

Mental Health & Wellbeing at the Bar

Serious Misconduct
Guidance



Wellbeing
at the Bar

Serious Misconduct

What is misconduct?

For this purpose, misconduct means breaches of obligations under the BSB Handbook.

What duties arise under the BSB Handbook if a barrister commits misconduct?

Two main duties may arise:

1. In some circumstances, there will be a duty to report the misconduct to the BSB: see below.
2. A barrister who commits misconduct is under a duty (flowing from Core Duties 2 and 10) to take all reasonable steps to mitigate the effects of that misconduct (gC2, gC94).

A failure to comply with either of those duties will itself be misconduct.

If you are working in an entity, then misconduct falling short of serious misconduct should be reported to your HOLP so that this can be recorded: see gC102.

When should misconduct be reported to the BSB?

Any misconduct by a barrister can be reported to the BSB, but except as mentioned below, it does not have to be.

In some circumstances, you will have duties to report misconduct.

All those who are bound by Part C4 of the BSB Handbook (see rC1.2) may owe duties to report.

All barristers are bound by Part C4, in whatever capacity, so it includes Heads of Chambers.

If Part C4 applies to you, then there are two types of duty to report:

1. You have a duty to make a report about yourself in all of the circumstances set out in Rule C65.

In particular, these circumstances include the following:

- You have a duty to report your own misconduct if it is “serious misconduct” (rC65.7), but not otherwise. Your duty is to make a report “promptly”.
- Other things must also be reported, however, such as certain criminal charges, cautions and convictions (rC65.1, rC65.2).

2. You have a duty to make a report about serious misconduct by other barristers, unless one of the exceptions applies: Rule C66, gC95-gC86.

What is “serious misconduct”?

This is not defined, but examples are given in the BSB Handbook at gC96.

Further guidance is available from the [BSB](#).

What happens if I do not report serious misconduct by myself or another barrister?

A failure to report serious misconduct is, itself, serious misconduct, unless (in the case of misconduct by someone else) an exception applies.

How do I decide if I have an obligation to report serious misconduct?

You should follow the guidance in the BSB Handbook at gC97-gC98.

If in doubt, both the Bar Council and the BSB advise that you should consider seeking advice from the [Bar Council's Ethical Enquiries Service](#).

According to Guidance C98, the duty to report arises if, having considered all of the circumstances, “you have reasonable grounds to believe there has been serious misconduct”.

Guidance C98 goes on to explain that this will be so where, having given due consideration to the circumstances, including the matters identified at Guidance C97, you have material before you which as it stands establishes a reasonably credible case of serious misconduct. Your duty is then to report the potential serious misconduct so that the BSB can investigate whether or not there has in fact been such misconduct.

In addition, the BSB’s separate [Guidance on Reporting Serious Misconduct of Others](#) adds two suggestions:

- It suggests (at paragraph 26) that you may also wish to take into account whether there is a risk that the misconduct will continue or be repeated if no action is taken.
- It suggests (at paragraph 27) that issues of competence will not normally constitute serious misconduct unless they are so serious as to pose a serious risk to the public or to diminish the trust and confidence which the public places in the profession.

As that separate Guidance explains (at paragraph 6), whether or not misconduct is serious misconduct is a matter of judgement, depending on the particular circumstances. It goes on to say, however, that if having considered all the facts and circumstances, you remain unsure whether the behaviour in question amounts to serious misconduct, you should err on the side of caution and make a report to the BSB.

Do I have a discretion whether to report?

No; not as such. If your duty to report has been triggered, then you have no discretion not to report.

Indeed, one of the examples of serious misconduct given in gC96 is a failure promptly to report serious misconduct by another barrister: see gC96.8.

This does not mean, however, that there are no elements of judgement which may affect your decision as to whether and, if so, when and how to report. These are explained below.

The first element of judgement is that involved in deciding whether the behaviour in question amounts to serious misconduct (see above: How do I decide whether I have an obligation to report?), but subject to that, if your duty to report has been triggered then you have no discretion not to report.

The reason for this is given at gC95: “It is in the public interest that the [BSB] is made aware of, and is able to investigate, potential instances of serious misconduct.”

The rationale is also explained in the BSB’s separate [Guidance on Reporting Serious Misconduct of Others](#) as being to achieve Outcomes oC21 to oC23 (set out at the start of Section C4 of the BSB Handbook).

The BSB's separate guidance (paragraph 18) does emphasise, however, that reporting what you believe may be serious misconduct "simply puts the BSB in a position to decide what action, if any, to take by making a fair assessment as to whether or not serious misconduct (or any misconduct) has in fact occurred. Action will only be taken in relation to the barrister or lawyer concerned where this is appropriate, proportionate and in accordance with the BSB's policies".

If your duty to report arises, then there may still be two further elements of judgment as regards (1) when you should report, and (2) whether steps should be taken internally first (and, if so, what steps).

The separate BSB Guidance states that you should make a report to the BSB as soon as reasonably practicable, and there will clearly be circumstances in which misconduct should be reported to the BSB without delay: for example, dishonesty or admitted sexual harassment. (In the latter respect, Bar Council guidance recommends that this be reported as soon as possible).

However, the Bar Council does not believe that you are inevitably under a duty to make a report straight away. Much will depend on the nature and circumstances of the misconduct. Relevant matters are likely to include the following: the seriousness of the misconduct; the impact on clients and on others within your organisation; any impact on the public, or on public confidence in the profession; any risk to the public interest; the degree of risk of repetition or continuation of the misconduct, and the likely effects if this happens; the cause(s) of the misconduct; any history of similar misconduct; the degree of intention involved; whether the barrister may yet be persuaded to comply with the duty to report him/herself (see below: What are the exceptions to the duty to report serious misconduct by others?); whether the misconduct falls within an internal complaints or grievance procedure (which may be something that must, should, or could helpfully be triggered); and whether the misconduct is still at the stage of being an unproven allegation of misconduct which is denied, and an internal investigation is in train or going to be carried out.

This does not mean that the misconduct can be kept from the BSB – indeed, it may be prudent in many cases to ensure that it is reported to the BSB at an early stage anyway – but it may mean that sensible and reasonable steps can still be taken by the barrister in question, and by chambers or an entity, to seek to address the misconduct and any consequences. Indeed, given that the barrister who has committed the misconduct is likely to be under a duty to take all reasonable steps to mitigate the effects of that misconduct (gC2, gC94), it may be both proper and sensible for chambers or the entity to

assist the barrister to do this. Any mitigation may well count in the barrister's favour when the BSB decides how to respond to the report of misconduct (see below: What are the exceptions to the duty to report serious misconduct by others?).

Finally, there is an element of judgement to be exercised in deciding *how* to report. There is a link between this and any steps that might be, or may have been, taken internally. It is likely to be helpful to the BSB, particularly if you are a person in a position of responsibility within chambers (such as a Head of Chambers), for them to know what steps have been taken to deal with the serious misconduct, and what further steps (if any) chambers or the entity intends to take to deal with it. This will enable the BSB to decide how best, and when, to deal with this itself; and the BSB may even engage with you in this regard, while maintaining its independent judgement and position as regulator and its right to take the matter further if and when it thinks fit.

What are the exceptions to the duty to report serious misconduct by others?

The exceptions are limited. They are set out in the BSB Handbook at Rule C68, and guidance is given at gC99.

In brief, they are as follows:

1. Where your knowledge arises from matters within the public domain, and the circumstances are such that you reasonably consider it likely that the facts will have come to the attention of the BSB.
2. Where you are aware that the person who committed the serious misconduct has already reported it to the BSB.
3. Where the events which led to you becoming aware of someone's serious misconduct are subject to that person's legal professional privilege.
4. Where you become aware of the serious misconduct a result of your work on one of four identified Bar Council advice lines. These include the Ethical Enquiries Service.

If you are a barrister, then in view of the second exception, you will not need to report another barrister for serious misconduct if you know that the other barrister has already made a report.

Similarly, you may delay making a report yourself if you have reason to believe that the other barrister is going to make a report, so long as you follow up on that so that you know that it has been done.

It will be in any barrister's best interests to report him/herself for serious misconduct, rather than to have a report made by someone else. This is not only because the failure to make such a report will be a further instance of serious misconduct, but also because a barrister's actions in response to his/her own misconduct may have a bearing on any decisions which may need to be made by the BSB or a Disciplinary Tribunal.

For all of those reasons, if you become aware of serious misconduct by another barrister, then you may well wish to encourage that barrister to make a report for him/herself.

Victims

Some types of misconduct may result in impacts on others in chambers, including members of chambers, pupils and staff. Similarly, a barrister who makes a report of serious misconduct may fear being victimised as a result of making such a report.

Some protections are available for victims of misconduct. In particular:

1. The BSB's separate [Guidance on Reporting Serious Misconduct of Others](#) states (at paragraph 16) that "the BSB will treat any report of discrimination, harassment (whether or a sexual nature or otherwise), or victimisation as sensitively as possible and will not act without first consulting with any alleged victim".
2. It is misconduct to victimise any person for making a report to the BSB, in good faith, of what they genuinely and reasonably believe to be serious misconduct: rC69. This applies to a victim making a report, as well as to anyone else doing so.

Where can I get advice about reporting serious misconduct?

You may seek advice from the [Bar Council's Ethical Enquiries Service](#). This service is confidential, and advisers giving advice through this service are also exempt from the requirement to report serious misconduct. As a result, you can seek confidential advice without running the risk that any barrister who may advise you will be obliged to make a report. However, you can still expect an adviser to encourage you to report misconduct if the adviser considers it to be serious: see gC101.

You can seek advice from other barristers, including your Head of Chambers, but they will all be under a duty to report any serious misconduct that you draw to their attention.

If the issue is such that it raises questions of law, then you may seek legal advice (including from another practising barrister). Legal advice will be covered by legal professional privilege, and the barrister from whom you seek legal advice will be prevented accordingly from disclosing information you have confided to him/her confidentially for the purpose of seeking that advice.

How do I report misconduct to the BSB?

A report of misconduct is essentially a complaint to the BSB.

Information about how to make a complaint of serious misconduct is available on the BSB website:

<https://www.barstandardsboard.org.uk/complaints-and-professional-conduct/obligations-to-report-serious-misconduct/>

You should also refer to the BSB's separate Guidance on Reporting Serious Misconduct of Others:

https://www.barstandardsboard.org.uk/media/1666565/reporting_serious_misconduct_of_others__august_2015_.pdf

There is a specific form which can be used for reporting serious misconduct by other barristers:

https://www.barstandardsboard.org.uk/media/1702477/140619_-_pg22_-_procedure_for_dealing_with_reports_of_serious_misconduct_-_annex_a_-_form_-_live_updated_october_2015_.pdf

There is no requirement to use this form, but the BSB's guidance indicates that any report should include the information covered by the form.

The form includes a declaration, to be signed by the person making the report, as follows:

"I believe that this report is accurate, made in good faith and on the basis of a genuine and reasonably held belief that the conduct described was serious misconduct."

Before deciding what to include in your report, you may wish to refer to the answer above:

Do I have a discretion whether to report?

What happens after a report is made?

This is governed by the Complaints Regulations in Part 5A of the BSB Handbook.

You may also wish to refer to the explanation on the [BSB website](#).

In simple terms:

- The BSB will investigate a report of serious misconduct in the same way as any other complaint.
- Having investigated the complaint, the BSB will decide what, if any, action to take.
- You will have no role in the complaint process other than as a potential witness.

If, in the course of considering the complaint, the BSB identifies that the individual who is the subject of the complaint may be unfit to practise, then it must refer that to a Fitness to Practise Panel under the fitness to Practise Regulations: see Fitness to Practise.