

Annex A – Enforcement Decision Regulations 2019

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rE1 These regulations set out the powers and functions in relation to: the assessment of *reports* and the investigation of *allegations* which may indicate a potential breach of the *Handbook* or require regulatory action; the decisions available to the *Commissioner* and an *Independent Decision-Making Panel* at the conclusion of an investigation; the reconsideration of *allegations* that have been disposed of; and the disclosure of *reports* or *allegations* by the *Bar Standards Board*. These regulations also set out the operation of the *administrative sanction* appeal procedure and the *determination by consent procedure*

A1. The assessment of *reports*

Powers of the *Commissioner* in relation to the assessment of *reports*

rE2 The powers of the *Commissioner* include (but are not limited to):

- .1 gathering information relating to *applicable persons* from any source for the purposes of assessing whether there has been a potential breach of the *Handbook*; and
- .2 exercising the power under rE12 to determine that a *report* or part of a *report* may be treated as an *allegation*.

rE3 The *Commissioner* shall have the power to authorise any *person*, group or body to fulfil any function or exercise any power given to the *Commissioner* by this Section 5.A. Any authorisations given must be in writing and may be either or both retrospective and prospective, and either or both general and for a particular purpose.

Reference to the Legal Ombudsman

rE4 If a *report* is received by the *Bar Standards Board* from a person entitled to complain to the *Legal Ombudsman* about the subject of the *report*, the *Commissioner* must refer the *report* without further consideration to the *Legal Ombudsman* or signpost the provider of the *report* to the *Legal Ombudsman*.

Reference where an *applicable person* acting in judicial or *quasi-judicial* capacity

rE5 If it appears to the *Commissioner* that a *report* relates to an *applicable person's* actions in a part-time or temporary judicial or *quasi-judicial* capacity, the *Commissioner* must refer the *report* to the person or body responsible for the appointment of the *applicable person* to the judicial or *quasi-judicial* office concerned or another person or body responsible for considering such reports (“the appropriate body”), where it appears that the appropriate body should consider the *report*, requesting notification of the outcome of the appropriate body’s consideration as soon as it has been dealt with, subject to rE6 to rE8 below.

rE6 Where:

- .1 the appropriate body refuses to deal with the *report*; or
- .2 it appears there is no appropriate body

the *Commissioner* may consider the *report* in accordance with the provisions of this Section 5.A.

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- rE7 When the appropriate body has dealt with the *report*, or the *Commissioner* considers that the appropriate body has not dealt with it within a reasonable time or fully or satisfactorily, the *Commissioner* may consider the *report* in accordance with the provisions of this Section 5.A. and may consider any finding made and any action taken by the appropriate body.
- rE8 The *Commissioner* must not consider or take action in relation to a *report* arising in substance from dissatisfaction or disagreement with anything decided, done or said by the *applicable person* in the proper exercise of their judicial or *quasi-judicial* functions.

Reference to the Lord Chancellor or other appropriate body

- rE9 If it appears to the *Commissioner* that the *report* relates to the conduct of an *applicable person* who, since the events giving rise to the *report* took place, has been appointed to and continues to hold full-time judicial office and has ceased to practise, the *Commissioner* shall not consider the *report* further and must direct the person from whom the *report* is received to the Lord Chancellor or the Office of Judicial Complaints or to such other person or appropriate body with responsibility for addressing complaints about judges.

Reference to any other person

- rE10 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.
- rE11 If, having referred a *report* to another body under rE10, the *Commissioner* subsequently considers that the *report* has not been dealt with by that other body within a reasonable time or fully or satisfactorily, the *Commissioner* may choose to exercise the powers set out in rE2.1 and rE2.2 above.

Initial assessment of reports

- rE12 Where the *Commissioner*, having regard to rE13, considers that a *report*:
- .1 discloses a potential breach of the *Handbook* by an *applicable person*; and/or
 - .2 potentially satisfies the *disqualification condition*
- the *Commissioner* may treat the *report* as an *allegation*.
- rE13 In determining whether to treat a *report* as an *allegation* under rE12 the *Commissioner* must have regard to:
- .1 whether the conduct disclosed in the *report* or its consequences presents sufficient risk to the *regulatory objectives* to justify further action;
 - .2 whether the conduct disclosed in the *report* can be properly and fairly investigated; and
 - .3 whether the conduct disclosed in the *report* could not more appropriately be dealt with under one or more of the provisions set out at rE4 to rE11 above.

A2. Investigation of *allegations*

Powers of the *Commissioner* in relation to the investigation of *allegations*

- rE14 The powers of the *Commissioner* include (but are not limited to) the power at any time:
- .1 to carry out the investigation of *allegations* as appropriate; and
 - .2 to withdraw any *allegation* and treat it as if a decision under rE12 had not been made.

Investigating *allegations*

- rE15 The *Commissioner* must not conclude any investigation of an *allegation* without taking reasonable steps to ensure that the *applicable person* has been informed of the *allegation* and given a reasonable opportunity to comment on the *allegation*.
- rE16 If a new *report* comes to light during an investigation of an *allegation* that meets the criteria of rE12, it may be treated as a new *allegation* and investigated in accordance with the provisions of Section 5.A.
- rE17 The *Commissioner* may defer further consideration of the original *allegation* until a new *allegation* has been investigated.
- rE18 No further investigation or opportunity to respond is required where the subject matter of a new *allegation* has already been investigated by the *Commissioner* and the *applicable person* has already been given an opportunity to comment on it during the original investigation.

A3. Possible outcomes of the investigation of an *allegation*

Powers of the *Commissioner* in relation to the conclusion of investigations

- rE19 At the conclusion of an investigation of an *allegation* the *Commissioner* has the power to decide:
- .1 that the conduct alleged did not constitute a breach of the *Handbook*, or that there was insufficient evidence of a breach of the *Handbook* (on the civil standard of proof);
 - .2 that the conduct alleged did constitute a breach of the *Handbook* (on the civil standard of proof) but that, in all the circumstances, no enforcement action should be taken in respect of the breach;
 - .3 that the conduct alleged did constitute a breach of the *Handbook* (on the civil standard of proof) and that the breach should be dealt with by the imposition of an *administrative sanction*;
 - .4 that the conduct alleged may constitute a breach of the *Handbook* and, if the breach were to be proved, that an *administrative sanction* under rE19.3 would not be appropriate in all the circumstances, and that the subject matter of the *allegation* against an *applicable person* involves:
 - a. a conviction for an offence of dishonesty or deception; or

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- b. a conviction for an offence under Section 4, Section 5 or Section 5A Road Traffic Act 1988 (Driving or being in charge of a motor vehicle with alcohol concentration/ concentration of a controlled drug above prescribed limit); or
- c. a breach of Part 3 or 4 of the *Handbook*; or
- d. any failure to pay an administrative fine within the relevant time; or
- e. a failure to comply with any requirements of a sanction imposed following *Disciplinary Action*;
in which case the *allegation* may form the subject matter of a referral to *Disciplinary Action*; or

.5 to refer an *allegation* to an *Independent Decision-Making Panel* for a decision.

rE20 In conjunction with a decision under rE19 the *Commissioner* may refer any *allegation* for supervisory action.

rE21 In conjunction with a decision under rE19.1 or rE19.2 the *Commissioner* may issue the *applicable person* with advice.

Powers of an *Independent Decision-Making Panel* in relation to *allegations* referred to it

rE22 Where an *allegation* has been referred to an *Independent Decision-Making Panel* under rE19.5 the *Independent Decision-Making Panel* has the power to decide:

- .1 that, on the evidence before it, the conduct alleged did not constitute a breach of the *Handbook*, or that there was insufficient evidence of a breach of the *Handbook* (on the civil standard of proof); or
- .2 that, on the evidence before it, the conduct alleged did constitute a breach of the *Handbook* (on the civil standard of proof) but that, in all the circumstances, no enforcement action should be taken in respect of the breach; or
- .3 that, on the evidence before it, the conduct alleged did constitute a breach of the *Handbook* (on the civil standard of proof) and that the breach should be dealt with by an *administrative sanction*; or
- .4 that
 - a. there is a *realistic prospect of a finding of professional misconduct being made* or there is a *realistic prospect of the disqualification condition being satisfied*, and
 - b. having regard to the *regulatory objectives*, it is in the public interest to pursue *Disciplinary Action*
in which case the *allegation* must form the subject matter of *Disciplinary Action*.

rE23 In conjunction with a decision under rE22 the *Independent Decision-Making Panel* may recommend the matter be referred for supervisory action.

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rE24 In conjunction with a decision under rE22.1 or rE22.2 the *Independent Decision-Making Panel* may issue the *applicable person* with advice.

Independent Decision-Making Panel and Commissioner powers/requirements

rE25 In exercising its powers under Section 5.A, the *Commissioner* or an *Independent Decision-Making Panel* must have regard to the *Bar Standards Board enforcement strategy* and any published *Bar Standards Board* policy and guidance that appear to be relevant.

Administrative sanction

rE26 Pursuant to rE19.2 and rE22.2 above, the *Commissioner* or an *Independent Decision-Making Panel* may impose an *administrative sanction* on an *applicable person* where there is sufficient evidence on the balance of probabilities of a breach of the *Handbook* by that *applicable person*.

rE27 The *Commissioner* or an *Independent Decision-Making Panel* may only impose an *administrative sanction* on an *applicable person* pursuant to rE26 where:

- .1 the *Commissioner* or an *Independent Decision-Making Panel* considers that to impose an *administrative sanction* is proportionate and sufficient in the public interest; or
- .2 where the matter falls to be considered under rE209 of Section 5.B of the *Handbook*.

rE28 In determining the level of *administrative sanction* to be imposed, the *Commissioner* or an *Independent Decision-Making Panel* must have regard to any published *Bar Standards Board* policy that appears to the *Commissioner* or an *Independent Decision-Making Panel* to be relevant.

rE29 The maximum level of a fine which can be imposed by the *Commissioner* or an *Independent Decision-Making Panel* under rE19.3 and rE22.3 is:

- .1 £1,000 (one thousand pounds) where the fine is to be imposed on an *applicable person* who is not a BSB entity; or
- .2 £1,500 (one thousand and five hundred pounds) where the fine is to be imposed on a *BSB entity*.

rE30 Any decision to impose an *administrative sanction* will be recorded and may, where appropriate, be considered for continued monitoring and supervision but will not be disclosed to any third parties except in accordance with Section A7 of these regulations.

rE31 The *applicable person* may appeal a decision of the *Commissioner* or an *Independent Decision-Making Panel* to impose an *administrative sanction* in accordance with Section 5.A of the *Handbook*

rE32 In the case of a *non-authorised individual* (other than an unregistered barrister, a manager of a BSB entity or a registered European lawyer who does not have a current practising certificate) who at the time of the alleged conduct was an employee of a *BSB authorised person* the *Commissioner* or an *Independent Decision-Making Panel* may only:

- .1 decide that no further action should be taken in relation to the *allegation*; or

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- .2 make an application to the *Disciplinary Tribunal* that the *non-authorised individual* be subject to a *disqualification order*.

A4. Professional misconduct proceedings

Disciplinary Action

- rE33 Where rE19.4 or rE22.4 is applicable, the *allegation* shall be referred to *Disciplinary Action* only where the *Commissioner* or an *Independent Decision-Making Panel* is satisfied that:
- .1 there is a *realistic prospect of a finding of professional misconduct being made* or there is a *realistic prospect of the disqualification condition being satisfied*; and
 - .2 having regard to the *regulatory objectives*, it is in the public interest to pursue *Disciplinary Action*.
- rE34 Where the *Commissioner* or an *Independent Decision-Making Panel* is satisfied that the requirements of rE33 are met, an *allegation* which the *Commissioner* or an *Independent Decision-Making Panel* is otherwise intending to refer to the *Disciplinary Tribunal* may, with the consent of the *applicable person* against whom the *allegation* is made, be finally determined by an *Independent Decision-Making Panel*. This is referred to as the “*determination by consent procedure*”.
- rE35 The *Commissioner* or an *Independent Decision-Making Panel* must, in deciding whether to refer an *allegation* to the *determination by consent procedure*, consider all the circumstances. However, the *Commissioner* or an *Independent Decision-Making Panel* may only make the *allegation* subject to the *determination by consent procedure* if:
- .1 the *applicable person* submits to the jurisdiction of an *Independent Decision-Making Panel*; and
 - .2 the *Commissioner* or an *Independent Decision-Making Panel* considers that:
 - a. there are no substantial disputes of fact which can only fairly be resolved by oral evidence being taken; and
 - b. having regard to the *regulatory objectives*, it is in the public interest to resolve the *allegation* under the *determination by consent procedure*; and
 - c. the potential *professional misconduct* or *disqualification condition*, if proved, combined with the *applicable person’s* previous disciplinary history, does not appear to be such as to warrant a period of *suspension* or disbarment, the withdrawal of an *authorisation* or *licence* (as appropriate) or the imposition of a *disqualification order* (or equivalent by another *Approved Regulator*).
- rE36 *Disciplinary Action* will be conducted in accordance with such procedures as the *Bar Standards Board* may prescribe from time to time, including in Section 5.B of the Handbook, and will apply the appropriate standard of proof as described in rE37, rE38, rE164, and rE261A.

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- rE37 Where a matter is to be considered under the *determination by consent procedure* as per rE34, the standard of proof to be applied is the civil standard of proof, except when rE38 applies.
- rE38 In considering *allegations* under the *determination by consent procedure*, the *Commissioner* or an *Independent Decision-Making Panel* must apply the criminal standard of proof when deciding charges of *professional misconduct* where the conduct alleged within that charge occurred prior to 1 April 2019, including where the same alleged conduct continued beyond 31 March 2019 and forms the basis of a single charge of *professional misconduct*.

Determination by Consent

- rE39 Where the *Commissioner* or an *Independent Decision-Making Panel* has decided to refer an *allegation* to the *determination by consent procedure* in accordance with rE35, the *Commissioner* or an *Independent Decision-Making Panel* (as the case may be) may terminate the *determination by consent procedure* at any time if it no longer considers that the requirements of rE35 are satisfied, or for any other good reason.
- rE40 If the *determination by consent procedure* ends other than by a finding and sanction to which the *applicable person* consents, then an *allegation* may be referred to a three-person *Disciplinary Tribunal*.
- rE41 An *Independent Decision-Making Panel* may impose on an *applicable person* against whom a charge of *professional misconduct* has been found proved under the *determination by consent procedure* any one or more the following:
- .1 an order to pay a fine to the *Bar Standards Board* (the amount of such fine to be determined having regard to the relevant sanctions guidance) on such terms as to payment as the *Independent Decision-Making Panel* thinks fit;
 - .2 the imposition of any conditions on their licence or authorisation (where appropriate);
 - .3 a reprimand by the *Bar Standards Board*;
 - .4 advice by the *Independent Decision-Making Panel* as to their future conduct; and
 - .5 an order to complete (or, in the case of a *BSB entity*, an order to procure that any relevant *managers* or employees complete) continuing professional development of such nature and duration as an *Independent Decision-Making Panel* shall direct and to provide satisfactory proof of compliance with this order to the *Commissioner*.
- rE42 In determining what sanction, if any, to impose under the *determination by consent procedure*, an *Independent Decision-Making Panel* shall have regard to any relevant policy or guidelines issued by the *Bar Standards Board* and/or by the *Council of the Inns of Court* from time to time.
- rE43 An *Independent Decision-Making Panel* may not make an award of costs when dealing with an *allegation* under the *determination by consent procedure*.
- rE44 The *Commissioner* must publish any finding and sanction resulting from the *determination by consent procedure* to the same extent as such publication would have taken place on a

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finding and sanction by a *Disciplinary Tribunal*, as provided for in the Disciplinary Tribunal Regulations.

rE45 If the *applicable person* accepts the outcome of the *determination by consent procedure*, no one may appeal against it.

Disciplinary Tribunal

rE46 At the same time as the *Commissioner* or an *Independent Decision-Making Panel* directs that an *allegation* shall form the subject matter of a disciplinary charge and/or *disqualification* application before a *Disciplinary Tribunal*, the *Commissioner* or an *Independent Decision-Making Panel* must also decide whether a three-person panel or a five-person panel is to be constituted.

rE47 In deciding whether to direct the constitution of a three-person or a five-person panel, the *Commissioner* or an *Independent Decision-Making Panel* shall consider the sanction which it considers is likely to be imposed on the *applicable person* if the charge or application is proved, having regard to:

- .1 any indicative sanctions guidance published by *BTAS/COIC/Bar Standards Board* from time to time; and
- .2 the previous disciplinary record of the *applicable person*.

rE48 The *Commissioner* or an *Independent Decision-Making Panel* may direct that a five-person panel is to be constituted if it considers that:

- .1 having regard to any indicative sanctions guidance published by *BTAS/COIC/Bar Standards Board*, in all the circumstances, a sanction of disbarment or *suspension* from *practice* for more than twelve months may be appropriate; or
- .2 having regard to any indicative sanctions guidance published by *BTAS/COIC/Bar Standards Board*, in all the circumstances, a sanction of indefinite *disqualification* or *disqualification* for a defined term of more than twelve months may be appropriate; or
- .3 having regard to any indicative sanctions guidance published by *BTAS/COIC/Bar Standards Board*, in all the circumstances, a sanction of a *BSB entity* having its authorisation or licence revoked or *suspended* for a period of more than twelve months may be appropriate; or
- .4 the *allegation* involves a conviction for dishonesty or deception

otherwise the *Commissioner* or an *Independent Decision-Making Panel* must direct that a three-person panel is to be constituted.

rE49 The *Commissioner* or an *Independent Decision-Making Panel* must inform the *applicable person* of the direction that it has made pursuant to rE48. There is no appeal against the decision to refer a matter to a three or a five-person panel.

rE50 The *Commissioner* or an *Independent Decision-Making Panel* may:

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- .1 refer to the same *Disciplinary Tribunal* any charges and/or *disqualification* applications which they consider may conveniently be dealt with together; and
- .2 refer any additional charges or *disqualification* applications relating to the same *applicable person* to the *Disciplinary Tribunal* which is dealing with the original disciplinary charge or *disqualification* application (as the case may be), even if the additional charge or application, by itself, may be regarded as insufficiently serious to merit disposal by a *Disciplinary Tribunal* of that level.

rE51 When the *Commissioner* or an *Independent Decision-Making Panel* has directed that an *allegation* shall form the subject matter of a charge or application before a *Disciplinary Tribunal*, the *Commissioner* is responsible for bringing the charge or application on behalf of the *Bar Standards Board* and prosecuting that charge before such *Disciplinary Tribunal*. If so:

- .1 the *Commissioner* may arrange for the appointment of a representative to settle the charge and to present the case before the *Disciplinary Tribunal*; and
- .2 any charges shall be brought in the name and on behalf of the *Bar Standards Board*.

rE52 Section 5.B applies in respect of the procedure to be followed by the *Disciplinary Tribunal*

rE53 Where a *Disciplinary Tribunal* directs that matter(s) be referred to *Commissioner* or an *Independent Decision-Making Panel* under rE209 to consider whether an *administrative sanction* should be imposed, the *Commissioner* or an *Independent Decision-Making Panel* shall consider the matter in accordance with rE26 to rE32 or take no enforcement action in accordance with rE19.2 and rE22.2.

A5. Appeals

rE54 An *applicable person* has a right to appeal from a decision to impose an *administrative sanction*. That appeal is to an *appeal panel* constituted under the auspices of the *Council of the Inns of Court* in the same composition as a *three-person panel* constituted under rE133 of the *Disciplinary Tribunal Regulations*.

rE55 An appeal, if made, shall be made by the *applicable person* sending to the *Commissioner*, within 28 days of the imposition of the *administrative sanction*, a notice identifying the decision appealed against, the decision the *applicable person* contends for, the grounds of such appeal and a statement whether the *applicable person* requires their appeal to be disposed of at an oral hearing. If the *applicable person* does not expressly request an oral hearing, the appeal will be dealt with by a review of the papers. The appeal is a review of the original decision, not a re-hearing.

rE56 The notice must be accompanied by a sum as prescribed by the *Bar Standards Board* from time to time. The sum will be payable to the *Bar Standards Board* to cover expenses.

rE57 Where the appeal is to be dealt with at an oral hearing then:

- .1 at least 5 working days before the time set for the appeal, the *Bar Standards Board* will provide each member of the *appeal panel* and the *applicable person* with a paginated bundle of the correspondence and other documents on its files relating to the original decision; and

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.2 the *applicable person* and *Bar Standards Board* may be represented at the hearing.

rE58 The decision of an *appeal panel* is final and shall not be not subject to any further appeal or reconsideration.

rE59 The *appeal panel* must decide whether to set aside or to vary the original decision.

rE60 If the *appeal panel* allows the appeal in whole or in part, the *appeal panel* may direct that any administrative fine or appeal fee already paid by the *applicable person* be refunded either in whole or in part, but the appeal panel has no power to award costs.

A6. Reconsidering *allegations* which have been disposed of

rE61 The *Commissioner* or an *Independent Decision-Making Panel* may reconsider an *allegation* which has been disposed of by the *Commissioner* or an *Independent Decision-Making Panel* respectively where:

- .1 new evidence becomes available which leads it to conclude that it should do so, or
- .2 for some other good reason.

rE62 Following such reconsideration, the *Commissioner* may take any further or different action the *Commissioner* thinks fit, as if any earlier decision had not been made.

A7. Confidentiality

rE63 The *Bar Standards Board* must keep *reports* and *allegations* assessed or investigated under these regulations confidential. The *Bar Standards Board* must not disclose the fact that a *report* exists, or details of the *report* or of its treatment as an *allegation* or otherwise, or of its disposal save as specified in this Section 5.A, or as otherwise required by law.

rE64 Disclosure may be made:

- .1 for the purpose of the *Bar Standards Board's* regulatory assurance, supervision or authorisations functions; or
- .2 for the purpose of keeping the *applicable person*, or any source of information relating to the *applicable person*, informed of the progress of the consideration of a *report* or *allegation*; or
- .3 for the purpose of publicising any forthcoming public hearing of charges arising from the *allegation*; or
- .4 where the *applicable person* consents; or
- .5 in response to a request from the selection panel or a member of its secretariat in respect of an application by a *barrister* for silk; or from any body responsible for the appointment of judges in respect of an application for judicial appointment; or from some other body or the *BSB authorised individual* for a *certificate of good standing* in respect of a *barrister*; or

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- .6 for the purposes of providing examples of the types of behaviour that may constitute breaches of the e either externally or internally within the *Bar Standards Board*, provided that where disclosure occurs in these circumstances although details of the individual *reports* or *allegations* may be published, any relevant party's identities will remain anonymous; or
- .7 with the approval of the *Commissioner*, where the *Commissioner* considers it is in the public interest to disclose some or all of the details of the *report* or *allegation*.

A8. Interpretation

- rE65 For the avoidance of doubt, this Section 5.A does not prevent the immediate operation of the *Interim Suspension and Disqualification Regulations* or the *Fitness to Practise Regulations*, where appropriate.

A9. Commencement

- rE66 This Section 5.A shall come into force in accordance with the provisions of Part 1 of this Handbook.