals procedures are set out in the Disciplinary Tribunal Regulations at Part V of the Handbook.

Determination by consent (DBC)

25. A complaint which would otherwise be referred to a Disciplinary Tribunal may be determined by the PCC using the DBC procedure. This would only happen:
 - a. with the consent of the defendant;
 - b. where there is no substantial dispute of facts; and
 - c. where, if proved, the alleged professional misconduct is unlikely to warrant disbarment, suspension or disqualification (or revocation of the licence in relation to an entity).

Details of this procedure, including the available sanctions, are set out in the Complaints Regulations at Part V of the Handbook.

Interim Suspension and Disqualification Orders

26. Following a hearing, the BSB may impose an interim suspension or disqualification order on a BSB regulated person to prevent them from practising until their case is considered by a Disciplinary Tribunal. In very urgent and serious cases an immediate interim suspension or disqualification order (an order made without a hearing) may be imposed where we are satisfied this is necessary to protect the public. The regulations relating to Interim Panels, including the available sanctions, are in the Interim Suspension and Disqualification Regulations at Part V of our Handbook.

Additional arrangements in relation to BSB regulated entities

Interventions and divestiture

27. We have the power to intervene in an ABS (this does not apply to individual barristers, chambers, barrister only entities or LDPs) to take control of clients' files and/or money. We might use this power, for example, to protect clients' interests where we have removed an ABS's licence.
28. We also have the power to apply to a court to have an ownership interest of a non-authorised person divested, that is disposed of or sold, and to place restrictions on their shares in an entity. We may use such powers, for example, where an individual has obtained an interest in an entity without our approval.
29. Further details about these arrangements can be found in the Interventions and Divestiture section at Part V of our Handbook.

Decision-makers

30. All those involved in making decisions, including professional members, lay persons and members of BSB staff will be trained so that decisions are made consistently and appropriate sanctions applied. Decisions will be regularly and systematically scrutinised to ensure consistency.

Openness and transparency

31. **Right of appeal or review** – Where we have decided to take enforcement action the regulated person concerned will always have an opportunity to appeal the decision or have it reviewed. The precise nature of the appeal will depend on the type of enforcement action taken. Where a charge of professional misconduct has been dismissed by a Disciplinary Tribunal, the BSB will have limited rights to appeal, but will

only do so where this is in the public interest. The BSB will also have the right to appeal in circumstances where a charge is proved but we feel the sentence is insufficient.

32. **Publication of investigation outcomes** – We will publish general statistics about the types of complaint received and the outcomes of investigations so that the levels of compliance by BSB regulated persons can be understood. We are registered under the Data Protection Act 1998 and must comply with its provisions.
33. **Imposition of administrative sanctions** – Administrative sanctions will be formally recorded but not made public. However, the BSB will disclose these finding on request from a relevant external body (eg the Judicial Appointments Board). Any administrative sanction imposed will be taken into account in future risk assessments and decisions about how to deal with subsequent cases of non-compliance. We will publish general statistics about the total number and type of administrative sanctions applied.
34. **Publication of professional misconduct findings** – Disciplinary Tribunals are held normally held in public. We will publish findings of professional misconduct and sentences imposed by Disciplinary Tribunals or the PCC under the DBC procedure. Members of the public who search our on-line register will be able to see any published disciplinary findings against a BSB regulated individual.
35. **Publication of conditions** – We will publish the details of any conditions imposed on an authorisation or licence.
36. **Disqualification list** – Where a Disciplinary Tribunal has reached a decision to disqualify an individual, this decision will be published. We will provide details of the disqualification to the LSB and all other Approved Regulators.

Strategy Consultation, Review & Evaluation

37. This strategy came into effect XXXX 2013. We shall consult with stakeholders to evaluate its effectiveness two years from its initial application. Where the strategy is failing to maintain the standards set out in our Code of Conduct it will be amended as appropriate. In the meantime, we welcome any feedback on the strategy's content, implementation and effectiveness.
38. All the regulations and procedures referred to in this strategy are available on our website at [include url] or on request from our Professional Conduct Department at [provide email address]. A copy of the strategy will be available to all those involved in disciplinary enquiries and proceedings.