Chapter 1

THE JURISDICTION OF REGULATORS: POWERS, PRINCIPLES AND APPROACH

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(1) THE LEGAL BASIS FOR THE REGULATOR'S POWERS

Statutory and contractual powers

1.01 A disciplinary tribunal may derive its jurisdiction to regulate entities (individual or corporate) in a number of ways, including statute, and contract. The legal basis on which the regulator exercises authority may be relevant not only to the principles that apply to it, and how they apply, but also the mechanisms by which any decision may be challenged. The regulator may owe its powers as a matter of private law, eg under an express or implied contract or it may have a statutory basis. For an example of an implied contract and a discussion of the circumstances in which an implied contract may be held to exist, see the decision of the Court of Appeal in *Modahl v British Athletic Federation*.[1]

[1] *Modahl v British Athletic Federation* [2001] EWCA Civ 1447.

1.02 There also exist bodies which, although established neither by statute nor contract, exercise a predominant power over the exercise of a trade or profession in the way that the Jockey Club exercises authority in relation to horse racing or the International Tennis Federation in relation to tennis.

1.03 In *Nagle v Feilden*,[1] Lord Denning MR held that the courts could exercise a supervisory jurisdiction over authorities exercising a predominant power over the exercise of a trade or profession, irrespective of the absence of contract or statutory underpinning. In that case, the court held that the refusal by the Jockey Club to issue a training licence to a woman might be void as being contrary to public policy on discrimination grounds. *McInnes v Onslow-Fane* (discussed in greater detail below) is a further example of the court's review jurisdiction over a non-public, non-contractual body exercising regula-

tory power over the ability of a person to exercise a professional activity. In *Wilander v Tobin*, Lord Woolf MR, held that there was an implied term that gave the High Court essentially the same supervisory jurisdiction as it would have on a claim for judicial review, over what was assumed to be the contractual Appeal Committee of the International Tennis Federation:[2]

> 'Assuming but not deciding that the Appeal Committee is not subject to judicial review because it is not a public body, this does not mean that it escapes the supervision of the High Court. The proceedings out of which this appeal arises are part of that supervision. The Appeals Committee's jurisdiction over the plaintiff arises out of a contract. That contract has an implied requirement that the procedure provided for . . . is to be conducted fairly . . . if the Appeals Committee does not act fairly or if it misdirects itself in law and fails to take into account relevant considerations or takes into account irrelevant considerations, the High Court can intervene. It can also intervene if there is no evidential basis for its decision.'

1 *Nagle v Feilden* [1966] 2 WLR 1027.
2 *Wilander v Tobin* [1997] 2 Lloyds Rep 293, [1996] EWCA Civ 1280.

1.04 Those remarks have also been held applicable in relation to non-contractual, non-statutory bodies. In *Bradley v Jockey Club*[1] Richards J noted that the observations in *Tobin* 'were made in what was assumed to be a contractual context . . . In my view, however, they have just as much bearing on the non-contractual claim'. In *Fallon v Horseracing Regulatory Authority*,[2] David J held:

> 'it is well established that a decision of a body such as the HRA cannot be challenged by judicial review proceedings. But it is equally well established that the High Court retains a supervisory jurisdiction over such decisions, and the approach to be adopted is essentially that which the Administrative Court would adopt in public law cases'.

In *Cronin v The Greyhound Racing Board of Great Britain Ltd*,[3] Maurice Kay LJ observed of the board:

> 'It is a private sector regulator constructed on contractual foundations but which, when exercising its disciplinary powers, is subject to requirements of fairness, whether or not they are expressed in the rules it has adopted.'[4]

1 *Bradley v Jockey Club* [2005] EWCA Civ 1056, [2006] ISLR, SLR-1.
2 *Fallon v Horseracing Regulatory Authority* [2006] EWHC 2030 (QB).
3 *Cronin v The Greyhound Racing Board of Great Britain Ltd* [2013] EWCA Civ 668.
4 Although note in *Andreou v Institute of Chartered Accountants in England and Wales* [1997] EWCA Civ 2189, [1998] 1 All ER 14, [1996] 8 Admin LR 557 the Court of Appeal declined to imply a term that the power of the ICAEW to make bye-laws would be exercised fairly and reasonably.

1.05 The proper approach to the interpretation of the scope of the regulator's procedural powers will depend upon its legal basis. Where a regulator owes its powers to contract, then the scope of its powers will have to be determined in accordance with ordinary principles of contractual interpretation. Where a regulator is established by statute, the same will be determined by relevant principles of statutory interpretation. In *Virdi v Law Society*[1] the appellant sought to argue that the Solicitors Disciplinary Tribunal had no power to permit the clerk to retire with the tribunal or to assist in drafting their

written findings; in rejecting the submission, the court summarised the approach to ascertaining the powers of a regulator established by statute at paras 28–31, per Stanley Burnton LJ:

> '28 A statutory body, such as the tribunal, has only such powers as Parliament has conferred on it. However, it may not be confined to the powers expressly conferred. It is lawful for it to do what the law expressly or impliedly authorises: see, for example, Sir Thomas Bingham MR in *R v Somerset County Council, Ex p Fewings* [1995] 1 WLR 1037, 1042H. Generally, a body created by statute must have powers given to it if its acts are to have legal effects. It must therefore have powers conferred if it is to enter into contracts, and the power to enter into contracts may be circumscribed by reference to its authorised functions. In the case of a disciplinary tribunal, it must have powers conferred on it if it is to make legally binding decisions, including rulings as to its procedure which, if not complied with, may have legal consequences. But it does not need to have powers conferred for acts that have no direct legal effect. Indeed, the word "power" is strictly inaccurate. When a tribunal invites its clerk to advise it, or to remind it of evidence, whether in plenary session or in private, it is not exercising a power, but rather a liberty. Its act may have an indirect legal effect, if, for example, it renders the proceedings unfair, but not otherwise. So I doubt whether there is really an issue of vires in this case at all. We are, rather, concerned as to whether there was, impliedly (since there was no express restriction), a prohibition on the tribunal acting as it did.
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> 30 However, if there is an issue of vires, it must be remembered that a statutory body does not require express conferment of specific powers in order to perform its functions. Parliament is taken to have impliedly conferred powers ancillary to the discharge of their functions. In *Attorney General v Great Eastern Railway Co* (1880) 5 App Cas 473, 478, Lord Selborne LC said that the doctrine of ultra vires:
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> > "ought to be reasonably, and not unreasonably, understood and applied, and that whatever may fairly be regarded as incidental to, or consequential upon, those things which the legislature has authorised, ought not (unless expressly prohibited) to be held, by judicial construction, to be ultra vires."
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> In the case of local authorities, that principle was enacted in section 111 of the Local Government Act 1972: see Woolf LJ in *Hazell v Hammersmith and Fulham London Borough Council* [1990] 2 QB 697, 722 and the speech of Lord Templeman in that case in the House of Lords [1992] 2 AC 1, 29. Of course, that implied conferment of powers is subject to any express or implied statutory restriction.
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> *31 Thus, if Parliament creates a tribunal and says nothing about its procedure and administration, it will have implied powers incidental to the exercise of its jurisdiction: power to regulate its procedure and to make such administrative arrangements as are appropriate for it to discharge its functions.* Provided it has a budget, it may hire staff, including a clerk, give them instructions, arrange accommodation for its hearings, purchase stationery, and so on. In my judgment, therefore, the new section 46(5A) of the Solicitors Act 1974 only confers expressly what had previously been conferred impliedly.
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> 32 These considerations lead me to think that Mr Beaumont is in a "Catch 22" situation. Either when the tribunal instructed or invited their clerk to retire with them and to assist them they were regulating their own "procedure" within the meaning of rule 31(a), or what was done was no more than an administrative arrangement within the implied incidental powers of the tribunal . . .

33 In my judgment, the procedure of the tribunal included their withdrawing to consider their decision in private with their clerk and her role in this case' (emphasis added).

[1] *Virdi v Law Society* [2010] EWCA Civ 100, [2010] 1 WLR 2840.

1.06 *Virdi* was approved in *R (Hill) v Institute of Chartered Accountants in England and Wales*.[1] Longmore LJ, with whom the other judges agreed, said:

'I agree with Stanley Burnton LJ in *Virdi v Law Society* [2010] 1 WLR 2840, paras 28–31, that when one is dealing with byelaws and regulations of professional disciplinary bodies one cannot expect every contingency to be foreseen and provided for. The right question to ask of any procedure adopted should therefore be not whether it is permitted but whether it is prohibited. If one asks that question in this case after rejecting any application of the expressio unius principle, the answer is that the procedure adopted is not prohibited. It must, of course, still be fair and that to my mind is the critical issue in this appeal.'

[1] *R (Hill) v Institute of Chartered Accountants in England and Wales* [2013] EWCA Civ 555.

1.07 If a tribunal does not act within its jurisdiction, however conferred, acts done beyond their powers, that is to say *ultra vires*, may be set aside on application to the court. In *Gorlov v Institute of Chartered Accountants in England and Wales*[1] the ICAEW proceeded with a disciplinary hearing without following its bye-laws. Despite the fact that jurisdiction was not contested by the claimant, the court held that the proceedings were a nullity:

'20. . . . The Disciplinary Committee did not have power under the bye-laws to consider any complaint which was not referred by the Investigating Committee. Unlike a court, the Disciplinary Committee does not have any inherent jurisdiction. It only has the powers conferred upon it by the bye-laws . . .

22. . . . The claimant could not by consent confer upon the Disciplinary Tribunal powers which it did not have under the bye-laws.'

In *Stenhouse v Legal Ombudsman*,[2] Coulson J considered an application for judicial review by a barrister against a Legal Ombudsman determination. The determination included findings in respect of a claim by the barrister for unpaid fees against his former client (the latter being the person who had complained to the Legal Ombudsman). The findings did not relate to any of the complaints made against the barrister and fell outside the matters considered by the Legal Ombudsman's Investigating Officer prior to the determination ([67]). As a result, Coulson J held that they were made without jurisdiction:

'69 It is axiomatic that the LO can only investigate the complaints that have been made. That is the source of his jurisdiction. He does not have the jurisdiction to make findings in his Determination without prior notice, or to make findings which have never been the subject of complaint.'

[1] *Gorlov v Institute of Chartered Accountants in England and Wales* [2001] EWHC 220 (Admin), [2001] ACD 73.
[2] *Stenhouse v Legal Ombudsman* [2016] EWHC 612 (Admin), [2016] 2 Costs LR 281.

(2) THE LEGAL BASIS FOR THE REGULATOR'S POWERS: TERRITORIAL JURISDICTION

1.08 Even where disciplinary rules do not expressly permit the consideration of conduct which took place outside the United Kingdom, it is likely that a court will be ready to include such conduct in consideration, given that the purpose of the proceedings is protection of the public, and the location of the conduct may not be relevant to the question whether the practitioner poses a risk to the public.

1.09 In *Antonelli v Secretary of State for Trade and Industry*[1] the Director-General of Fair Trading made an order under the Estate Agents Act 1979 prohibiting the claimant from doing any estate agency work on the ground of his conviction for an offence involving violence, namely that of 'burning real estate other than a dwelling house'. The claimant appealed on the basis that convictions by a foreign tribunal could not found jurisdiction.

[1] *Antonelli v Secretary of State for Trade and Industry* [1998] QB 948.

1.10 Lord Justice Beldam, giving the court's judgment, stated as follows:

'I can see no ground for confining the word "conviction" so that a conviction before a court outside the United Kingdom for fraud, dishonesty or violence is excluded. By 1979 fraud and dishonesty had already achieved an international dimension. Parliament is unlikely to have intended that a person convicted of serious fraud, for example in France, should be able to commute from Calais to Dover and there to carry on practise as an estate agent . . . In my view the purpose of the Act of 1979 is a more persuasive consideration and it would seem to me anomalous if Parliament had not intended convictions for fraud, dishonesty or violence outside the United Kingdom as qualifying to enable the Director to make an order that a person so convicted was unfit to carry on estate agency work generally . . . '

1.11 In *R (Health Professions Council) v Disciplinary Committee of the Chiropodists Board*[1] Goldring J held that the respondent had jurisdiction to consider conduct which had occurred in New Zealand (at [21]–[24]):

'21. I have come to the view that the Committee did have jurisdiction to hear the New Zealand complaints.

22. First, section 9(2) does not impose any jurisdictional limit. If it had been Parliament's intention there should be one, it could have said so. It is plain that a conviction outside the United Kingdom would not count for the purposes of section 9(1) of the Act. It equally could have said that conduct outside the United Kingdom would not count for the purposes of section 9(2).

23. Second, the purpose of this legislation was the protection of the public. If a chiropodist has been guilty of serious professional misconduct, it does not matter to a member of the public whether that misconduct arose within or outside the jurisdiction. It does not seem to me that the fact that the charges relate to matters outside the United Kingdom and do not directly relate to Mr Green's registration in the United Kingdom is material. The issue is whether they amount to conduct of such a nature as to be infamous in any professional respect, wherever committed. If there is such possible conduct, it is the duty of the Committee to investigate it.

24. I add. When Mr Green sought and was given his Registration in 1981, he knew that serious professional misconduct by him would put his registration at risk. Provided the allegation of such misconduct is properly proved, the fact it may have

occurred outside the jurisdiction cannot, in my view, be unfair to someone in Mr Green's position'

[1] *R (Health Professions Council) v Disciplinary Committee of the Chiropodists Board* [2002] EWHC 2662 (Admin).

1.12 In *Swanney v General Medical Council*[1] a doctor argued that since he had not been registered with the GMC at the time of the relevant incidents under question and that they had occurred in Canada, the GMC had no jurisdiction over him. The Inner House of the Court of Session rejected both arguments, taking an expansive view of the GMC's jurisdiction (at [17]):

'Section 36(1)(b) of the 1983 Act authorises the professional conduct committee to take action in respect of serious professional misconduct "whether while so registered or not". In our view, the appearance of these words in that subsection make it completely clear that the committee was being given authority by Parliament to explore an issue of serious professional misconduct in relation to actions which may have occurred while the subject of the inquiry was not a registered person in the United Kingdom. In our opinion, there can be absolutely no doubt about that matter. The second issue arising from the appellant's first argument was whether section 36(1)(b) could relate to conduct which took place outside the United Kingdom. While the legislation itself is silent upon this matter, we have reached the view that the provision can relate to conduct outside the United Kingdom. We agree with the submission made to us by counsel for the respondents that the consequences of the view advanced by the appellant would be highly undesirable. It cannot be supposed that Parliament intended such consequences. It appears to us to be inconceivable that the legislation would not permit inquiry into the conduct of a registered person, with a view to seeing whether serious professional misconduct had occurred, simply because that conduct had occurred in some other state. If the contrary view were accepted it would mean that a practitioner whose conduct could be regarded as serious professional misconduct in some other jurisdiction could come to the United Kingdom and practise medicine here with impunity, it might be to the danger of the public. Such a result would undermine the objective of the respondents, enshrined in section 1(1A) of the 1983 Act, which provides that the main objective of the respondents is to "protect, promote and maintain the health and safety of the public".'

In *R (Lee) v General Medical Council*[2] a disciplinary committee of the Singapore Medical Council (SMC) found the claimant doctor guilty of professional misconduct and imposed sanctions. The decision was suspended pending the claimant's statutory appeal, which was eventually dismissed. While not practising in the UK, she was registered with the GMC, and did not inform it of the SMC's adverse determination. Dismissing her application for judicial review, Haddon-Cave J held (at [32]) that the claimant had been under a duty under the relevant GMC guidance immediately to notify it of an adverse finding by a foreign regulatory body, notwithstanding that the decision was suspended pending appeal. A fitness to practise panel had therefore been correct to find that the claimant had failed in her duty to notify the GMC of the SMC's adverse finding.[3]

[1] *Swanney v General Medical Council* [2008] CSIH 35.
[2] *R (Lee) v General Medical Council* [2016] EWHC 135 (Admin), [2016] 4 WLR 34.
[3] Note that, at the time of writing, an appeal in this case is outstanding.

(3) THE LEGAL BASIS FOR THE REGULATOR'S POWERS: JURISDICTION IN TIME

1.13 In the absence of a rule to the contrary, there is no specific time limit with respect to the bringing of disciplinary proceedings.

1.14 Time starts running in civil proceedings when proceedings are instituted and stops running when the final appeal decision has been made or the time for appealing has expired. The reasonableness of the length of proceedings must be assessed in each case taking into account all the circumstances including (1) the complexity of the case, (2) the conduct of the applicant and the conduct of the judicial authorities, and (3) the conduct of the relevant authorities, including delay in commencing proceedings.

1.15 Failure to determine professional disciplinary proceedings within a reasonable time may violate Art 6 *without proof of prejudice to the accused*: *Aaron v The Law Society*.[1]

[1] *Aaron v The Law Society* [2003] EWHC 2271 (Admin); [2003] NPC 115 at [25].

1.16 Where there is prejudice to the respondent (for instance due to suspension) as a result of delay, it will be relevant to the period of time which the court considers to be reasonable. However, the threshold in terms of delay is high and is highly fact-sensitive.[1] In that case the threshold had not been reached, where events dated back to 1987 which were adjudicated upon by the tribunal in 2002.

[1] See *Aaron* at [27].

1.17 Where extensions of time are to be given only in exceptional circumstances, the court will construe the jurisdiction strictly. In *R (Peacock) v General Medical Council*[1] Gibbs J held that the GMC's decision to permit an allegation of impairment to proceed more than 5 years after the most recent events giving rise to the allegation was unlawful. The claimant GP had received a complaint letter in 2005 from a complainant some 7 years after he had prescribed drugs which had led to a series of cardiac arrests causing neurological brain injury in 1998. Civil proceedings had been commenced and liability had been compromised in 2002, quantum in 2005.

[1] *R (Peacock) v General Medical Council* [2007] EWHC 585 (Admin).

1.18 Rule 4(5)[1] of the relevant rules permitted an allegation to proceed more than 5 years after the most recent events giving rise to the allegation where the Registrar considers that 'it is in the public interest, in the exceptional circumstances of the case, for it to proceed' deciding here that the case 'raise[d] serious allegations' into the prescribing habits of the claimant. However, the court held that it was at its gravest a complaint of serious negligence in the case of one patient in relation to one example of prescribing, further, there was no sensible explanation for the delay.

[1] General Medical Council (Fitness to Practise) Rules Order of Council 2004, SI 2004/2608.

1.19 In *R (Gwynn) v General Medical Council*[1] Sullivan J held that the GMC's decision to allow disciplinary proceedings to proceed against a surgeon where they arose out of a reopened complaint and complaints made outside

the normal 5-year time limit amounted to an error of law and it was quashed, there being no identified exceptional circumstances. The judge stated as follows (at [46]):

> 'While the 2004 Rules do not impose a duty to give reasons for a decision to allow, or not to allow, proceedings to continue under rule 4(5), fairness to both the practitioner and the patient requires that reasons are given by the Registrar. The need to give adequate reasons for a rule 4(5) decision is all the more important if that decision is a belated decision in an attempt by the GMC to cure an earlier procedural irregularity. On the assumption that the irregularity is capable of being cured, the practitioner must be able to identify the "exceptional circumstances of the case", which have led the Registrar to conclude that it is in the public interest, in those circumstances, that it should proceed; otherwise he or she will be left with a very real doubt as to whether the underlying reason for the Registrar's decision was not the exceptionality of the case, but a corporate desire on the part of the GMC to avoid the inconvenient or embarrassing consequences of its own procedural errors.'

In *R (Chaudhuri) v General Medical Council*[2] the GMC's application of the 5-year limit under Rule 4(5) had been based on a factual error. When the claimant doctor pointed this out, the GMC refused to revisit its decision. In granting the doctor's application for judicial review, Haddon-Cave J held that the 5-year rule was a matter of precedent or jurisdictional fact, such that the court should intervene to correct a clear and admitted error:

> '36 Is the five-year rule a matter of precedent or jurisdictional fact? In my view, the language, structure and context of Rule 4(5) indicates that it is. Rule 4(5) comprises two parts: the rule and the proviso. The language in which the first half of Rule 4(5) is expressed is stark and redolent of a precedent or jurisdictional fact: "No allegation shall proceed further if . . . more than five years have elapsed . . . ". It is vanilla question of fact which admits only of a binary answer. No value judgment is required to answer it. This is in contrast to the wording of the proviso in the second half of Rule 4(5) which does require the Registrar to exercise a value judgment: " . . . unless the Registrar considers that it is in the public interest . . . " etc. The stark wording of the first half of Rule 4(5) is in contrast not only to the value judgment language of the second half of Rule 4(5) but also the language in e.g. Rules 4(1), 6 and 7(2).
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> 37 The date upon which an event or an alleged event took place (as opposed to the event itself) is an objectively verifiable fact. A date is no less an actual date merely because the event which is said to have taken place on that date is not yet proven, e.g. negligent treatment or negligent surgery or mistaken prognosis or a wrong prescription. In a case of negligent treatment by a GP, it would be the date upon which a particular patient appointment with the GP doctor took place. In a case of negligent surgery, it would be the date upon which the operation on that patient by that surgeon took place. Equally, calculating the period of five-years is an objectively verifiable matter and does not require a value judgment.'

Haddon-Cave J further held that public bodies such as the GMC possess an inherent jurisdiction to revisit previous decisions so as to correct fundamental mistakes and misunderstandings, rather than being limited to correcting slips or minor errors which do not substantially affect the rights of the parties or the decision taken ([46]). This followed from the existence of a 'broad corrective principle' in administrative law. To suggest that public bodies do not have the power to correct their own decisions based on a fundamental mistake of fact 'would be to allow process to triumph over common sense' ([47]). Accordingly, the refusal of the GMC's assistant registrar to revisit the Rule 4(5) decision upon discovering a fundamental mistake was in breach of her power and duty to do so ([57]).

In *Lee*,[3] Haddon-Cave J additionally held that only the GMC's registrar had the jurisdiction to make a determination under the 5-year rule, and so a fitness to practise panel did not ([46]). This, he stated, was consonant with the decision of Gibbs J in *Peacock* and his own in *Chaudhuri* ([47]). It followed from this finding that the claimant's application to challenge the GMC's decision under the 5-year rule was out of time ([51]).

1 *R (Gwynn) v General Medical Council* [2007] EWHC 3145 (Admin), [2008] LS Law Medical 112.
2 *R (Chaudhuri) v General Medical Council* [2015] EWHC 6621 (Admin), [2016] ACD 19.
3 *R (Lee) v General Medical Council* [2016] EWHC 135 (Admin), [2016] 4 WLR 34.

1.20 In *Murnin v Scottish Legal Complaints Commission*[1] the Inner House of the Court of Session held that the gravity of the allegations (a deficit on a solicitor's client account of £230,000 in relation to 13 different client ledgers) justified the view that there were exceptional circumstances falling within the rule requiring complaints against solicitors to be made within one year of the occurrence of the event. The court stated the following (at [30]):

> 'The court has little difficulty in holding that the gravity of any alleged misconduct can be an exceptional circumstance in this context. Although, in many cases, the feature identified may relate to some event, such as a mistake or oversight, which results in a complaint not being timeous, there must be situations where the misconduct is so grave that, even if the reason for the lateness of the complaint were wholly inexcusable, nevertheless the public interest demands that the complaint be investigated and, if well founded, the solicitor dealt with according to the profession's disciplinary rules and procedures.'

1 *Murnin v Scottish Legal Complaints Commission* [2012] CSIH 34.

1.21 Ordinarily the jurisdiction of a disciplinary tribunal lasts only as long as the respondent remains registered as a professional. A senior police officer, suspended under police disciplinary regulations following a complaint made against him, whose appointment to office under a fixed term contract expired by effluxion of time, was held no longer to be subject to the disciplinary process: *Surrey Police Authority v Beckett*.[1]

1 *Surrey Police Authority v Beckett* [2001] EWCA Civ 1253, [2002] ICR 257.

1.22 Some respondents have attempted to escape the judgment of disciplinary tribunals by resigning their registration. The courts have had little difficulty in finding reasons for the tribunal to retain jurisdiction to investigate such complaints.

1.23 In *Woodman-Smith v Architects Registration Board*[1] the appellant attempted to have his name removed from the register in an attempt to frustrate disciplinary proceedings against him. The respondent stated that it was unable to accept his resignation while disciplinary proceedings were outstanding. The court held that the appellant was a 'registered person' at the time of the disciplinary proceedings and the respondent had jurisdiction to pursue proceedings; alternatively he had waived the right to ask for his name

to be removed from the register.

[1] *Woodman-Smith v Architects Registration Board* [2014] EWHC 3639 (Admin).

1.24 In *R (Birks) v Commissioner of Police of the Metropolis*[1] the court held that the defendant had been entitled to rescind his acceptance of the claimant's resignation as a police officer, for although the representations that he would not be prevented from resigning had been sufficiently unambiguous to found a substantive legitimate expectation, and had been relied upon by the claimant, the public interest in ensuring that he remained subject to police disciplinary jurisdiction justified the defendant in departing from them (the claimant having been involved in the arrest and restraint of a black musician who suffered from paranoid schizophrenia who collapsed and died in police custody).

[1] *R (Birks) v Commissioner of Police of the Metropolis* [2014] EWHC 3041 (Admin).

(4) THE LEGAL BASIS FOR THE REGULATOR'S POWERS: RETROSPECTIVE EFFECT OF RULES ON PAST CONDUCT

1.25 There is a general presumption that legislation is not to be applied retrospectively,[1] although that presumption may be displaced by express provision (which may give rise to other difficulties, such as incompatibility with the Human Rights Act 1998).[2]

[1] See *Wilson v First County Trust Ltd (No 2)* [2003] UKHL 40, [2004] 1 AC 816, in which Lord Nicholls approved the following quotation from Staughton LJ in an earlier case: 'the true principle is that Parliament is presumed not to have intended to alter the law applicable to past events and transactions in a manner which is unfair to those concerned in them, unless a contrary intention appears. It is not simply a question of classifying an enactment as retrospective or not retrospective. Rather it may well be a matter of degree – the greater the unfairness, the more it is to be expected that Parliament will make it clear if that is intended.'

[2] In *R (Reilly (No 2)) v Secretary of State for Work and Pensions* [2014] EWHC 2182 (Admin), [2015] 2 WLR 309 Mrs Justice Lang stated as follows: '81. The principles which I draw from the case-law cited above are that, although Parliament is not precluded in civil matters from adopting new retrospective provisions to regulate rights arising under existing laws, the principle of the rule of law and the notion of a fair trial and equality of arms contained in Article 6(1) "precludes any interference by the legislature . . . with the administration of justice designed to influence the judicial determination of a dispute" (*Zielinkski* at [57]) or "influencing the judicial determination of a dispute to which the State is a party" (*National & Provincial Building Society v UK* at [112]). This can only be justified in law "on compelling grounds of the general interest" (*Zielinkski* at [57]) and "any reasons adduced to justify such measures be treated with the greatest possible degree of circumspection" (*National & Provincial Building Society v UK* at [112]). These principles have been cited with approval by the Supreme Court in *AXA General Insurance Ltd v HM Advocate* [2012] 1 AC 868, per Lord Reed at [122].

82. Although these principles emanate from decisions of the ECtHR, in my view they also accurately reflect fundamental principles of the UK's unwritten constitution. The constitutional principle of the rule of law was expressly recognised in section 1, Constitutional Reform Act 2005. It requires, inter alia, that Parliament and the Executive recognise and respect the separation of powers and abide by the principle of legality. Although the Crown in Parliament is the sovereign legislative power, the Courts have the constitutional role of determining and enforcing legality. Thus, Parliament's undoubted power to legislate to overrule the effect of court judgments generally ought not to take the form of retrospective legislation designed to favour the Executive in ongoing litigation in the courts brought against it by one of its citizens, unless there are compelling reasons to do so. Otherwise it is likely to offend a citizen's sense of fair play.' These paragraphs from the judgment of Lang J were cited with approval by

the Court of Appeal in *R (Reilly) v Secretary of State for Work and Pensions* [2016] EWCA Civ 413, [2016] 3 WLR 1641 at [77]–[78].

1.26 In the regulatory context courts have had less difficulty with the concept of rules being applied retrospectively to past conduct.

1.27 In *Antonelli* (see 1.09), Beldam LJ held that convictions for the purposes of the Estate Agents Act 1979 included past convictions, for the following reasons (958H–959H):

> 'I start with the declared purpose of the Act of 1979 and the policy behind its enactment that it is intended to make provision "with respect to the carrying on of and the persons who carry on" estate agent's activities. The provisions giving the Director power to disqualify are intended for the protection of the public and it would be quixotic to suppose that Parliament intended that the public should be protected from the activities of a practitioner convicted a week after the Act came into force but not from those of the practitioner convicted a week before. Should Parliament be supposed to have regarded the imposition of a disqualification which precluded a person convicted of a serious mortgage fraud only a month or two before the passing of the Act from continuing to act as an estate agent as "unfair?" In my view, Parliament might well have considered it unfair to allow such a person to continue in practice to the possible detriment of the public whilst prohibiting a person convicted of a similar offence a month or two after the Act of 1979 came into force.
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> I turn to the hardship of the result if the power given to the Director is exercisable in respect of past convictions. I accept that an order of disqualification from carrying on the practice of estate agency is severe and could be a catastrophic hardship. But the conviction of an offence involving fraud or other dishonesty or violence is only a precondition upon which the Director's powers are exercisable. If satisfied that the person concerned has been convicted, the Director still has to consider whether he is unfit to carry on estate agency work generally or of a particular description and has a wide discretion in determining whether that is so or not. Thus the past conviction is not by itself determinative of the imposition of an order of disqualification. Thus it seems to me that Parliament clearly intended to give the Director power to make an order of disqualification in respect of past convictions whilst trusting in his discretion whether he did so or not . . . '

1.28 In *Holton v General Medical Council*[1] the question arose whether conduct arising before the coming into force of the relevant legislation could be considered. Stanley Burnton J held as follows:

> 'Retrospection
>
> 79 The GMC has proceeded on the basis that professional performance before 1 July 1997, when s 36A and the Performance Rules came into force, cannot be the basis of a finding that the professional performance of a doctor has been seriously deficient. I assume it did so on the assumption that the presumption against retrospectivity is applicable to the interpretation of s 36A . . . During the hearing of this appeal I questioned whether that assumption is correct. In my judgment, it is not.
>
> 80 On the literal wording of s 36A, after the section came into force a Panel might make a decision that a doctor's professional performance had been seriously deficient on the basis of his misconduct before it came into force. The words "found by the Committee on Professional Performance to have been seriously deficient" are apt to include previous conduct. In my judgment, that is a sensible and the correct interpretation of the statute. Section 36A does not create any criminal offence. It is

common ground that it is not penal in character. It is a regulatory measure, primarily aimed at the protection of the public, but also calculated to assist doctors whose deficient professional importance may be remedied by the imposition and their compliance with conditions. As Lord Walker said in *Sadler v GMC* [2003] UKPC 59:

> "17. . . . The purpose of assessment is not to punish a practitioner whose standards of professional performance have been seriously defective, but to improve those standards, if possible, by a process of supervision and retraining, for the protection and benefit of the public. . . .
>
> 38. . . . The purpose of all the provisions is to protect the public from sub-standard medical care, not to punish practitioners for blameworthy acts or omissions."
>
> 81 Before s 36A came into force, the only disciplinary measure available in relation to deficient professional performance was for the GMC to seek to establish that it amounted to serious professional misconduct. I was told by [Counsel] that the availability of the less serious findings and measures under s 36A was welcomed by doctors. But where a doctor had demonstrated before 1 July 1997 that his professional performance was seriously deficient, I see no good reason why Parliament should be taken to have intended that he had to repeat his seriously deficient performance, to the detriment of his patients, and at their risk, after that date before the GMC could intervene.'

[1] *Holton v General Medical Council* [2006] EWHC 2960 (Admin), (2007) 93 BMLR 74.

1.29 In *R (Wright) v Secretary of State for Health*[1] the Court of Appeal was required to decide whether the legislation permitted consideration of conduct which pre-dated its coming into force, in the context of the lists kept by the Secretary of State of care workers considered to be unsuitable to work with vulnerable adults. Lord Justice May stated as follows:

> '27. . . . The plain purpose of this part of the statute would be irrationally truncated if the protection of vulnerable adults by means of the POVA list did not extend to dismissals etc on the grounds of section 82(2)(a) misconduct before the commencement of the section. Vulnerable adults are just as vulnerable to care workers who may have perpetrated section 82(2)(a) misconduct just before the commencement of the section as to those who may have perpetrated it after its commencement. The claimants' objection that this could take matters unfairly back into the distant past is in part met by the statutory test in section 82(7)(b) in particular and the antecedent requirement in section 82(4) for the Secretary of State to form a judgment that it may be appropriate for the worker to be included in the POVA list. These requirements may not be fulfilled for long past misconduct where, for instance, the worker's conduct towards vulnerable adults may have been entirely satisfactory for a long intervening period.'

In *Zebaida v Secretary of State for Education*[2] the court considered an appeal against a decision by the Secretary of State to make a prohibition order. The appellant was a concert pianist who worked as a freelance music examiner between 1998 and 2013. In 2000 he worked as a part-time music teacher at a school for one term. In November 2013 he was convicted of sexual assault, having intentionally touched a 15-year old child in a sexual manner in November 2012. Having been alerted about the conviction by the Disclosure and Barring Service, the National College of Teaching and Leadership (NCTL) conducted an investigation, which led to a professional conduct panel being

convened. The panel found that it had jurisdiction to hear the complaint, and that the appellant was guilty of unacceptable professional conduct and had brought the profession into disrepute. The Secretary of State imposed a prohibition order. The jurisdiction issue on appeal turned on whether the appellant came within s 141A of the Education Act 2002, which stated that it applied to 'a person who is employed or engaged to carry out teaching work'. HHJ Molyneux, sitting as a High Court judge, allowed the appeal and held as follows:

> '7 . . . A common sense and plain reading of the legislation allows for referral to the Secretary of State of a person who is employed or engaged in teaching (whenever the conduct giving rise to concern takes place) or who was so employed or engaged at the time the conduct complained of takes place or comes to light. That is what the words say and what the principle in *In re M* [1994] 2 AC 424 enables. The outcome feared by the respondent does not arise. The legislation, as worded, enables the regulation of teachers.
>
> 38 The legislation, as worded, does not allow for the referral of a person who is not employed as a teacher either at the time of the conduct or at the time of the referral. If Parliament has intended section 141A of the 2002 Act to a person who "is or has been employed" then it could easily have drafted the section to say so.'

See further *McTier v Secretary of State for Education*,[3] a case concerning the Secretary of States power to prohibit a teaching in respect of conduct which had occurred as far back as 1985, under a previous and narrower regulatory regime. Although the case was for different reasons remitted back for a new a decision it emphasised the difference between 'strong' retrospectivity, where vested or accrued rights are retrospectively taken away, and 'weak' retrospectivity where (as in that case), an adjusted sanctions regime applied to conduct of the type which, in a broad sense, was already the subject of a similar though narrower sanctions regime at the time of the conduct complained of: see also *Wilson v First County trust Limited (No 2)*.[4]

[1] *R (Wright) v Secretary of State for Health* [2007] EWCA Civ 999, [2008] QB 422. Note that, while May LJ dissented from the reasoning of Dyson and Jacob LJJ in certain respects, all three were agreed in relation to the retrospectivity issue. Further, while the decision of the Court of Appeal was reversed by the House of Lords in *R (Wright) v Secretary of State for Health* [2009] UKHL 3, the appeal did not encompass retrospectivity.

[2] *Zebaida v Secretary of State for Education* [2016] EWHC 1181 (Admin), [2016] PTSR 1490.

[3] *McTier v Secretary of State for Education* [2017] EWHC 212 (Admin); [2017] PTSR 815; [2017] ELR 327; [2017] ACD 46.

[4] *Wilson v First County Trust Limited (No 2)* [2004] 1 AC 816, referring to *R v Field* [2003] 1 WLR 882.

(5) GENERAL PRINCIPLES AND APPROACH

Reasonableness and relevance

1.30 As a matter of law, decisions taken by regulatory bodies must (i) be reasonable and (ii) they must be taken having regard to relevant matters and without regard to irrelevant matters. These are separate requirements and each must be met, though in practice they may overlap. However, it is important always to remember that when exercising a supervisory or review jurisdiction, the court will not seek to substitute its own view of the substantive decision for that of the decision-maker, whether as to facts or evaluation.

1.31 As to the question of reasonableness, the classic formulation of the test for the court's intervention is in *Associated Provincial Picture Houses v Wednesbury Corp*,[1] in which it was held that the court would intervene where a decision is 'so unreasonable that no reasonable authority could have come to it'. The key point is that the courts recognise that there may be a range of reasonable responses open to a decision-maker, and that the court may not itself be best placed to evaluate the situation, and that it should intervene on rationality grounds only where the decision taken is obviously perverse. In *Bradley v Jockey Club*,[2] Lord Phillips MR approved the following passage from the decision of Richards J at first instance:

'. . .

> "(37) . . . that brings me to the nature of the court's supervisory jurisdiction over such a decision. The most important point, as it seems to me, is that it is *supervisory*. The function of the court is not to take the primary decision but to ensure that the primary decision-maker has operated within lawful limits. It is a review function, very similar to that of the court on judicial review. Indeed, given the difficulties that sometimes arise in drawing the precise boundary between the two, I would consider it surprising and unsatisfactory if a private law claim in relation to the decision of a domestic body required the court to adopt a materially different approach from a judicial review claim in relation to the decision of a public body. In each case the essential concern should be with the lawfulness of the decision taken: whether the procedure was fair, whether there was any error of law, whether any exercise of judgment or discretion fell within the limits open to the decision maker, and so forth . . .
>
> (40) . . . The supervisory role of the court should not involve any higher or more intensive standard of review when dealing with a non-contractual than a contractual claim . . .
>
> (43) Of course, the issue in the present case is not one of procedural fairness but concerns the proportionality of the penalty imposed. To my mind, however, that underlines the importance of recognising that the court's role is supervisory rather than that of a primary decision-maker. The test of proportionality requires the striking of a balance between competing considerations. The application of the test in the context of penalty will not necessarily produce just one right answer: there is no single 'correct' decision. Different decision-makers may come up with different answers, all of them reached in an entirely proper application of the test. In the context of the European Convention on Human Rights it is recognised that, in determining whether an interference with fundamental rights is justified and, in particular, whether it is proportionate, the decision-maker has a discretionary area of judgment or margin of discretion. The decision is unlawful only if it falls outside the limits of that discretionary area of judgment. Another way of expressing it is that the decision is unlawful only if it falls outside the range of reasonable responses to the question of where a fair balance lies between the conflicting interests."

The same essential approach must apply in a non-ECHR context such as the present. It is for the primary decision-maker to strike the balance in determining whether the penalty is proportionate. The court's role, in the exercise of its supervisory jurisdiction, is to determine whether the decision reached falls within the limits of the decision-maker's discretionary area of judgment. If it does, the penalty is lawful; if it does not, the penalty is unlawful. It is not the role of the court to stand in the shoes of the primary decision-maker, strike the balance for itself, and determine on that basis what it considers the right penalty should be.

Mr Higginson, who was counsel for Mr Bradley, cited *Daly v Secretary of State for the Home Department*[3] in support of his submissions on the correct approach of the court towards the issue of proportionality:

> I see nothing in *Daly* that is inconsistent with the views I have expressed above. The importance of the court limiting itself to a supervisory role of the kind I have described is reinforced in the present case by the fact that the Appeal Board includes members who are knowledgeable about the racing industry and are better placed than the court to decide on the importance of the Rules in question and decide the weight to be attached to breaches of those Rules. I treat the Appeal Board as the primary decision-maker since, although its function under Appendix J of the Rules of Racing is largely a review function, it is found that the penalty imposed by the Disciplinary Committee was disproportionate and, as it had power to do, substituted a penalty of its own as a proportionate penalty.'

1 *Associated Provincial Picture Houses v Wednesbury Corp* [1948] 1 KB 223.
2 *Bradley v Jockey Club* [2005] EWCA Civ 1056.
3 *Daly v Secretary of State for the Home Department* [2001] 2 AC 532.

1.32 In *Flaherty v National Greyhound Racing Club Ltd*,[1] Scott Baker LJ said:

> '19 It seems to me inherently unsatisfactory that a hearing before a sporting tribunal lasting between 1 and 2 hours should be followed by a High Court hearing lasting 10 days and an appeal taking up a further day and a half. It is important to bear in mind the words of Mance LJ in *Modahl v British Athletic Federation Limited* [2002] 1 WLR 1192, 1226 para 115 to the effect that a conclusion that the disciplinary process should be looked at overall matched the desirable aim of affording to bodies exercising jurisdiction over sporting activities as great a latitude as is consistent with the fundamental requirements of fairness. In this regard he cited the words of Sir Robert Megarry V-C *in McInnes v Onslow Fane*[2] approved by Sir Nicolas Browne-Wilkinson V-C in *Cowley v Heartley*:[3]
>
> > "I think that the courts must be slow to allow an implied obligation to be fair to be used as a means of bringing before the court for review honest decisions of bodies exercising jurisdiction over sporting and other activities which those bodies are far better fitted to judge than the courts. This is so even where those bodies are concerned with the means of livelihood of those who take part in those activities. The concepts of natural justice and the duty to be fair must not be allowed to discredit themselves by making unreasonable requirements and imposing undue burdens. Bodies such as the board which promote a public interest by seeking to maintain high standards in a field of activity which otherwise might easily become degraded and corrupt ought not to be hampered in their work without good cause."
>
> 20 I respectfully agree with the observations of Sir Nicolas Browne-Wilkinson V-C that it is the courts' function to control illegality and make sure that a body does not act outside its powers. But it is not in the interest of sport or anybody else for the courts to seek to double guess regulating bodies in charge of domestic arrangements.
>
> 21 Sports regulating bodies ordinarily have unrivalled and practical knowledge of the particular sport that they are required to regulate. They cannot be expected to act in every detail as if they are a court of law. Provided they act lawfully and within the ambit of their powers, the courts should allow them to get on with the job they are required to do. It is important to look at the consequences of anything that appears to have gone wrong. Mr Timothy Charlton QC, who has appeared with Mr Jasbir Dhillon for the NGRC, submits that the judge never explained why he felt it

impropriety of the sort which had occurred, depended on the factual circumstances. When it had been established that there had been material non-disclosure, the issue was whether there was a real possibility that the tribunal would have come to a different conclusion had the disclosure been made, as had been held in *McInnes (Paul) v HM Advocate*.[2] That involved a consideration of the content of the undisclosed material and an evaluation of the various ways in which its disclosure might have affected the course of the proceedings. The court found that there was a real possibility that the tribunal would have come to a different conclusion had disclosure been made.

[1] *R (on the application of McCarthy) v The Visitors to the Inns of Court and The Bar Standards Board* [2015] EWCA Civ 12.
[2] *McInnes (Paul) v HM Advocate* [2010] UKSC 7, [2010] All ER (D) 101 (Feb).

Chapter 9

THE HEARING

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9.01 In this chapter, the principal features of a disciplinary hearing are described. It cannot capture all of the issues that may arise, but sets out the most important matters that practitioners face in preparing for or appearing at such a hearing. It examines:

(1) the right to a fair hearing;
(2) public hearings and reporting;
(3) the right to an oral hearing;
(4) the right to representation;
(5) the burden of proof;
(6) the standard of proof;
(7) the order of proceedings;
(8) securing the attendance of witnesses and the production of documents;
(9) aspects of the evidence;
(10) the defence case;
(11) the conduct of the tribunal;
(12) the consequences of procedural defects.

(1) THE RIGHT TO A FAIR HEARING

9.02 This subject is discussed in CHAPTER 1, but a brief summary of the relevant principles will assist practitioners to prepare for and appear at a disciplinary hearing. In general, a fair hearing requires that the accused know the case and the evidence against him, so that he has an opportunity to correct or contradict that evidence.[1] The requirements of a fair hearing are not fixed.[2] There is no prescribed list of what is required to ensure a fair hearing in a particular type of case or situation, as the requirements will vary flexibly from case to case in light of a variety of factors, such as the history and nature of any previous course of dealing between the decision-maker and the individual.[3]

[1] There are innumerable judicial statements of this core principal. An early seminal statement is *Kanda v Government of Malaya* [1962] AC 322, PC, 337.
[2] *Re Pergamon Press* [1971] Ch 388, CA, 403 per Sachs LJ; *Lloyd v McMahon* [1987] AC 625, HL, 702 per Lord Bridge; *R v H* [2004] UKHL 3, [2004] 2 AC 134, HL, para 11 per Lord Bingham.

[3] Eg *Lloyd v McMahon* [1987] AC 625, HL, 702 per Lord Bridge; *R v Secretary of State for Health, ex p United States Tobacco International Inc* [1992] QB 353, DC, 370 per Taylor LJ.

9.03 It is possible though to identify some key elements of the duty to act fairly. The subject of disciplinary action must be afforded the following.

(a) There must be sufficient notification of the hearing.[1] Notice must give sufficient time to enable the individual to effectively arrange their representation and submissions.[2] Whether a failure to give notice, or insufficient notice, has led to unfairness will depend on the facts of the case and matters such as, for example, the extent to which the individual already knew of the hearing and what was in issue.[3] Individuals are usually fixed with the consequences of any act or omission of their representative in this respect, however this is not an absolute rule.[4]

(b) Sufficient information must be given to enable the subject of disciplinary action to participate effectively in the process. This must be sufficient information to enable him or her to understand the nature of the allegations and to comment on or dispute them.[5] The individual must be notified of all the allegations that might be considered.[6] This will include information both as to the issues and as to the evidence to be considered.

(c) As to provision of evidence, the minimum requirement for a fair hearing of a disciplinary charge is that the individual is informed of the gist of the evidence.[7] However, in many or most cases the subject of the charge is shown all of the evidence that the decision-maker is to consider.

(d) The subject of disciplinary action must be afforded an opportunity to make representations, particularly in relation to points adverse to him or her upon which the decision-maker might rely. In some circumstances this will require an oral hearing. The issue of when fairness requires an oral hearing is considered further in Section 3 below.

(e) In certain circumstances fairness will require that the subject of disciplinary action must be afforded legal representation, at public expense if necessary. This is considered further in Section 4 below.

(f) There will be other requirements necessitated by particular circumstances, such as where the decision-maker uses his or her own knowledge or experience to reach a decision,[8] or the requisite response where a party has failed to submit representations.

[1] *R v County of London Quarter Sessions Appeals Committee, ex p Rossi* [1956] 1 QB 682, CA, 691 per Denning LJ.

[2] *Local Government Board v Arlidge* [1915] AC 120, HL, 132; *R v Thames Magistrates' Court, ex p Polemis* [1974] 1 WLR 1371, DC, 1375.

[3] Eg *Russell v Duke of Norfolk* [1949] 1 All ER 109, CA, 117–118 per Tucker LJ.

[4] Eg *R v County of London Quarter Sessions Appeals Committee, ex p Rossi* [1956] 1 QB 682, CA, 691–693 per Denning LJ (letter returned undelivered, so decision-maker partially at fault).

[5] *Kanda v Government of Malaya* [1962] AC 322, PC, 337; *R (Shoesmith) v Ofsted & Ors* [2011] EWCA Civ 642, [2011] ICR 1195.

[6] Eg *Maradana Mosque Trustees v Mahmud* [1967] 1 AC 13, PC, 24–25 (decision-maker acting partly on grounds not notified to the individual).

[7] Eg *Kanda v Government of Malaya* [1962] AC 322, PC, 337; *R v Army Board, ex p Anderson* [1992] QB 169, DC, 188–189 per Taylor LJ.

[8] See, eg, *R v City of Westminster Assessment Committee, ex p Grosvenor House* [1941] 1 KB 53, CA, 69 per du Parcq LJ; *R v Brighton & Area Rent Tribunal, ex p Marine Parade Estates*

[1950] 2 KB 410, DC, 420–421 per Lord Goddard CJ; *Westminster Renslade Ltd v Secretary of State for the Environment* (1984) 48 P&CR 255, QBD, 261 per Forbes J.

9.04 There is a conflict in the authorities as to whether an appellate or reviewing court should afford the first instance tribunals a 'generous ambit' in its decisions about what fairness requires (for further discussion, see CHAPTER 11 below).

9.05 Article 6(1) of the ECHR applies to disciplinary proceedings which might result in the removal of professional status.[1] However, in this area of fairness/natural justice there is often little or no material distinction between common law and European Convention requirements of fairness.

[1] See *Le Compte and others v Belgium* (1981) 4 EHRR 1; *Konig v Germany* (1979–80) 2 EHRR 170; and *H v Belgium* (1988) 10 EHRR 339. However, if what is at stake is a sanction that would not prevent someone from practising their profession Art 6(1) is not generally engaged: see *R (on the application of Thompson) v The Law Society* [2004] EWCA Civ 167.

(2) PUBLIC HEARINGS AND REPORTING

9.06 Historically, the disciplinary proceedings of private organisations, such as trade associations and the professional bodies, were conducted in private. The disciplinary proceedings of some statutory regulators on the other hand have long been open to the public. Since the enactment of the Human Rights Act 1998, however, all public authorities have been compelled to offer defendants the right to public hearings of their disciplinary proceedings. Article 6(1) of the ECHR, as applied by HRA 1998, s 6(1), provides that:[1]

> 'in the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and *public hearing* within a reasonable time by an independent and impartial tribunal established by law' (emphasis added).

[1] This right may be waived by the respondent: see *Albert and Le Compte v Belgium* (1983) 5 EHRR 533.

9.07 The legal position of private organisations not fulfilling public functions remains unchanged, but the HRA 1998 has strengthened the existing trend towards greater transparency.

9.08 Lord Diplock explained the justification for public hearings in the courts of law as follows:[1]

> 'as a general rule the English system of administering justice does require that it be done in public: *Scott v Scott*.[2] If the way that courts behave cannot be hidden from the public ear and eye this provides a safeguard against judicial arbitrariness or idiosyncrasy and maintains the public confidence in the administration of justice. The application of this principle of open justice has two aspects: as respects proceedings in the court itself it requires that they should be held in open court to which the press and public are admitted and that, in criminal cases at any rate, all evidence communicated to the court is communicated publicly.'

[1] *Attorney General v Leveller Magazine Ltd* [1979] 1 All ER 745, 749. Also see para 4 of Lord Woolf's judgment in *R v Legal Aid Board, ex parte Kaim Todner (A Firm)* [1998] 3 All ER 541 and that of Henry LJ in *Storer v British Gas plc* [2000] 2 All ER 440.

[2] *Scott v Scott* [1913] AC 417.

9.09 The justification of open hearings put forward by the ECtHR is that:[1]

> 'This public character protects litigants against the administration of justice without public scrutiny; it is also one of the means whereby people's confidence in the courts can be maintained. By rendering the administration of justice transparent, publicity contributes to the achievement of the aim of Art 6(1), namely a fair trial, the guarantee of which is one of the fundamental principles of any democratic society, within the meaning of the ECHR.'

[1] *Gautrin and Others v France* (1999) 28 EHRR 196.

9.10 It is not sufficient for the accused to have a right to a public hearing if he has not been made aware of that right. In *H v Belgium*,[1] the ECtHR found non-compliance with Art 6 established where a barrister failed to apply for a public hearing in disciplinary proceedings normally held in private when he knew that there was 'little prospect' of such a request being granted.

[1] *H v Belgium* (1988) 10 EHRR 339.

9.11 There are exceptions to the requirement of a public hearing. Article 6 permits press and public to be excluded from a hearing if it is:

> 'in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.'

9.12 The courts have stressed repeatedly that these exceptions must be construed restrictively. The 'interests of justice' exception would appear to be the same as that which already exists at common law. As Lord Diplock said in the case of *Attorney General v Leveller Magazine Ltd*:[1]

> 'since the purpose of the general rule is to serve the ends of justice it may be necessary to depart from it where the nature or circumstances of the particular proceeding are such that the application of the general rule in its entirety would frustrate or render impracticable the administration of justice or would damage some other public interest for whose protection Parliament has made some statutory derogation from the rule. Apart from statutory exceptions, however, where a court in the exercise of its inherent power to control the conduct of proceedings before it departs in any way from the general rule, the departure is justified to the extent and to no more than the extent that the court reasonably believes it to be necessary in order to serve the ends of justice.'

[1] *Attorney General v Leveller Magazine Ltd* [1979] 1 All ER 745, 749.

Hearings in private etc

9.13 Nevertheless, there are circumstances in which tribunals will be prepared to sit in private, at least for part of the hearing. The most common instance of this is where the tribunal is to hear evidence concerning the registrant's health. Another reason for hearing matters in private is if there are linked criminal proceedings in existence, and either the regulator or the respondent (or both)

fears that publicity of the disciplinary hearing may prejudice the integrity of the criminal trial. Particular difficulties may also arise in disciplinary proceedings against legal professionals where the lay client concerned in the allegations has not waived privilege. In such cases, where the lay client may be easily identified even if anonymised, the entire proceedings may need to be heard in private.

9.14 The tribunal may also be asked to anonymise parties or witnesses. Any order restraining publication of the normally reportable details of a case is a derogation from the principles of open justice and an interference with the Art 10 rights of the public at large. The tribunal ought ordinarily to follow the course which involves the least restriction on the principle of open justice, and it will have to balance the various common law and Convention rights of all interested parties. Public figures and celebrities are not entitled to special treatment, and an order for anonymity should not be made merely because the parties are in agreement.[1]

[1] See generally *JIH v News Group Newspapers Ltd* [2011] EWCA Civ 42.

9.15 In *R v Legal Aid Board, ex parte Kaim Todner (A Firm)*,[1] dismissing an appeal against a refusal to order anonymity to a firm of solicitors, Lord Woolf MR held:[2]

> 'There can be no justification for singling out the legal profession for special treatment. The inference that they should be singled out should not be drawn from Ord. 106, r. 12. The Order certainly presupposes that solicitors in disciplinary appeals to the High Court should not be identified in the title to the proceedings. However this is probably a remnant from earlier times when the disciplinary proceedings were themselves in private which is no longer the position. The situation in relation to other professions, e.g. doctors and dentists appealing to the Privy Council, is that in general they are not granted any anonymity. In our view, the Rules of the Supreme Court should now be amended to bring the position of solicitors in line with that general practice.'

[1] *R v Legal Aid Board, ex parte Kaim Todner (A Firm)* [1999] QB 966, [1998] 3 All ER 541.
[2] *R v Legal Aid Board, ex parte Kaim Todner (A Firm)* [1999] QB 966, at 975–976.

9.16 Those rules were duly amended, and there is nowadays no question of anonymity for solicitors, unless the particular facts of the case make it appropriate (see eg 9.13 above). The existence of prior convictions, either spent or unspent, is not of itself sufficient to amount to an exceptional circumstance that would justify holding appeals under the Master of the Rolls (Appeals and Applications) Regulations 2001 in private.[1] *L v Law Society* was applied in *Solicitor (No 18 of 2008), Re*[2] to determine the preliminary hearing of whether the appeal should be heard in public. The Court of Appeal resolved the issue as follows:[3]

> 'The SRA does not consent to it being heard in private and it further submits that there is no good reason for holding the hearing in private. The general principle which I adopt can be seen in *L v The Law Society (No 13 of 2008)* [2008] EWCA Civ 811. It is only in a rare case that it is appropriate to hold a hearing of this kind

in private. In the present case I see no reason whatever to depart from the general rule that this hearing, like most hearings, should take place in public.'

1 *L v The Law Society* [2008] EWCA Civ 811; applied in *Solicitor (No 18 of 2008), Re* [2008] EWCA Civ 1358.
2 *Solicitor (No 18 of 2008), Re* [2008] EWCA Civ 1358.
3 *Solicitor (No 18 of 2008), Re* [2008] EWCA Civ 1358, at 3.

Private disciplinary hearings

9.17 Most private disciplinary tribunals still keep their hearings private. This is because disciplinary proceedings are not judicial proceedings; they differ from them in many ways which may make public hearings inappropriate. Most obviously, the members of a private body, such as a club, do not serve a public interest which makes open hearing necessary. Their members submit voluntarily to the discipline of their peers and expect that discipline to be conducted as privately as their other affairs.

Reporting of disciplinary proceedings

Public disciplinary proceedings

9.18 Material presented in open court should generally be released to the general public, including journalists.[1] The same applies to material presented at a disciplinary hearing to which the public has access. Under the ECHR, the principle of open justice is expressly protected by Art 6(1) which provides that in the determination of a person's civil rights and obligations 'judgment shall be pronounced publicly'.[2]

1 *R (on the application of Guardian News and Media Ltd) v City of Westminster Magistrates Court* [2012] EWCA Civ 420.
2 For the meaning of these terms see CHAPTER 1 AND CHAPTER 10.

9.19 The rationale for this requirement, as explained by the ECtHR, is as follows:[1]

'The public character of proceedings protects litigants against the administration of justice in secret with no public scrutiny; it is also one of the means whereby confidence in the courts can be maintained. By rendering the administration of justice visible, publicity contributes to the achievement of the aim of Article 6(1), a fair hearing, the guarantee of which is one of the foundations of a democratic society.'

1 *B and P v UK* (2001) 34 EHRR 529.

9.20 According to the Supreme Court, this rationale is the same as in the common law.[1] Once decisions are announced or promulgated publicly, the media is free to report them. Qualified privilege attaches to a fair and accurate report of the findings or decisions of the categories of bodies specified in the Defamation Act 1996, Sch 1. These categories are wide enough to include most trade and professional bodies, as well as many sporting and charitable organisations. The case of *Seaga v Harper (Jamaica)*[2] suggests that the courts

may take a more liberal view of qualified privilege in relation to the reports of the disciplinary proceedings of certain regulators. Fair and accurate reports of proceedings in public before courts and tribunals exercising the judicial power of the state attract absolute privilege if published contemporaneously.[3]

1 *A v SSHD* [2014] SC (UKSC) 151.
2 *Seaga v Harper (Jamaica)* [2008] UKPC 9, [2008] 1 All ER 965.
3 Defamation Act 1996, s 14.

9.21 The ECtHR has held that the form of publicity to be given to the 'judgment' of a tribunal affected by Art 6 must be assessed in light of the special features of the proceedings in question and with reference to the object and purpose of the article (*Axen v Federal Republic of Germany*).[1] In *Axen*, there was no breach of Art 6(1) despite the absence of public pronouncement by the domestic appeal court because 'the object pursued by Art 6(1) in this context - namely, to ensure scrutiny of the judiciary by the public with a view to safeguarding the right to a fair trial' was achieved by (1) the court below having already given judgment publicly and (2) the appeal court making its decision in pursuance of statutory conditions governing appeals, its compliance with which were recorded in place of public pronouncement.[2] A disciplinary tribunal will not share these features and, despite the ECtHR's purposive interpretation of Art 6(1), it is hard to see how a disciplinary tribunal could fulfil the purpose of Art 6(1) without pronouncing its judgment publicly.

1 *Axen v Federal Republic of Germany* (1984) 6 EHRR 195 (a tribunal which deposited its judgments in a registry open to the public was held to comply with Art 6).
2 (1984) 6 EHRR 195, para 32.

Private disciplinary proceedings

9.22 Many regulators have an informal and private disciplinary system for low-level professional misconduct. For instance, until the passing of the Legal Services Act 2007 put matters on a statutory footing, the Law Society operated an internal and confidential system of low-level discipline: reprimands and warning letters were placed on an individual's file and so formed part of his regulatory history, but the material was not disseminated to the public. With the enactment of the 2007 Act, the SRA was given statutory authority to fine and rebuke those that it regulates, but it may still keep certain matters confidential. If the media were to discover such matters and wish to report them, it would be at risk of being injuncted. However, as Toulson LJ pointed out in *Napier & Another v Pressdram Ltd*:[1]

'Freedom to report the truth is a precious thing both for the liberty of the individual (the libertarian principle) and for the sake of wider society (the democratic principle), and it would be unduly eroded if the law of confidentiality were to prevent a person from reporting facts which a reasonable person in his position would not perceive to be confidential . . . '

1 *Napier & Another v Pressdram Ltd* [2009] EWCA Civ 443.

9.23 In *Napier*, the court dismissed an appeal against a refusal to grant an injunction preventing the magazine *Private Eye* from publishing information

(a) about the outcome of a complaint made to the Law Society against the appellant (a prominent solicitor) by a former client; and (b) about a report concerning the Law Society's handling of the complaint. The disciplinary procedure in question was the Law Society's extra-statutory scheme for investigating complaints against solicitors described above (before the procedure introduced by the 2007 Act had come into force). The investigation into the complaint was conducted privately in the sense that it was conducted through correspondence, but the Law Society's caseworker reassured the complainant that the process was not intended to end with a 'secret disposal'. Toulson LJ held that no duty of confidentiality was owed because:

> 'The subject matter underlying the adjudication was nothing private to the solicitor. The subject matter was the conduct of the solicitor in relation to the complainant, about which the complainant was free (subject to the law of defamation) to broadcast his grounds of complaint as widely as he wished. He was similarly free to broadcast the fact that he had complained about the solicitor to the Law Society . . . [1]
>
> . . . The solicitor has to show why any reasonable person in the position of the complainant ought to have regarded that fact as something which he was bound to treat as confidential. It cannot be because reporting the decision would involve the disclosure of underlying subject matter which was itself intrinsically confidential, for reasons already stated . . . [2]
>
> . . . I do not believe that it can be said that the complainant subscribed to a duty to treat the panel adjudication as confidential by his conduct in invoking the Law Society's extra-statutory scheme for investigating complaints against solicitors; and I cannot see any other basis on which any reasonable person in his position would have regarded himself as being under such a duty . . . [3]
>
> . . . I would not attach significance to the fact that correspondence was headed "Private and confidential". Many letters are marked in that way when they are intended by the sender to be for the eyes of the person to whom they are addressed, without prior reading by others, but without necessarily intending to limit the use which the receiver may decide to make of them.[4]
>
> . . . In investigating the complaint made by the complainant, the Law Society was performing a public function. I cannot see any basis on which it could have imposed on the complainant, involuntarily, a duty not to disclose the outcome of the investigation, even if it had wished to do so. (I stress again, for the avoidance of doubt, that I am not here considering the position where intrinsically confidential information is supplied in the course of such an investigation. I am concerned only with a case where the only suggested basis of confidentiality is the procedural nature of the investigation itself.)'[5]

1 *Napier & Another v Pressdram Ltd* [2009] EWCA Civ 443 at 44.
2 Ibid at 45.
3 Ibid at 49.
4 Ibid at 53.
5 Ibid at 56.

(3) THE RIGHT TO AN ORAL HEARING

9.24 Many regulators operate a two-tier disciplinary system which provides for an oral hearing before a full tribunal in the more serious cases, and a

paper-based procedure for the less serious allegations. Cases in the latter category may be disposed of without an oral hearing, although sometimes one is offered.

9.25 Neither the common law nor the European Convention recognise a general right to an oral hearing.[1] However, in *R (Osborn) v Parole Board*[2] the Supreme Court quashed decisions of the Parole Board not to hold oral hearings, and Lord Reed provided general guidance, much of which will be relevant to disciplinary tribunals, the most useful passages of which are as follows:

> '(i) In order to comply with common law standards of procedural fairness, the board should hold an oral hearing before determining an application for release, or for a transfer to open conditions, whenever fairness to the prisoner requires such a hearing in the light of the facts of the case and the importance of what is at stake. By doing so the board will also fulfil its duty under section 6(1) of the Human Rights Act 1998 to act compatibly with article 5.4 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, in circumstances where that article is engaged.
>
> (ii) It is impossible to define exhaustively the circumstances in which an oral hearing will be necessary, but such circumstances will often include the following. (a) Where facts which appear to the board to be important are in dispute, or where a significant explanation or mitigation is advanced which needs to be heard orally in order fairly to determine its credibility. The board should guard against any tendency to underestimate the importance of issues of fact which may be disputed or open to explanation or mitigation. (b) Where the board cannot otherwise properly or fairly make an independent assessment of risk, or of the means by which it should be managed and addressed. That is likely to be the position in cases where such an assessment may depend on the view formed by the board (including its members with expertise in psychology or psychiatry) of characteristics of the prisoner which can best be judged by seeing or questioning him in person, or where a psychological assessment produced by the Ministry of Justice is disputed on tenable grounds, or where the board may be materially assisted by hearing evidence, for example from a psychologist or psychiatrist. Cases concerning prisoners who have spent many years in custody are likely to fall into the first of these categories. (c) Where it is maintained on tenable grounds that a face-to-face encounter with the board, or the questioning of those who have dealt with the prisoner, is necessary in order to enable him or his representatives to put their case effectively or to test the views of those who have dealt with him. (d) Where, in the light of the representations made by or on behalf of the prisoner, it would be unfair for a "paper" decision made by a single member panel of the board to become final without allowing an oral hearing: for example, if the representations raise issues which place in serious question anything in the paper decision which may in practice have a significant impact on the prisoner's future management in prison or on future reviews.
>
> . . .
>
> (iv) The board should also bear in mind that the purpose of holding an oral hearing is not only to assist it in its decision-making, but also to reflect the prisoner's legitimate interest in being able to participate in a decision with important implications for him, where he has something useful to contribute.
>
> . . .
>
> (vii) The board must be, and appear to be, independent and impartial. It should not be predisposed to favour the official account of events, or official assessments of risk, over the case advanced by the prisoner.

(viii) The board should guard against any temptation to refuse oral hearings as a means of saving time, trouble and expense.

. . .

(xi) In applying this guidance, it will be prudent for the board to allow an oral hearing if it is in doubt whether to do so or not.

(xii) The common law duty to act fairly, as it applies in this context, is influenced by the requirements of article 5.4 as interpreted by the European Court of Human Rights. Compliance with the common law duty should result in compliance also with the requirements of article 5.4 in relation to procedural fairness.'

1 Eg, in *R v Solicitors Complaints Bureau, ex parte Curtin* [1994] 6 Admin LR 657 it was held that a decision on the part of an assistant director of the Bureau to impose upon a solicitor a restricted practising certificate was not procedurally unfair despite the fact that the solicitor had not been offered an oral hearing.
2 *R (Osborn) v Parole Board* [2013] UKSC 61, [2014] AC 1115.

9.26 In similar vein, in *R (West) v Parole Board* Lord Bingham of Cornhill said that:[1]

'While an oral hearing is most obviously necessary to achieve a just decision in a case where facts are in issue which may affect the outcome, there are other cases in which an oral hearing may well contribute to achieving a just decision . . .

The common law duty of procedural fairness does not, in my opinion, require the Board to hold an oral hearing in every case where a determinate sentence prisoner resists recall, if he does not decline the offer of such a hearing. But I do not think the duty is as constricted as has hitherto been held and assumed. Even if important facts are not in dispute, they may be open to explanation or mitigation, or may lose some of their significance in the light of other new facts. While the Board's task certainly is to assess risk, it may well be greatly assisted in discharging it (one way or the other) by exposure to the prisoner or the questioning of those who have dealt with him. It may often be very difficult to address effective representations without knowing the points which are troubling the decision-maker. The prisoner should have the benefit of a procedure which fairly reflects, on the facts of his particular case, the importance of what is at stake for him, as for society.'

1 *R (West) v Parole Board* [2005] 1 WLR 350.

9.27 The right to a 'public hearing' in Art 6(1) of the ECHR normally includes the right to an oral hearing. However, such a right may seemingly be withheld where the subject matter of the dispute is of such a nature, for instance, a highly technical issue, that it is better dealt with in written proceedings (*Bakker v Austria*).[1] After reviewing both the European and the domestic jurisprudence, the Court of Appeal *in R (on the application of Thompson) v The Law Society*[2] concluded that:

'There may be cases in which a public and oral hearing is required at first instance and other cases where it is not, just as there may be cases in which the potential availability of judicial review will not be sufficient to avoid a breach of Article 6(1) [of the European Convention].'

1 *Bakker v Austria* (2003) 39 EHRR 162 (physiotherapist denied an oral hearing with reference to his right to work).
2 *R (on the application of Thompson) v The Law Society* [2004] EWCA Civ 167.

Trial in the absence of the respondent

9.28 The case law on when a disciplinary hearing may proceed in the absence of the registrant has developed recently. Historically, disciplinary tribunals were expected to follow the checklist approved by the House of Lords in the criminal case of *R v Jones*.[1] The *Jones* approach recognised that a trial judge had discretion to proceed in a defendant's absence but 'That discretion must be exercised with great care and it is only in rare and exceptional cases that it should be exercised in favour of a trial taking place or continuing, particularly if the defendant is unrepresented'. *Jones* was applied to a disciplinary tribunal in *Tait v Royal College of Veterinary Surgeons (RCVS)*,[2] and *Yusef v Royal Pharmaceutical Society of Great Britain*.[3] More recently, however, the Court of Appeal in *GMC v Adeogba & Visvardis*[4] has emphasised that *Jones* is just a starting point and there are many differences between criminal hearings and disciplinary hearings:

'18 . . . Steps can be taken to enforce attendance by a [criminal] defendant; he can be arrested and brought to court. No such remedy is available to a regulator.

19 There are other differences too. First, the GMC represent the public interest in relation to standards of healthcare. It would run entirely counter to the protection, promotion and maintenance of the health and safety of the public if a practitioner could effectively frustrate the process and challenge a refusal to adjourn when that practitioner had deliberately failed to engage in the process. The consequential cost and delay to other cases is real. Where there is good reason not to proceed, the case should be adjourned; where there is not, however, it is only right that it should proceed.

20 Second, there is a burden on medical practitioners, as there is with all professionals subject to a regulatory regime, to engage with the regulator, both in relation to the investigation and ultimate resolution of allegations made against them. That is part of the responsibility to which they sign up when being admitted to the profession.'

1 *R v Jones* [2003] 1 AC 1.
2 *Tait v Royal College of Veterinary Surgeons* [2003] UKPC 34.
3 *Yusef v Royal Pharmaceutical Society of Great Britain* [2009] EWHC 867 (Admin).
4 *GMC v Adeogba & Visvardis* [2016] EWCA Civ 162; [2016] 1 WLR 3867. For an application of the principles in the context of barristers, see *Rehman v The Bar Standards Board* [2016] EWHC 2023 (Admin).

9.29 The conclusion of the Court of Appeal in *Adeogba* is that 'No regulatory system can operate on the basis that failure to attend should lead to an adjournment on the basis that the practitioner might not know of the date of the hearing (rather than having disengaged from the process or even adopted an "ostrich like attitude"): any culture of adjournment is to be deprecated.'[1] Where the tribunal concludes that the registrant's absence is the result of a deliberate choice not to engage with his regulator, it will be entitled to proceed.[2] Different considerations arise where there is medical evidence that the registrant's absence is due to ill health.[3]

1 *GMC v Adeogba & Visvardis* [2016] EWCA Civ 162; [2016] 1 WLR 3867 at [61].
2 *GMC v Adeogba & Visvardis* [2016] EWCA Civ 162; [2016] 1 WLR 3867 at [63].
3 See 7.45 et seq.

9.30 Regulators tend to make provision in their rules for the hearing to take place in the absence of the respondent, as such absence is not uncommon. Some respondents become impossible to contact, others may regard the result of the hearing as a foregone conclusion, and their expulsion from the profession inevitable. Yet others may find it difficult to face up to the reality of disciplinary proceedings, claiming last minute illness, or simply failing to appear. The rules of the Solicitors Disciplinary Tribunal provide that where a respondent was neither present nor represented, and the Tribunal decided the case in his absence, he may apply for a re-hearing within 14 days of the filing of the order which the Tribunal may grant upon such terms as it thinks fit.[1] A solicitor who voluntarily absents himself from the hearing will ordinarily, however, receive little sympathy from the Tribunal, and is unlikely to obtain a re-hearing. In *R (Elliott) v Solicitors Disciplinary Tribunal*,[2] the applicant applied for an adjournment of the substantive hearing, and then walked out when the adjournment was refused. The Tribunal heard the remainder of the case in his absence, and subsequently refused an application for a re-hearing. It was held in judicial review proceedings that the rule (then rule 25 of the 1994 Rules) did not apply to such a situation.

1 Rule 19 of the Solicitors (Disciplinary Proceedings) Rules 2007.
2 *R (Elliott) v Solicitors Disciplinary Tribunal* [2004] EWHC 1176.

(4) THE RIGHT TO REPRESENTATION

Legal representation

9.31 A series of cases brought by prisoners in the 1970s and 1980s established that there was no automatic right to legal representation for prisoners who faced disciplinary proceedings in prison, whether at common law or under the European Convention.[1] There was a discretion to permit such representation, and in *R v Secretary of State for the Home Department and Others, ex parte Tarrant and Another* Webster J set out the following considerations as being relevant to the exercise of that discretion:[2]

- the seriousness of the charge and the potential penalty;
- whether any points of law are likely to arise;
- the capacity of the defendant to present his case;
- procedural difficulties, such as the need to interview and cross-examine witnesses;
- the need for reasonable speed in making the adjudication; and
- the need for fairness as between parties and as between the defendant and prosecutor.

1 See *Fraser v Mudge* [1975] 1 WLR 1132, *R v Secretary of State for the Home Department and Others, ex parte Tarrant and Another* [1984] 1 All ER 799, and *Campbell and Fell v United Kingdom* [1984] 7 EHRR 165. Two other fairly old cases worthy of note are *Pett v Greyhound Racing Association* [1970] 1 QB 46 (but see too *Pett v Greyhound Racing Association (No 2)* [1970] 1 QB 46) and *Enderby Town Football Club Ltd v Football Association* [1971] Ch 591.
2 *R v Secretary of State for the Home Department and Others, ex parte Tarrant and Another* [1984] 1 All ER 799, 816, approved in *Hone v Maze Prison Board of Visitors* [1988] 1 All ER 321.

9.32 It remains the law that there can be no automatic right to legal representation unless the professional is contractually entitled to such representation. In the context of medical disciplinary proceedings, the Court of Appeal held in *Kulkarni v Milton Keynes Hospital NHS Foundation Trust & Others* that a hospital doctor was contractually entitled to legal representation at a disciplinary hearing. As for Art 6, Lady Justice Smith explained the decision of the European Court in *Le Compte, Van Leuven and De Meyere v Belgium:*[1]

> 'in ordinary disciplinary proceedings, where all that could be at stake was the loss of a specific job, article 6 would not be engaged. However, where the effect of the proceedings could be far more serious and could, as in that case, deprive the employee of the right to practise his or her profession, the article would be engaged.'[2]

1 *Le Compte, Van Leuven and De Meyere v Belgium* (1981) 4 EHRR 1.
2 *Kulkarni v Milton Keynes Hospital NHS Foundation Trust & Others* [2009] EWCA Civ 789 at [65].

9.33 She went on to state, in the light of the fact that the NHS is to all intents and purposes a single employer for the whole country and that if a trainee doctor was found guilty in NHS disciplinary proceedings of conduct which could amount to a criminal offence, he would be unemployable as a doctor and would never complete his training. As a result, she said (obiter) that if it had been necessary for her to determine the matter, she would have found Art 6 engaged. As a result, she would have inferred a right to legal representation as the doctor was facing, in effect, a criminal charge albeit in the context of civil proceedings.[1]

1 *Kulkarni v Milton Keynes Hospital NHS Foundation Trust & Others* [2009] EWCA Civ 789 at [67]–[68].

9.34 In the absence of a contractual entitlement to legal representation, the essential issue for the tribunal will be whether a professional will be able to do himself justice if he is unrepresented. That will depend upon the complexity of the case, and the other matters listed in the bullet points set out above at **9.31**.[1] It will also depend upon whether the decision in the disciplinary proceedings in question will prevent the respondent from remaining in the profession. An important decision is that of the Supreme Court in *R (G) v Governors of X School (Secretary of State for the Home Department and another intervening)*,[2] the facts of which must be considered with care. The claimant, who was employed as a teaching assistant at a primary school, faced disciplinary proceedings for having allegedly formed an inappropriate relationship with a 15-year-old boy who was undergoing work experience at the school. The claimant requested permission of the school governors for his solicitor to represent him at the hearing before the disciplinary committee of three governors. The governors refused, stating that an employee could be represented by a colleague or trade union representative but that no other person would be permitted to attend the hearing. The disciplinary committee summarily dismissed the claimant and referred the matter to the Secretary of State, who had the power, at the time, to make a direction prohibiting a person from working with children in educational establishments. The claimant appealed against the dismissal decision and again requested that his

solicitor attend the future appeal hearing. The governors refused on the same grounds. The claimant's dismissal was then referred to the Independent Safeguarding Authority (ISA) by which the Secretary of State could determine whether an individual could be prevented from working with children in educational establishments.

[1] See *R (SS) v Knowlsey NHS Primary Care Trust, R (Ghosh) v Northumberland NHS Care Trust* [2006] EWHC 26 (Admin). See too *R (Malik) v Waltham Forest Primary Care Trust* [2006] EWHC 487 (Admin), [2006] ICR 1111 (where a primary care trust was considering interim suspension, fairness would only require the more formal trappings of legal representation and cross-examination in very exceptional cases).

[2] *R (G) v Governors of X School (Secretary of State for the Home Department and another intervening)* [2011] UKSC 30, [2012] 1 AC 167.

9.35 The claimant sought judicial review of the refusals of legal representation of procedural protection. The Supreme Court reversing the judge at first instance and the Court of Appeal, held that the disciplinary proceedings before the governors did not engage Art 6. The Supreme Court approved the test adopted by the Court of Appeal – ie that the claimant might enjoy Art 6 rights if the decision in the disciplinary proceedings would have a substantial influence on the determination by the ISA of the claimant's right to practise his profession. However, the Supreme Court found that that test was not met on the facts , because the ISA was required to make its own findings of fact and bring its own independent judgment to bear as to the seriousness and significance of the allegations made against the referred person before deciding whether it was appropriate to place him on the barred list, and because there was no reason to hold that it would be influenced profoundly, or at all, by the governors' opinion of how the primary facts should be viewed.

Public funding

9.36 In *Pine v Law Society*,[1] the Court of Appeal rejected a complaint by a solicitor that he had been denied legal aid for a hearing before the Solicitors Disciplinary Tribunal, the Vice-Chancellor stating:

> 'Only in exceptional circumstances, namely where the withholding of legal aid would make the assertion of a civil claim practically impossible or where it would lead to obvious unfairness of the proceedings, can such a right be invoked (in disciplinary proceedings) by virtue of Article 6(1) of the Convention.'

[1] *Pine v Law Society* [2001] EWCA Civ 1574. See too *Awan v Law Society* [2003] EWCA Civ 1969.

9.37 Under the European Convention, the right to legal assistance in Art 6(3)(c) is normally inapplicable to disciplinary proceedings because it applies only to persons 'charged with a criminal offence'. The ECtHR has recognised a right to legal representation in certain circumstances for the purposes of a fair hearing under Art 6(1). But it is not incumbent on the state to seek through the use of public funds to ensure total equality of arms between the assisted person and the opposing party, as long as each side is afforded a reasonable opportunity to present his case under conditions that do not place him at a

substantial disadvantage vis-à-vis the adversary (*De Haes and Gijsels*).[1]

[1] *De Haes and Gijsels* (1997) judgment of 24 February 1997, Reports 1997-I, s 53.

Assistance from a non-legal adviser or friend

9.38 Many respondents who do not wish or cannot afford to instruct a solicitor or barrister to represent them before a disciplinary tribunal may wish to be assisted by a non-legally qualified friend or colleague. Such individuals were formerly called 'McKenzie friends' after the decision in *McKenzie v McKenzie*,[1] but the Court of Appeal in *ex parte Barrow* strongly deprecated the use of that term. The most useful modern authority on the issue is the Court of Appeal's guidance in *R v Leicester Justices ex p Barrow*[2] (following proceedings in the Magistrates' Court), in which Sir John Donaldson MR stated:

> 'A party to proceedings has a right to present his own case and in so doing to arm himself with such assistance as he thinks appropriate, subject to the right of the court to intervene. Thus he can bring books and papers with him, pens, pencils, his spectacles, a hearing aid and any other form of material assistance which he thinks appropriate. Subject to them not being of extraordinary volume and unusual nature, there is no need for the matter to be mentioned to the justices or their clerk. If he wishes to have an adviser, as contrasted with an advocate, it is convenient that he should mention this fact to the justices or to their clerk in order that they may know why the person concerned is sitting next to the defendant, rather than in the space reserved for the general public. Furthermore the justices or their clerk may reasonably wish to know whether this adviser is likely to be called as a witness and should not hear the evidence of other witnesses, if exclusion from court whilst that evidence is being given is usual in that class of case. They may reasonably also wish to know that the adviser is not claiming rights of audience or proposing to exercise them on behalf of the party and that he is not a party to another case or a member of the public who has lost his way. But if a party arms himself with assistance in order the better *himself* to present his case, it is not a question of seeking the leave of the court. It is a question of the court objecting and restricting him in the use of this assistance, if it is clearly unreasonable in nature or degree or if it becomes apparent that the 'assistance' is not being provided bona fide, but for an improper purpose or is being provided in a way which is inimical to the proper and efficient administration of justice by, for example, causing the party to waste time, advising the introduction of irrelevant issues or the asking of irrelevant or repetitious questions.'

[1] *McKenzie v McKenzie* [1970] 3 All ER 1034.
[2] *R v Leicester Justices ex p Barrow* [1991] 2 QB 260. See also useful general guidance in the Family Division in *Re O (Children)* [2005] EWCA 759 at [67].

9.39 As a general rule, therefore, disciplinary tribunals will ordinarily permit assistance by a non-legally qualified friend or colleague unless there is good reason not to, eg the friend or colleague is being disruptive.

(5) THE BURDEN OF PROOF

9.40 In an adversarial system the burden of proving an allegation normally rests on the party making it; in the case of disciplinary proceedings this is, of

course, the regulator or whoever prosecutes on its behalf. Where there is doubt it has been said that an appropriate test as to where the burden of proof lies is provided by the question: 'who will lose if no evidence is called?'[1]

[1] *R v Redbourne* [1993] 2 All ER 753, 758 (confiscation order in criminal proceedings).

9.41 In *Re B (Children)*,[1] Lord Hoffmann held that:

> 'If a legal rule requires a fact to be proved (a "fact in issue"), a judge or jury must decide whether or not it happened. There is no room for a finding that it might have happened. The law operates a binary system in which the only values are 0 and 1. The fact either happened or it did not. If the tribunal is left in doubt, the doubt is resolved by a rule that one party or the other carries the burden of proof. If the party who bears the burden of proof fails to discharge it, a value of 0 is returned and the fact is treated as not having happened. If he does discharge it, a value of 1 is returned and the fact is treated as having happened.'

[1] *Re B (Children)* [2008] UKHL 35.

9.42 In determining where the burden lies, it is necessary first to look at the statutory scheme, if any.[1]

[1] *Jones v Commission for Social Care Inspection* [2004] EWCA Civ 1713.

Reverse onus clauses

9.43 In conventional disciplinary proceedings, the burden of proof will invariably lie upon the regulator, although in applications made to a regulator by a regulated individual, the burden is likely to lie upon the applicant. In the criminal law, which may become relevant because statutory offences are created to enforce regulatory objectives, Parliament may provide that a burden of proving a fact lies upon the defendant. The ECtHR has held that, in deciding whether such a reverse burden provision is justifiable within the presumption of innocence required by Art 6 of the ECHR, the fact that the legislation is of a regulatory nature may be taken into account where the duty holders are persons who have chosen to engage in work or commercial activity and are in charge of it. In *Salabiaku v France*[1] the ECtHR observed:

> 'Presumptions of fact or of law operate in every legal system. Clearly, the Convention does not prohibit such presumptions in principle. It does, however, require the Contracting States to remain within certain limits in this respect as regards criminal law . . . Article 6(2) does not therefore regard presumptions of fact or of law provided for in the criminal law with indifference. It requires States to confine them within reasonable limits which take into account the importance of what is at stake and maintain the rights of the defence.'

[1] *Salabiaku v France* (1988) 13 EHRR 379.

9.44 Applying *Saliabku* in the context of health and safety legislation, the Court of Appeal held that the reversed burden of proof involved in the defence of not being reasonably practicable to do more would not be unlawful under s 6(2) of the HRA 1998.[1] The Court held that it had to pay regard to the

choices of the legislature in matters of social and economic policy and consider whether a fair balance had been struck between the fundamental rights of the individual and the general interests of the community.

[1] *R v Davies* [2002] EWCA Crim 2949.

9.45 The European and domestic case-law on so-called reverse-onus clauses was extensively reviewed by a five-judge Court of Appeal in *Attorney General's Reference (No 1 of 2004)*.[1] The Court held that the common law and Art 6(2) of the Convention both permitted the imposition of a legal burden of proof on a defendant, provided that it was proportionate and reasonably necessary in the circumstances, and that such a legal burden would usually be justified if the prosecution had to prove the essential ingredients of the offence but, in respect of a particular issue, it was fair and reasonable to deny a defendant the general protection normally guaranteed by the presumption of innocence.

[1] *Attorney General's Reference (No 1 of 2004)* [2004] EWCA Crim 1025; [2004] 1 WLR 2111.

9.46 Shortly afterwards, the House of Lords considered the case of *Sheldrake v Director of Public Prosecutions Attorney General's Reference (No 4 of 2002)*[1] and held that that the justifiability and fairness of provisions which imposed a burden of proof on a defendant in a criminal trial had to be judged in the particular context of each case: the court's task was to decide whether Parliament had unjustifiably infringed the presumption of innocence, and the overriding concern was that a trial should be fair. Lord Bingham declined to endorse the guidance given by the Court of Appeal in para 52 of its judgment in *Attorney General's Reference (No 1 of 2004)*, and stated:

> 'The task of the court is never to decide whether a reverse burden should be imposed on a defendant, but always to assess whether a burden enacted by Parliament unjustifiably infringes the presumption of innocence. It may none the less be questioned whether (as the Court of Appeal ruled in para 52d) 'the assumption should be that Parliament would not have made an exception without good reason'. Such an approach may lead the court to give too much weight to the enactment under review and too little to the presumption of innocence and the obligation imposed on it by section 3.'

[1] *Sheldrake v Director of Public Prosecutions Attorney General's Reference (No 4 of 2002)* [2005] 1 AC 264.

9.47 Where an evidential burden rests on the defendant the standard of proof is the civil standard of balance of probabilities.

(6) THE STANDARD OF PROOF

9.48 The criminal standard of proof means that the case has to be proved beyond reasonable doubt. The civil standard of proof is a lower standard, and means that the case has to be proved on the balance of probabilities, ie that it is more likely than not that a particular fact occurred.

9.49 In disciplinary tribunals, the conventional standard of proof is the civil standard. However, in the most serious disciplinary proceedings concerning

solicitors and barristers, the tribunal will adopt the criminal standard.[1] There is no logical justification for treating barristers and solicitors differently from all other regulated individuals. As to which standard should be adopted, there are powerful arguments on both sides. Those who favour the civil standard point to the overwhelming majority of tribunals which adopt that standard, and the need for consistency across the regulated sector. Those who support the criminal standard consider that the majority is simply wrong, and that the consequences of a disciplinary finding for a professional in terms of the loss of livelihood and reputation are so serious that those consequences should only flow when the tribunal is left in no doubt that professional misconduct has been established.

[1] For a case in which the difference in standard of proof made a difference to the result of the case, see *Law Society v Waddingham and others* [2012] EWHC 1519 (Admin) at [60].

The different treatment of barristers and solicitors

9.50 In *Re a Solicitor* Lord Lane CJ stated:[1]

> 'It seems to us, if we may respectfully say so, that it is not altogether helpful if the burden of proof is left somewhere undefined between the criminal and the civil standards. We conclude that at least in cases such as the present, where what is alleged is tantamount to a criminal offence, the tribunal should apply the criminal standard of proof, that is to say proof to the point where they feel sure that the charges are proved or, put in another way, proof beyond reasonable doubt. This would seem to accord with decisions in several of the Provinces of Canada.'

[1] *Re a Solicitor* [1993] QB 69.

9.51 That somewhat equivocal statement (the Court was only concerned with an allegation that was tantamount to an allegation of a criminal offence), was the trigger for a far wider statement by Lord Brown of Eaton-under-Heywood (who had been a member of the Court on the earlier occasion), in *Campbell v Hamlet* to the following effect:[1]

> 'That the criminal standard of proof is the correct standard to be applied in all disciplinary proceedings concerning the legal profession, their Lordships entertain no doubt. If and insofar as the Privy Council in *Bhandari v Advocates Committee* [1956] 1 WLR 1442 may be thought to have approved some lesser standard, then that decision ought no longer, nearly fifty years on, to be followed.'

[1] *Campbell v Hamlet* [2005] UKPC 19 at [16].

9.52 There, for the time being at least, matters remain. The Bar Standards Board has undertaken a consultation, which concluded in July 2017, as to whether to replace the criminal standard with a civil standard. The debate continues among the bodies that regulate solicitors. In *Richards v Law Society*[1] the SRA (the regulatory branch of the Law Society) sought to argue for the civil standard, whereas the representative branch supported the status quo. The Divisional Court held that on the particular facts of the case, the issue was academic, but implied that the Solicitors Disciplinary Tribunal was bound to apply the criminal standard unless and until the Supreme Court ruled otherwise. The issue was revisited in *The Solicitors Regulation Authority v*

Solicitors Disciplinary Tribunal,[2] where the Divisional Court cast doubt on the earlier authorities without overruling them. In a judgment with which Leveson LJ agreed, Leggatt J said:

> 'I [. . .] see considerable force in the point that the climate and approach to professional regulation and discipline have changed since Re a Solicitor was decided. Persuasive as [counsel's] submissions were, however, I would decline the invitation to express a concluded view on the question [of the standard of proof] in the present case. To do so would require us to decide whether a previous decision of this court and a decision of the Privy Council should not now be followed. Those authorities do seem to me ripe for reconsideration. But not in a case where the Tribunal was not undertaking a primary fact-finding role so that the question of what standard of proof is appropriate in that situation does not arise. In these circumstances, any views that we express on the point could only amount to obiter dicta and would have no binding force.'

[1] *Richards v Law Society* [2009] EWHC 2087 (Admin) at [22]. See also *Law Society v Waddingham and others* [2012] EWHC 1519 (Admin), in which the SRA appealed against a finding by the Tribunal that it was not satisfied that dishonesty had been proved against two of the respondents: the High Court dismissed the appeal specifically on the basis that dishonesty had not been established to the criminal standard (at [60]).

[2] *The Solicitors Regulation Authority v Solicitors Disciplinary Tribunal* [2016] EWHC 2862 (Admin).

The civil standard explained

9.53 Until comparatively recently, judges in the civil courts operated a 'sliding scale' of proof: the more serious the allegation, the higher the standard of proof required, and where the allegation was to all intents and purposes an allegation of criminal conduct, the standard of proof required would be the criminal standard. However, this approach was disapproved of in a series of cases arising out of allegations of child abuse, and the House of Lords emphatically declared that in civil cases, the civil standard of proof must invariably apply. It is now necessary to look no further than the following passage from Lord Hoffmann's speech in *Re B (Children)*:[1]

> 'Dame Elizabeth Butler-Sloss P restored clarity and certainty in *Re U (A Child) (Department for Education and Skills intervening)*.[2]
>
> "We understand that in many applications for care orders counsel are now submitting that the correct approach to the standard of proof is to treat the distinction between criminal and civil standards as 'largely illusory'. In our judgment this approach is mistaken. The standard of proof to be applied in Children Act 1989 cases is the balance of probabilities and the approach to these difficult cases was laid down by Lord Nicholls in *In re H (Minors) (Sexual Abuse: Standard of Proof)*.[3] That test has not been varied nor adjusted by the dicta of Lord Bingham of Cornhill CJ or Lord Steyn who were considering applications made under a different statute. There would appear to be no good reason to leap across a division, on the one hand, between crime and preventative measures taken to restrain defendants for the benefit of the community and, on the other hand, wholly different considerations of child protection and child welfare nor to apply the reasoning in *McCann's* case[4] to public, or indeed to private, law cases concerning children. The strict rules of evidence applicable in a criminal trial which is adversarial in nature is to be contrasted with the partly inquisitorial approach of the court dealing with children cases in which the

Chapter 15

THE REGULATION OF LEGAL SERVICES

Gregory Treverton-Jones QC

(1) THE STRUCTURE OF LEGAL SERVICES REGULATION

Introduction: the genesis of the Legal Services Act 2007

15.01 In March 2001 the Office of Fair Trading produced a report, 'Competition in Professions',[1] recommending certain unjustified restrictions on competition be removed. A government consultation paper and report followed which concluded that 'the current framework is outdated, inflexible, overcomplex and insufficiently accountable or transparent . . . Government has therefore decided that a thorough and independent investigation without reservation is needed'.[2]

[1] Office of Fair Trading Report, *Competition in Professions* (March 2001); Office of Fair Trading Progress Report, *Competition in Professions* (April 2002).
[2] *In the Public Interest?* (July 2002); *Conclusions to In the Public Interest?* (July 2003).

15.02 There followed in July 2003 a regulatory review of legal services conducted by Sir David Clementi.[1] The terms of reference were:

(i) to consider what regulatory framework would best promote competition, innovation and the public and consumer interest in an efficient, effective and independent legal sector; and
(ii) to recommend a framework which would be independent in presenting the public and consumer interest, comprehensive, accountable, consistent, flexible, transparent and no more restrictive or burdensome than is clearly justified.

Sir David published his report in December 2004. The principal recommendations were:

- Setting up a Legal Services Board - a new legal services regulator to provide consistent oversight regulation of front-line bodies such as the Law Society and the Bar Council.
- Statutory objectives for the Legal Services Board, including promotion of the public and consumer interest.

- Regulatory powers to be vested in the Legal Services Board, with powers to devolve regulatory functions to front-line bodies, now called Approved Regulators, subject to their competence and governance arrangements.
- Front-line bodies to be required to make governance arrangements to separate their regulatory and representative functions.
- The Office for Legal Complaints - a single independent body to handle consumer complaints in respect of all members of front-line bodies, subject to oversight by the Legal Services Board.
- The establishment of alternative business structures that could see different types of lawyers and non-lawyers managing and owning legal practices.

Following consultations, the Government decided to implement most of the Clementi recommendations. To this end the Government published the White Paper *The Future of Legal Services: Putting the Consumer First* on 17 October 2005 setting out their proposals for the regulatory reform of legal services in England and Wales. The draft Legal Services Bill was laid before Parliament on 24 May 2006 and received Royal Assent on 20 October 2007. The Act established a Legal Services Board, an Office for Legal Complaints, and enabled legal services to be provided under new business structures in line with the Clementi proposals.

[1] Sir David Clementi, *The Review of the Regulatory Framework for Legal Services in England and Wales* (December 2004).

Reserved legal activities

15.03 At the heart of the system of regulation of practising lawyers created by the Legal Services Act 2007 is the concept of reserved legal activities, ie those activities which Parliament has decreed can only be carried out by regulated lawyers. It is an offence under s 14 of the 2007 Act to carry on reserved legal activities without being entitled to do so, subject to a defence where the accused shows that the accused did not know and could not reasonably have known the offence was being committed.[1] Where the offence relates to conducting litigation or exercising a right of audience without being entitled, it is also a contempt of court.[2] Unless exempt under s 19, a person (defined to include a body of persons, whether incorporated or unincorporated[3]) must be authorised to carry on reserved legal activities by an approved regulator, or, in the case of a licensable body (ie an Alternative Business Structure) must hold a licence from the licensing authority covering the activity in question.

[1] Section 14(2).
[2] Section 14(4).
[3] Section 207.

15.04 The reserved legal activities which attract this regulatory regime are set out in s 12 of the Act and are:

- the exercise of a right of audience;
- the conduct of litigation;
- reserved instrument activities;
- probate activities;

- notarial activities;
- the administration of oaths.

15.05 Each reserved legal activity is further defined in the Act. It follows that any activities that fall outside those definitions are not subject to regulation: for instance, it is open to any member of the public to provide legal advice for reward, provided that the individual does not hold him or herself out to be a barrister, solicitor or other practising lawyer.

The Legal Services Board

15.06 The body which has the statutory power to approve regulators is the Legal Services Board (LSB), which was created by the 2007 Act with the statutory objectives of:

- protecting and promoting the public interest;
- supporting the constitutional principle of the rule of law;
- improving access to justice;
- protecting and promoting the interests of consumers;
- promoting competition in the provision of services in the legal sector;
- encouraging an independent, strong, diverse and effective legal profession;
- increasing public understanding of citizens legal rights and duties;
- promoting and maintaining adherence to the professional principles[1] of independence and integrity;
- proper standards of work;
- observing the best interests of the client and the duty to the court; and
- maintaining client confidentiality (Legal Services Act 2007, s 1(1)).

[1] The 'professional principles' are defined in s 1(3).

15.07 The LSB's duty is to promote the regulatory objectives (Legal Services Act 2007, s 1). The LSB's pamphlet *The Regulatory Objectives* examines what the regulatory objectives mean in practice, setting out their scope and how they might be used to measure the impact of reforms in the sector.

15.08 As well as authorising the approved regulators the LSB has power to censure them (Legal Services Act 2007, s 35), to impose financial penalties (Legal Services Act 2007, s 37), and to give directions requiring them to take steps in respect of a specific disciplinary case or other specific regulatory proceedings, as opposed to all, or a specified class of, such cases or proceedings (Legal Services Act 2007, s 32).

15.09 In discharging its functions the LSB must, so far as is reasonably practicable, act in a way which is compatible with the regulatory objectives,[1] one of which is the professional principles. The 'professional principles' are that authorised persons (legal professionals):

(a) should act with independence and integrity;
(b) should maintain proper standards of work;
(c) should act in the best interests of their clients;

(d) who exercise before any court a right of audience, or conduct litigation in relation to proceedings in any court, by virtue of being authorised persons should comply with their duty to the court to act with independence in the interests of justice; and

(e) should keep the affairs of clients confidential.

[1] Legal Services Act 2007, s 3.

15.10 The current list of approved regulators is:

Profession	Approved Regulators (representative body)	Independent Regulatory body	Approved Regulator (AR) Licensing Authority (LA)	Reserved legal activities regulated
Solicitors	Law Society	Solicitors Regulation Authority	AR LA	• The exercise of right of audience • The conduct of litigation • Reserved instrument activities • Probate activities • The administration of oaths
Barristers	Bar Council	Bar Standards Board	AR	• The exercise of right of audience • The conduct of litigation • Reserved instrument activities • Probate activities • The administration of oaths

Profession	Approved Regulators (representative body)	Independent Regulatory body	Approved Regulator (AR) Licensing Authority (LA)	Reserved legal activities regulated
				• The exercise of right of audience

Profession	Approved Regulators (representative body)	Independent Regulatory body	Approved Regulator (AR) Licensing Authority (LA)	Reserved legal activities regulated
Legal Executives	Chartered Institute of Legal Executives	ILEX Professional Standards Limited	AR	• The conduct of litigation • The administration of oaths
Licensed Conveyancers	Council for Licensed Conveyancers (regulatory body for Licensed Conveyancers, no representative body)		AR LA	• Reserved instrument activities • Probate activities • The administration of oaths
Patent Attorneys Trade Mark Attorneys	Chartered Institute of Patent Attorneys (CIPA) Institute of Trade Mark Attorneys (ITMA)	Intellectual Property Regulation Board (Regulatory body for both CIPA and ITMA)	AR	• The exercise of right of audience • The conduct of litigation • Reserved instrument activities • The administration of oaths
Costs Lawyers	Association of Costs Lawyers	Costs Lawyer Standards Board	AR	• The exercise of right of audience • The conduct of litigation • The administration of oaths
Notaries	Master of the Faculties (regulatory body for Notaries, no representative body)		AR	• Reserved instrument activities • Probate activities • Notarial activities

Profession	Approved Regulators (representative body)	Independent Regulatory body	Approved Regulator (AR) Licensing Authority (LA)	Reserved legal activities regulated
				• The administration of oaths
Chartered Accountants	Institute of Chartered Accountants in England and Wales There is no separate regulatory body; all decisions relating to legal activities are delegated to the independently chaired Probate Committee		AR	• Probate

The Legal Ombudsman

15.11 A further body set up by the Legal Services Act 2007 is the Office for Legal Complaints, branded as the Legal Ombudsman, or LeO, which opened for business on 6 October 2010. All consumer complaints about the quality of service provided by any regulated legal professional (or 'authorised person' to use the terminology of the Legal Services Act 2007), are now made to the LeO. The previous fragmented system, whereby complaints about barristers went to the Bar Standards Board, those about solicitors went to the Legal Complaints Service (LCS) of the Law Society, and those about licensed conveyancers went to the Council for Licensed Conveyancers, has been swept away. The Legal Services Act 2007 does not contain any words which are the equivalent of 'inadequate professional service' as used in Sch 1A to the Solicitors Act 1974. The LeO has jurisdiction in relation to complaints made by clients (and limited other categories) about acts or omissions of authorised persons; the only threshold or test to be satisfied for an award or direction to be made is that it is fair and reasonable in all the circumstances of the case.

15.12 A complainant must be an individual, or any of the following:

- a small business: a micro-enterprise as defined in European Recommendation 2003/361/EC of 6 May 2003 (broadly, an enterprise with fewer than ten staff and a turnover or balance sheet value not exceeding €2 million);
- a charity with an annual income less than £1 million;
- a club, association or society with an annual income less than £1 million;
- a trustee of a trust with a net asset value less than £1 million;
- a personal representative or the residuary beneficiaries of an estate where a person with a complaint died before referring it to the ombudsman scheme.

15.13 If the complaint is upheld, the LeO has power to make an award or determination that may include any one or more of the following directions to the authorised person in favour of the complainant:

- to apologise;
- to pay compensation of a specified amount for loss suffered - this is subject to a statutory maximum of £50,000;
- to pay interest on that compensation from a specified time;
- to pay compensation of a specified amount for inconvenience or distress caused;
- to ensure (and pay for) putting right any specified error, omission or other deficiency;
- to take (and pay for) any specified action in the interests of the complainant;
- to pay a specified amount for costs incurred by the complainant in pursuing the complaint (however, as a complainant does not usually need assistance to pursue a complaint with the LeO, awards of costs are likely to be rare);
- to limit the authorised person's fees to a specified amount.

15.14 A binding and final determination may be enforced through the High Court or a county court by the complainant. Those disaffected by a decision of the LeO may seek permission to move for judicial review after exhausting internal appeals, and a trickle of such applications started to appear in 2013.[1]

[1] For a detailed description of the Legal Ombudsman scheme, see ch 13 of *The Solicitor's Handbook 2017* by Andrew Hopper QC and Gregory Treverton-Jones QC.

(2) THE REGULATION OF SOLICITORS AND ALTERNATIVE BUSINESS STRUCTURES

The Law Society and the Solicitors Regulation Authority

15.15 The Law Society was founded on 2 June 1825, when a committee of management was appointed. The Society acquired its first royal charter in 1831. A new Charter in 1845 defined the Society as an independent, private body servicing the affairs of the profession like other professional, literary and scientific bodies. The organisation became known colloquially as the Law Society although its first formal title was 'The Society of Attorneys, Solicitors, Proctors and others not being Barristers, practising in the Courts of Law and Equity of the United Kingdom'. In 1903 the Society changed its official name to 'The Law Society'.

15.16 Part of the philosophy behind the Legal Services Act 2007 was that the regulatory functions of professional bodies should be separated from their representative functions: it was seen as inimical to the public interest for the same body to be both 'trade union' for and disciplinarian of regulated professionals. As a result, in January 2007, the Law Society split into three bodies: the Society itself, which remains the representative body for solicitors; the Solicitors Regulation Authority (SRA), which is the professional regulator; and the Legal Complaints Service, which dealt with complaints of inadequate professional service, and which has now been replaced by the Legal Ombudsman (see above). The SRA replaced the Office for the Supervision of Solicitors, which itself had superseded the Solicitors' Complaints Bureau.

The SRA Principles and Code of Conduct

15.17 The first codified set of rules for solicitors emerged as the Solicitors Practice Rules 1936. These were steadily enlarged over succeeding decades until they became the Solicitors Practice Rules 1990. In around 2004, The Law Society embarked on the preparation of a new comprehensive set of rules, and the resulting Solicitors' Code of Conduct 2007 came into force on 1 July 2007. The 2007 Code abandoned the historical approach of relatively narrow practice rules and wider but non-exclusive (official and published) guidance. Instead, it created a comprehensive regulatory framework for all aspects of a solicitor's conduct. The 2007 Code comprised 25 individual rules and was supplemented by guidance produced by the SRA which amplified and explained its provisions.

15.18 The passing of the Legal Services Act 2007, the inevitable need to create a regulatory environment which would work for both traditional law firms and Alternative Business Structures (ABSs), and strong guidance from the Legal Services Board, created the need to move to a different basis and style of regulation. Principles-based regulation had been pioneered by the financial services profession, and has been introduced to the legal profession under the title 'outcomes-focused regulation' (OFR). The result was the emergence of the SRA Principles, and another new Code of Conduct ('the 2011 Code'), both of which came into force on 6 October 2011.

15.19 Outcomes-focused regulation was introduced as a liberating measure for solicitors. Designed to provide a simplified rulebook and freedom to practise innovatively. Henceforth solicitors, and the entities in which they practised, would have to comply with broad principles in ways which best suited their businesses, while detailed formal rules would be restricted to areas in which they were necessary, such as accounts and professional indemnity insurance. The SRA Principles 2011 require all those subject to them to:

(i) uphold the rule of law and the proper administration of justice;
(ii) to act with integrity;
(iii) to not allow independence to be compromised;
(iv) to act in the best interests of each client;
(v) to provide a proper standard of service to their clients;
(vi) to behave in a way that maintains the trust the public places in them and in the provision of legal services;
(vii) to comply with their legal and regulatory obligations and deal with their regulators and ombudsman in an open timely and cooperative manner;
(viii) to run their business or carry out their role in the business effectively and in accordance with proper governance and sound financial and risk management principles;
(ix) to run their business or carry out their role in the business in a way that encourages equality of opportunity and respect for diversity; and
(x) to protect client money and assets (SRA Principles 2011, para 1).

15.20 The Code of Conduct 2011 is divided into 15 chapters, which contain mandatory Outcomes, non-mandatory Indicative Behaviours, and some very limited guidance. The Code is regularly amended as the need arises. In addition to the Principles and Code of Conduct, the SRA publishes the *SRA Handbook*,

which contains the detailed rules concerning accounts; authorisation and practising requirements; client protection; discipline and costs recovery; overseas practice; and specialist services. All of this material can be accessed via the SRA website at www.sra.org.uk.

At the time of writing, yet further reform is in the offing, and the SRA proposes to introduce new Codes of Conduct in 2018. The SRA Principles are likely to be reduced in number. There are intended to be two Codes, one for individual solicitors, and one for firms, including a firm's managers, compliance officers, and employees. The Code for individuals, which is likely to be shorter than the 2011 Code, will set out the standards of professionalism that are expected, and the Code for firms will set out the standards and business controls that are expected.

The regulation of entities

15.21 As well as individual solicitors being regulated by the SRA as individuals, the entities in which they operate are also regulated (unless the solicitors are employed in-house by an employer who is not offering legal services to the public or a section of the public). Although the SRA and its predecessors had statutory powers over recognised bodies from 1985, these were little used, and entity regulation in its current form can be traced back to March 2009, when the 2007 Code of Conduct and other rules were amended to make clear that the SRA was able to regulate not simply solicitors and others bound by the Code, but also the firms in which they operated. There have been few decided disciplinary cases against entities, and there is as yet no published policy by the SRA as to when it will consider it appropriate to prosecute an entity as well as, or instead of, individual solicitors. It is understood to be the 'official position' of the SRA in terms of policy that entity regulation should primarily involve 'supervision', with 'enforcement' being deployed only in two circumstances: (a) where there has been a serious failure of management - something fundamentally attributable to the way that the firm is being run; or (b) where on a problem being identified the firm is unwilling or unable to work with the SRA to put things right.

The regulation of Alternative Business Structures

15.22 An ABS, or a 'licensable body' to use the terminology of the 2007 Act, is a body that carries on (or wishes to carry on) reserved legal activities, and a non-authorised person is a manager of the body or has an interest in it. Alternatively, a body (B) is a licensable body if another body (A) is a manager of the body or has an interest in it and non-authorised persons are entitled to exercise, or control the exercise of, at least 10 per cent of the voting rights in A. Accordingly, if a holding or parent company of a firm providing reserved legal activities is partly owned by a non-authorised person who holds less than 10 per cent of its voting rights then the firm would not need to be authorised as an ABS, but would still need to be regulated by an approved regulator in the provision of reserved legal activities. Depending upon the reserved legal activities which the ABS wishes to carry on, there may be a choice of regulators.

15.23 The 2007 Act regulates ownership of an ABS by a non-authorised person where that person controls a material interest in an ABS. Broadly, a material interest is one where the non-authorised person holds at least 10 per cent of the shares of the ABS (or equivalent) or at least 10 per cent of the shares of the parent of the ABS, or is able to exercise significant influence in the management of the ABS or its parent by virtue of the shareholding. The licensing authority has to be satisfied that the non-authorised person holding a material interest in the ABS does not compromise the regulatory objectives set out in s 1 of the Act. It must also not compromise the duty of regulated persons employed by the ABS to fulfil their duty to comply with regulatory requirements; and the person must be fit and proper to hold the interest. In determining whether the licensing authority is satisfied as to the above matters, it must have regard to the non-authorised person's probity and financial position, whether he or she is disqualified from being a Head of Legal Practice, Head of Finance and Administration or as a manager or employee of a licensed body, under s 99 of the Legal Services Act 2007, or included on the LSB's list of persons subject to objections and conditions (that is objections and conditions relating to ownership notified to the LSB by licensing authorities), and must also have regard to the person's associates. The SRA Suitability Test will be applied to interest-holders.

15.24 In this way the SRA (or other regulator) can exercise control over the personnel who will run the ABS in the same way as it can control a traditional law firm. It may impose conditions upon the grant of the ABS licence, and may also impose conditions upon an existing licence. There is a right of appeal to the Solicitors Disciplinary Tribunal against many of the decisions made by the SRA, where the SRA is the licensing authority.

Investigations by the SRA

15.25 There are numerous ways in which concerns about a solicitor's conduct can be brought to the attention of the SRA. A client, opponent in litigation, fellow solicitor, or judge may complain to the SRA. The Legal Ombudsman may draw matters to the regulator's attention. Other regulatory or law enforcement agencies may report matters to the SRA. Solicitors themselves must self-report in certain circumstances. The solicitor may be slack in communicating with the regulator. The annual accountant's report may contain evidence that all is not well with the solicitor's accounting systems. Or the firm's SRA supervisor may consider that matters need to be looked into. All these and more can lead to an investigation by the SRA.

15.26 The most serious and focused investigation carried out by the SRA is a forensic investigation. This is a specialist investigation by a specialist branch of the SRA. Often the solicitor who is the subject of such a visit will not be told the reason for the visit, although in recent years the SRA has started to become more forthcoming about this. The solicitor is under a professional duty to cooperate with any and all SRA investigations.

15.27 In carrying out its investigations, the SRA has a wide range of statutory powers, conferred by the Solicitors Act 1974. It can require delivery-up of documents and other information, and can interrogate solicitors under investigation. The regulator can also require solicitors to investigate themselves under Outcome 10.11 of the Code of Conduct.

15.28 If the investigator considers that matters should be taken further, a report will be prepared. The affected solicitor(s) will ordinarily be provided with an opportunity to make representations upon the report and any associated questions raised arising out of it. The SRA may decide to take no action or furnish the solicitor with a letter of advice. Conditions may be applied to the solicitor's practising certificate. Where discipline is felt necessary, the SRA has some disciplinary powers (see below). Alternatively, the matter may be referred to the Solicitors Disciplinary Tribunal.

Intervention

15.29 The nuclear weapon in the armoury of the SRA is intervention. This was introduced in 1941 as a necessary adjunct to the creation of the Law Society Compensation Fund. The grounds upon which the SRA is entitled to intervene in a solicitor's practice are contained in Sch 1 to the Solicitors Act 1974 as amended by the Legal Services Act 2007. Essentially, these are designed to permit intervention when a solicitor cannot run (through ill health, imprisonment, bankruptcy and the like), or alternatively cannot be trusted to run, a solicitor's practice so as to ensure that clients' moneys are secure. The statutory grounds include the following:

- The SRA has reason to suspect dishonesty on the part of the solicitor, an employee of the solicitor or the personal representatives of a deceased solicitor, in connection with that solicitor's practice or former practice, or in connection with any trust of which that solicitor is or formerly was a trustee or that employee is or was a trustee in his capacity as such an employee (para 1(1)(a) of Sch 1).
- The SRA has reason to suspect dishonesty on the part of a solicitor in connection with (i) the business of any body of which the solicitor is or was a manager or (ii) any business carried on by the solicitor as a sole trader (para 1(1)(aa) of Sch 1).
- The SRA is satisfied that the solicitor has failed to comply with rules made by virtue of ss 31, 32 or 37(2)(c) of the 1974 Act. Section 31 refers to rules of professional conduct, s 32 to accounts rules and s 37 to rules in relation to professional indemnity insurance. In essence any breach of any part of the *SRA Handbook* or its statutory predecessors will suffice.
- The solicitor has been adjudged bankrupt or has made a composition or arrangement with his creditors (para 1(1)(d) of Sch 1).
- The solicitor has been committed to prison in any civil or criminal proceedings (para 1(1)(e) of Sch 1).
- The SRA is satisfied that it is necessary to exercise the powers of intervention, or any of them, to protect the interests of clients, or former or potential clients, of the solicitor or his firm, or the interests of the beneficiaries of any trust of which the solicitor is or was a trustee (para 1(1)(m) of Sch 1).

15.30 The statutory mechanism of an intervention is to vest the solicitor's practice moneys in the Law Society, and to require the solicitor to yield up the practice documents. The Law Society does not take over or run the practice. It appoints intervening agents, who seek to ensure that all clients are

informed of the intervention and find alternative solicitors, and that the practice moneys are distributed appropriately. The solicitor's practising certificate is automatically suspended unless the adjudicator or Adjudication Panel authorising the intervention direct otherwise.

15.31 Intervention therefore entails the destruction of the solicitor's practice. There is a statutory right to challenge the intervention in the High Court, but in the many decades since the regime was introduced, there have been only a small number of successful challenges, all save one of which were consented to by the Law Society/SRA. The only successful example of a contested challenge at first instance is *Sheikh v Law Society*,[1] but the decision was reversed by the Court of Appeal.[2]

[1] *Sheikh v Law Society* [2005] EWHC 1409 (Ch). Additionally, the Law Society has conceded a small number of such challenges.
[2] *Sheikh v Law Society* [2006] EWCA Civ 1577.

The disciplinary powers of the SRA: traditional law firms

15.32 The Legal Services Act 2007 introduced a new s 44D into the Solicitors Act 1974, which provided a statutory power for the SRA to impose fines of up to £2,000, or a written rebuke, upon solicitors. A parallel power in relation to recognised bodies, their managers and employees, was inserted in the Administration of Justice Act 1985 as para 14B of Sch 2. By s 44D(10), the Lord Chancellor may by order increase the £2,000 limit to such other amount as may be specified in the order. Parliament's intention was to remove the less serious cases from the Solicitors Disciplinary Tribunal, and to allow the SRA to deal with them more speedily and cheaply instead. The informal system which preceded this was kept confidential between the solicitor and the regulator: now, the SRA may itself publish details of any action it has taken under s 44D if it considers this to be in the public interest.

15.33 The LSB approved the SRA (Disciplinary Procedure) Rules 2010, which commenced on 1 June 2010. Those Rules have now been replaced by the SRA Disciplinary Procedure Rules 2011, which form part of the *SRA Handbook*. The Rules do not apply to any matters where the relevant act or omission occurred before 1 June 2010.

15.34 Section 44E of the Solicitors Act 1974 provides a right of appeal to the Solicitors Disciplinary Tribunal.

The disciplinary powers of the SRA: Alternative Business Structures

15.35 Somewhat anomalously, in contrast to its disciplinary powers over solicitors in traditional law firms, the SRA has almost unlimited disciplinary powers over ABSs and those who work in them. The structure of the Legal Services Act 2007 is that the licensing authority is responsible for disciplinary as well as licensing decisions, with the Solicitors Disciplinary Tribunal acting as an appeal body. As a result, the SRA has the power to fine the business, its managers and employees up to a maximum of £250 million, for the business, and £50 million, for an individual. Further, the SRA has the power of disqualification - to disqualify any individual from being a Head of Legal

Practice (HOLP) or Head of Finance and Administration (HOFA) and from being a manager or an employee of an ABS.

15.36 These are very significant new powers, and at the time of writing it remains to be seen how the SRA will exercise them. Although oral hearings are unknown in relation to the SRA's limited powers over solicitors in traditional law firms, it is impossible to see how the regulator will be able to refuse an oral hearing when the livelihood and very existence of an ABS and/or those who work in it are at stake.

The Solicitors Disciplinary Tribunal

15.37 Members of the Solicitors Disciplinary Tribunal are appointed by the Master of the Rolls. The Tribunal consists of solicitor members who are practising solicitors of not less than 10 years' standing, and lay members, who are neither solicitors nor barristers. Lay members are paid a daily stipend by the Ministry of Justice; until 2009 solicitor members were unpaid but are now paid from the Tribunal's annual budget met by the Law Society.

15.38 The Tribunal has been held to be an independent and impartial tribunal for the purposes of Art 6 of the ECHR.

15.39 Cases are heard by a tribunal consisting of two solicitor members and one lay member. The Tribunal's procedures are currently governed by the Solicitors (Disciplinary Proceedings) Rules 2007.[1]

[1] SI 2007/3588.

15.40 The substantive hearings of the tribunal are usually conducted in public although there is provision under the rules on application of either party for the tribunal to consent to all or part of the case being heard in private. Either party may be represented or appear in person and call witnesses and adduce evidence in accordance with broadly accepted principles applicable in the High Court. Evidence is given on oath and the tribunal has power to accept affidavit evidence although the strict rules of evidence do not apply. In the event of a respondent failing to appear at the tribunal the SDT may dispose of the case in the respondent's absence although there is a power to order a rehearing if upon application by the respondent, the respondent can satisfactorily explain why he has not appeared at the substantive hearing. The tribunal makes its decision at the hearing and decides what sanction to impose (if any) on a respondent. The order or finding takes effect as soon as it is filed with the Law Society and the detailed written judgment (formerly known as the tribunal's findings) is produced and made available as soon as possible after the hearing (usually within around 12 weeks).

15.41 On the hearing of an application, the Tribunal has the power, in relation to solicitors, to make such order as it thinks fit, and any such order may in particular include provision for any of the following matters:

- the striking off the roll of the name of the solicitor to whom the application or complaint relates;
- the suspension of that solicitor from practice indefinitely or for a specified period;

- the revocation of that solicitor's sole solicitor's endorsement (if any);
- the suspension of that solicitor from practice as a sole solicitor indefinitely or for a specified period;
- the payment by that solicitor or former solicitor of an unlimited penalty, which shall be forfeit to Her Majesty;
- in the circumstances referred to in subsection (2A), the exclusion of that solicitor from providing representation funded by the Legal Services Commission as part of the Criminal Defence Service (either permanently or for a specified period);
- the termination of that solicitor's unspecified period of suspension from practice;
- the termination of that solicitor's unspecified period of suspension from practice as a sole solicitor;
- the restoration to the roll of the name of a former solicitor whose name has been struck off the roll and to whom the application relates;
- in the case of a former solicitor whose name has been removed from the roll, a direction prohibiting the restoration of his name to the roll except by order of the Tribunal;
- in the case of an application under subsection (1)(f) of the Solicitors Act 1974, the restoration of the applicant's name to the roll; and
- the payment by any party of costs or a contribution towards costs of such amount as the Tribunal may consider reasonable.

15.42 The SDT issued a Guidance Note on Sanctions in August 2012, which has been reissued since. The up-to-date version is available on the SDT's website at www.solicitorstribunal.org.uk. The leading authority on principles of sentencing in the Tribunal is the oft-quoted judgment of Sir Thomas Bingham MR (as he then was) in *Bolton v Law Society*,[1] discussed in detail above. Solicitors found guilty of dishonesty can expect to be struck off the roll, save in exceptional circumstances. Other serious misconduct can lead to striking-off or suspension. There is a growing body of authority on the level of fines likely to be imposed by the Tribunal in cases which do not merit striking-off or suspension.[2]

1 *Bolton v Law Society* [1994] 1 WLR 512.
2 See *Fuglers v Solicitors Regulation Authority* [2014] EWHC 179 (Admin); *Solicitors Regulation Authority v Andersons and others* [2013] EWHC 4021 (Admin).

Appeals

15.43 There is a right of appeal to the High Court available to both sides under s 49 of the Solicitors Act 1974, without the need for permission, where the SDT has made a decision as a tribunal at first instance (as opposed to decisions made in the exercise of the tribunal's appellate jurisdiction). The appeal may be against 'conviction', or sentence, or against the costs order, or any combination of the three. Such appeals are heard either by a two-judge Divisional Court or a single Administrative Court judge. By s 49(4) of the Act, the High Court has power to make such order as it thinks fit. Where the Court concludes that the SDT has erred in some respect, it is open to the Court to remit the matter to the Tribunal for further consideration.

15.44 As for appeals against the sanction imposed, in *Bolton v Law Society*,[1] Sir Thomas Bingham MR observed that it would require a strong case to interfere with a sentence imposed by a professional disciplinary committee, which was the expert body best placed to weight the seriousness of professional misconduct. With the advent of the Human Rights Act 1998, the Courts moved towards a more flexible approach, and the modern practice is set out in the judgment of Jackson LJ in *Law Society v Salsbury*:[2]

> 'From this review of authority I conclude that the statements of principle set out by Sir Thomas Bingham MR in *Bolton v Law Society* [1994] 1 WLR 512 remain good law, subject to this qualification. In applying the *Bolton* principles the Solicitors Disciplinary Tribunal must also take into account the rights of the solicitor under articles 6 and 8 of the Convention. It is now an overstatement to say that "a very strong case" is required before the court will interfere with the sentence imposed by the Solicitors Disciplinary Tribunal. The correct analysis is that the Solicitors Disciplinary Tribunal comprises an expert and informed tribunal, which is particularly well placed in any case to assess what measures are required to deal with defaulting solicitors and to protect the public interest. Absent any error of law, the High Court must pay considerable respect to the sentencing decisions of the tribunal. Nevertheless if the High Court, despite paying such respect, is satisfied that the sentencing decision was clearly inappropriate, then the court will interfere.'

1 *Bolton v Law Society* [1994] 1 WLR 512.
2 *Law Society v Salsbury* [2008] EWCA Civ 1285, [2009] 1 WLR 1286 at [30].

15.45 Appeals from the Solicitors Disciplinary Tribunal sitting in its appellate capacity lie to the High Court only on a point of law arising from the decision of the Tribunal, and only with the permission of the High Court.[1]

1 Article 5(3) of the Legal Services Act (Appeals from Licensing Authority Decisions) (No 2) Order 2011, SI 2011/2863.

(3) THE REGULATION OF BARRISTERS

15.46 Barristers have been providing expert advice and advocacy since the thirteenth century. All barristers must belong to one of the four Inns of Court, the Inner Temple, the Middle Temple, Gray's Inn, and Lincoln's Inn. The Inns of Court are unincorporated associations which have existed since the fourteenth century and play a central role in the recruitment of student members, training of aspiring barristers and continuing professional development of established barristers. The Inns are responsible for calling barristers to the Bar. They are administered by benchers, formally known as Masters of the Bench, senior members of the Inn who are selected and elected by the existing benchers.

15.47 Discipline over the Bar has, since the reign of Edward I, been the responsibility of judges. Its history was traced by Jackson LJ in *R (on the application of Mehey and others v Visitors to the Inns of Court*:[1]

> 'From the thirteenth century onwards the judges of the King's courts determined who was entitled to appear before them as advocates. At an early date it became the normal practice of the judges to grant rights of audience to persons who had been called to the Bar by one of the Inns of Court. By the mid-seventeenth century that practice had become invariable. Every person called to the Bar by one of the Inns

of Court was entitled to practise in the courts. Accordingly it was the function of the Masters of the Bench ("benchers") of each Inn to determine (a) who was fit to be called to the Bar and (b) who should be disbarred, alternatively temporarily suspended from practising, by reason of misconduct. The benchers of each Inn exercised these powers on behalf of and with the consent of the judges: see the excellent historical summary in *In re S (A Barrister)* [1970] 1 QB 160.

These arrangements remained in place following the enactment of the Judicature Acts 1873 to 1875, which established the Court of Appeal and the divisions of the High Court. In 1966 each of the Inns of Court passed a resolution creating a new body, the Senate of the Four Inns of Court ("the Senate"). By those resolutions the Inns transferred to the Senate their former function of disciplining barristers. At the same time the judges of the three divisions of the High Court passed a resolution confirming that the Senate should exercise disciplinary powers over barristers. In this way all the powers to discipline barristers, which historically had been exercised first by judges and then by benchers, devolved upon the Senate. The Senate established a Disciplinary Committee to consider allegations of misconduct and to determine the appropriate punishment for any misconduct which was proved. The only residual role of the benchers of each Inn was to promulgate and give effect to any punishments which the Senate's Committee may impose upon errant members of that Inn.

In 1986/7 there was another upheaval. The Senate was dissolved and a new body, the Council of the Inns of Court ("COIC"), was created.'

[1] *R (on the application of Mehey and others) v Visitors to the Inns of Court* [2014] EWCA Civ 1630 at [11]–[13].

15.48 The Courts and Legal Services Act 1990 designated the Bar Council as the authorised body for the profession. In 2000 COIC adopted the Disciplinary Tribunals Regulations 2000, which were then amended on a number of occasions over the years.

15.49 The Bar Standards Board was set up under the Legal Services Act 2007 as a ring-fenced part of the Bar Council, and replaced the Bar Council as the prosecution authority in disciplinary proceedings against barristers. This was a consequence of the Clementi Report, which recommended a rigorous separation of regulatory functions from representative functions in legal professional bodies.

15.50 The BSB regulates barristers called to the Bar in England and Wales in the public interest, and is responsible for:

- setting the education and training requirements for becoming a barrister;
- setting continuing training requirements to ensure that barristers' skills are maintained throughout their careers;
- setting standards of conduct for barristers;
- monitoring the service provided by barristers to assure quality;
- handling complaints against barristers and taking disciplinary or other action where appropriate.

15.51 The regulatory objectives of the BSB derive from the Legal Services Act 2007 and can be summarised as follows:

- protecting and promoting the public interest;
- supporting the constitutional principles of the rule of law;

- improving access to justice;
- protecting and promoting the interests of consumers;
- promoting competition in the provision of the services;
- encouraging an independent, strong, diverse and effective legal profession;
- increasing public understanding of the citizen's legal rights and duties; and
- promoting and maintaining adherence to the following professional principles:
  - that authorised persons act with independence and integrity;
  - that authorised persons maintain proper standards of work;
  - that authorised persons act in the best interests of their clients;
  - that authorised persons comply with their duty to the court to act with independence in the interests of justice; and
  - that the affairs of clients are kept confidential.

The *BSB Handbook*

15.52 The history of the regulation and disciplining of barristers in the first 10 years of the twenty-first century is not a happy one.[1] There were a number of challenges to the arrangements which had been made by COIC. Although the Bar Council/Bar Standards Board survived these challenges, Jackson LJ observed in *R (on the application of Mehey and others v Visitors to the Inns of Court:*[2]

'Lord Justice Moses said that the Bar should be at the forefront of setting standards as to how institutions should regulate themselves. I agree. I would add that instead of being at the forefront, the Bar and COIC seem to have been lagging behind. That is not acceptable.'

[1] Students of this unhappy history should read *Re P (a barrister)* [2005] 1 WLR 3019 as well as *R (on the application of Mehey and others) v Visitors to the Inns of Court.*

[2] *R (on the application of Mehey and others) v Visitors to the Inns of Court* [2014] EWCA Civ 1630 at [102].

15.53 That position is now historical, and it remains to be seen whether the 2014 reforms, which we now describe, will have made up the lost ground.

15.54 With effect from January 2014, the BSB published its *Handbook*, which bears a considerable similarity in its structure to the *SRA Handbook*, which was first published in 2011. The pre-existing Code of Conduct for barristers was replaced by a new Code, erected on the same basis of outcomes-focused regulation as holds sway for the solicitors' profession. The *Handbook* includes Core Duties, Outcomes, Guidance, Rules and Regulations.

15.55 The Core Duties, which mirror the SRA Principles, are said to 'underpin the entire regulatory framework and set the mandatory standards that all BSB regulated persons are required to meet. They also define the core elements of professional conduct. Disciplinary proceedings may be taken against a BSB regulated person if the Bar Standards Board believes there has been a breach by that person of the Core Duties set out in this Handbook and that such action would be in accordance with the Enforcement Policy'.

15.56 The 10 Core Duties are:

- CD1 You must observe your duty to the court in the administration of justice.
- CD2 You must act in the best interests of each client.
- CD3 You must act with honesty and integrity.
- CD4 You must maintain your independence.
- CD5 You must not behave in a way which is likely to diminish the trust and confidence which the public places in you or in the profession.
- CD6 You must keep the affairs of each client confidential.
- CD7 You must provide a competent standard of work and service to each client.
- CD8 You must not discriminate unlawfully against any person.
- CD9 You must be open and cooperative with your regulators.
- CD10 You must take reasonable steps to manage your practice, or carry out your role within your practice, competently and in such a way as to achieve compliance with your legal and regulatory obligations.

15.57 The Core Duties are followed by a plethora of Outcomes, Rules and fairly detailed Guidance. The *Handbook* runs to 277 pages.

Disciplinary structure

15.58 Following the investigation of a complaint, the BSB may decide to formally refer it to a Disciplinary Tribunal for consideration. Disciplinary Tribunals are arranged by an independent organisation called the Bar Tribunals and Adjudication Service (BTAS) which operates on behalf of the President of the Council of the Inns of Court (COIC). It appoints the members of Disciplinary Tribunals and arranges the hearings. Under the BTAS Appointments Protocol 2014, COIC and the President of COIC delegated their powers to appoint and nominate Disciplinary Tribunal panel members to the Tribunals Appointments Body (TAB). The TAB is chaired by a Lord Justice of Appeal and is required to contain at least two silks, two practising barristers of at least 7 years standing and two lay members, as well as the Chairman. The TAB is charged, amongst other things, with appointing and maintaining a pool of:

- QC's, barristers and lay persons who are eligible to sit on Disciplinary Tribunal panels;
- lay members to sit on the Inns' Conduct Committee;
- clerks to Disciplinary Tribunals.

15.59 Disciplinary Tribunal panels are made up of barristers, lay people, and sometimes judges. All panels will include at least one lay person. There are two types of Disciplinary Tribunal: three-person panels and five-person panels. Both types of panel follow the same process, but their sentencing powers are different. A three-person panel is limited to a maximum sentence of 12 months' suspension, whereas a five-person panel may disbar the respondent or suspend him or her for a prescribed period (no maximum period is laid down). Lesser penalties are available to both panels. If the three-person panel considers that a sentence in excess of its jurisdiction may be justified, it must refer the matter to a five-person panel.

Appeals

15.60 Until January 2014, appeals from the Disciplinary Tribunal were heard by the Visitors to the Inns of Court by virtue of s 44 of the Senior Courts Act 1981. Section 24 of the Crime and Courts Act 2013 abolishes the jurisdiction of High Court judges to sit as Visitors to the Inns of Court and confers on the Bar Council and the Inns of Court the power to confer rights of appeal to the High Court in relation to the matters that were covered by the Visitors' jurisdiction. The BSB has issued a document entitled 'Guidance on Appeals against decisions of Disciplinary Tribunals and the Qualifications Committee of the Bar Standards Board'.[1]

[1] Available on the BSB website.

15.61 Appeals are made to the High Court (Administrative Court) and are conducted in accordance with the CPR Part 52 (Appeals) and Practice Directions 52A and 52D. Paragraph 27.1A of Practice Direction 52D provides for the appeal route to be to the Administrative Court.

15.62 The Court has all the powers of the Tribunal and may affirm, set aside or vary any order of the Tribunal or order a new hearing. If the Court strikes out an appellant's notice or dismisses an appeal and it considers that the notice or appeal is totally without merit it will record that fact. The appeal hearing will be limited to a review of the Tribunal's decision unless the Court considers that in the circumstances of an individual appeal it would be in the interests of justice to hold a rehearing. Unless it orders otherwise the Court will not receive oral evidence or evidence which was not before the Tribunal. Also at the hearing a party may not rely on a matter not contained in an appellant's or respondent's notice without the permission of the Court. An appeal will be allowed where the Tribunal's decision was wrong or unjust due to a serious procedural or other irregularity at the Tribunal stage.

(4) THE REGULATION OF OTHER LEGAL PROFESSIONALS

15.63 There are a number of other regulatory regimes for legal professionals, which can be briefly summarized.

Legal Executives

15.64 A Chartered Legal Executive is a lawyer who has followed one of the prescribed routes to qualification set out by the Chartered Institute of Legal Executives (CILEx). Chartered Legal Executives are eligible to become partners in law firms and to share in the firm's profits. Under the Legal Services Act 2007, Chartered Legal Executives are 'authorised persons' undertaking reserved legal activities alongside solicitors and barristers.

15.65 ILEX Professional Standards (IPS) regulates members of the Chartered Institute of Legal Executives (CILEx). It oversees the education, qualification and practice standards of Chartered Legal Executive lawyers and other CILEx members and ensures they maintain proper standards of professional and personal conduct.