

1.3 Chairman's power to replace members

[4-4] Normally the actual number or a minimum number of members in a disciplinary tribunal is fixed. There are situations when a member may have to cease sitting as member, such as where a member has fallen ill, died, is of unsound mind, or may be disqualified due to a conflict of interest. The question has been raised that whether the disciplinary tribunal should be dissolved or just have its members replaced by the Chairman.

[4-5] In *Chao Pak Ki, Raymond & Anor v The Hong Kong Society of Accountants*,² before any such hearing could take place, the applicants were advised that two members of the disciplinary committee had been forced to step down and that the chairman, acting pursuant to his powers in the Professional Accountants Ordinance,³ had appointed new members in their place. The applicants objected to the reconstitution of the disciplinary committee on the following grounds:⁴

- (a) There was no jurisdiction in the Ordinance for a chairman to appoint replacement members.
- (b) A failure to dissolve the committee and appoint a new committee may result in unfairness towards them.
- (c) Unless a new committee was appointed, it could not be assured that the committee as a whole had looked to the papers before it to determine whether a prima facie case was shown warranting the continuance of the committee's inquiry.

[4-6] The Court held at para 22 that replacement of one member with another does not result in the automatic dissolution of the committee itself:

- (i) It is clear on a reading of s 33(3)(a) and (b) that a disciplinary committee is constituted before any of its members (other than the chairman) are appointed. The members are appointed after the committee itself has been constituted.
- (ii) A committee, once constituted, remains constituted even though not all of its members are yet appointed by the chairman. It follows that, if one member of a committee steps down, the committee itself remains constituted and the chairman must have the power to appoint a replacement member to the committee so that it shall consist of sufficient members to discharge its statutory obligations.
- (iii) Section 33(3) does not require the chairman to appoint all the other members simultaneously. He may appoint one after the other. If therefore, having appointed a first member, that member steps down, he may proceed to appoint a second member who takes the place of that first member.
- (iv) This process of appointment does not involve reconstitution of a committee. The committee at all times remains constituted. The process instead is simply one of ensuring that there are enough members appointed so that the committee can then deal with the complaints placed before it.

² [2004] HKCU 1388 (unreported, HCAL 134/2003, 30 November 2004).

³ Section 33(3)(b), Professional Accountants Ordinance (Cap 50).

⁴ Rule 6(1) of the Disciplinary Committee Proceedings Rules, made pursuant to section 51(1)(f) of the Ordinance, reads:

"If upon consideration of any such documents transmitted to the Disciplinary Committee ... the Disciplinary Committee is of the opinion that no prima facie case is shown for any disciplinary action, the Disciplinary Committee may dismiss the complaint without requiring the respondent to answer the allegations, and without hearing the complainant or the Registrar."

- (v) In summary, the constituted status of the committee is separate and separable from the life of its individual members (other than the chairman).
- (vi) That being the case, the replacement of one member with another does not result in the automatic dissolution of the committee itself.

[4-7] A distinction should be drawn between the power to appoint and the power to hire and fire. In relation to the power to hire and fire, there is the risk of a chairman being able to substitute a member with another to ensure that a member whose views are contrary to those of other members is replaced by one whose views are not. Clearly, the Ordinance gives no such power to the chairman of a disciplinary committee.

1.4 Chairman

[4-8] The Chairman is a member of a disciplinary tribunal although sometimes when there is equal number of views of either side then he would cast his vote. It may be that the Chairman of a Committee may have a slightly ambiguous role as in the case of the Medical Council,⁵ the Chairman on the one hand has to make a preliminary determination and direct the Secretary to refer the complaint to the Preliminary Investigation Committee. On the other hand he has to preside over the Preliminary Investigation Committee's meetings.⁶ It may not be clear when he presides over the Preliminary Investigation Committee, whether he could make a determination so that the matter may proceed to the Medical Council (acting as the disciplinary tribunal) for inquiry, without going through the preliminary stage when the Secretary will be required to (re-)investigate the matter before the Chairman (re-) makes the preliminary determination.

[4-9] It may be noted here that the Preliminary Investigation Committee as a body shares no such ambiguity. The function of the Committee is just to consider the complaint or information, and the respondent's explanation, as put before it by the Secretary. There is no dual role to play under the relevant regulations.

1.5 Chief Executive

[4-10] Chief Executive, Administrator, Secretary General are normally titles describing the head of the supporting staff of the professional organisation. They are an employee of the professional body. The fact that the Chief Executive is participating at disciplinary hearings should be examined by reference to the overall scheme.⁷

⁵ *Leung Kam Chung Kenneth v Medical Council of Hong Kong* (1996) 6 HKPLR 409 (CA).

⁶ Regulation 12(1), Medical Practitioners (Registration and Disciplinary Procedure) Regulation (Cap 161E).

⁷ *Re The Listing Committee* [1998] 1 HKLRD 475, [1998] HKCU 2627. In that case, the applicants were the subject of disciplinary proceedings instituted by the Listing Division of the Hong Kong Stock Exchange, and brought before the Listing Committee. The Committee decided after receipt of written submissions and oral representations at a hearing that the applicants were in breach of particular rules imposed by the Listing Agreement to which the applicants were party and determined also upon a penalty to be imposed. The Applicant complained (which the Court did not accept) that:

- (a) The Chief Executive sat as a member of the Listing Committee and took part in its deliberations, but he was also the titular head of the executive arm of the Stock Exchange.

1.6 Members not present throughout hearing

[4-11] The complaint that partial absence of some members who had participated in the decision-making process but were not present throughout the hearing was considered in a town planning case, *Hysan Development Ltd v Town Planning Board*⁸ but analogy was drawn to disciplinary proceedings decided in the United Kingdom.⁹ The Court of Appeal laid down the following principles:

- (a) The hearing need not be confined to evidence or materials raised at an oral hearing.
- (b) For judicial bodies where the rule applies in its full rigour, it is important that each member of the tribunal should hear orally all the evidence. Reading a transcript is normally no substitute for hearing evidence from a live witness given orally.
- (c) In the context of a non-judicial body, there is no absolute rule that this must be achieved by the presence of all the members throughout the entire course of hearing. See the example given in *Jefferies v New Zealand Dairy Production and Marketing Board*¹⁰ and the dicta of Viscount Dilhorne.¹¹ Some other procedures may be acceptable when the credibility of witnesses or other reasons pertaining to the proper assessment of a matter which requires the presence of all the members is not engaged. It is a matter of procedure and fairness.
- (d) In respect of administrative decisions which are not of a quasi-judicial nature, the crucial question is whether all members participating in the decision-making were fully apprised of what had happened at the hearing (or in the words of Viscount Dilhorne: "fully informed of the evidence given and the submissions made").
- (e) Thus, if there are members who are partially absent during the proceedings taking part in the deliberation and decision making, there must be some other evidence to demonstrate that they have otherwise been adequately apprised of the relevant matters or representations which had been put forward during their absence.
- (f) In assessing the adequacy of an alternative arrangement, the court will have regard to the nature of the process, nature of the case of the party concerned, the evidence or representations that were given, and the issues that the decision maker needs to address.
- (g) The rule may also be relaxed if the relevant process is statutory and the statute provides for such relaxation. As stated by Pratte J in the Canadian

- (b) One of the functions of the Listing Division is to investigate and pursue disciplinary matters, and to conduct the prosecution of complaints before the Listing Committee.
- (c) It follows that there arises a real danger of bias when a member of the adjudicating tribunal is also the superior of the prosecutor.
- (d) The Chief Executive had also made comments to the press which intimated that he was intent on pursuing the applicants, and had prejudged their guilt.
- (e) The Listing Committee did not recuse itself.

⁸ [2014] HKCU 2620 (unreported, CACV 232 of 2012, 13 November 2014) (CA).

⁹ *R (on the application of Hill) v Institute of Chartered Accountants in England and Wales* [2013] EWCA Civ 555, [2014] 1 WLR 86 (CA, Eng).

¹⁰ [1967] 1 AC 551 (PC).

¹¹ [1967] 1 AC 551 (PC), 568-569, cited at [19].

case of *Doyle v Canada (Restrictive Trade Practices Commission)*:¹² "It ... does not apply where this is expressly stated to be the case ... nor does it apply where a review of all provisions governing the activities of a tribunal leads to the conclusion that the legislator could not have intended them to apply."

[4-12] The Court of Appeal in *Hysan Development* emphasised that the relaxation discussed above is only in respect of the alternative arrangement for some members to be apprised of the evidence and representations (without being personally present at the meeting when the representations were made) before they participated in the deliberation process. It is not a relaxation which allows some members to take part in the decision making process when they were ignorant of relevant materials. Thus, if the evidence shows that no attempt or an inadequate attempt was made to apprise those absent members of the relevant representations before they participated in the making of the decision, that would vitiate the decision; see *R v Preston Borough Council, ex p Quietlynn Ltd*.¹³

1.7 Non-members

[4-13] The question is whether, and if so, to what extent, a non-member can take part. Delegation, participation and mere presence are the three usual modes of taking part. However, there could be other modes.

[4-14] The starting point is from Wade and Forsyth's *Administrative Law*, that participation of non-members in the deliberations or decisions of a collective body may invalidate its acts. The decision of a disciplinary committee, for example, is likely to be invalid if any non-member of the committee has taken part in its proceedings.¹⁴

1.7.1 Delegation of decision making is generally prohibited

[4-15] Delegation of decision making is in general prohibited:

An element which is essential to the lawful exercise of power is that it should be exercised by the authority upon whom it is conferred, and by no one else. The principle is strictly applied, even where it causes administrative inconvenience, except in cases where it may reasonably be inferred that the power was intended to be delegable. Normally the courts are rigorous in requiring the power to be exercised by the precise person or body stated in the statute, and in condemning as ultra vires action taken by agents, sub-committees or delegates, however expressly authorised by the authority endowed with the power.¹⁵

1.7.2 Legal adviser may not be an extraneous person

[4-16] Limited participation of a disciplinary tribunal's legal adviser has been accepted by the Court of Final Appeal, and legal advisers are not considered

¹² (1985) 21 DLR (4th) 366 (Can CA).

¹³ [1985] 83 LGR 308.

¹⁴ Wade and Forsyth, *Administrative Law* (10th Edn), p 259.

¹⁵ Ibid.

'extraneous persons'.¹⁶ The legal adviser however was not an extraneous person in the context of the proceedings in *Medical Council of Hong Kong v Helen Chan*.¹⁷

[4-17] The legal adviser's duty is to tender advice when it is requested.¹⁸ However, if the tribunal misdirects themselves, the legal adviser has a duty to advise so as to put matters right.¹⁹ He does not decide for the tribunal. The surest way for a disciplinary tribunal's legal adviser to know whether the tribunal's members are misdirecting themselves in the course of their deliberations is for him to be present while they deliberate.²⁰

1.7.3 Mere presence of non-members during deliberation

[4-18] As regards mere presence, Wade and Forsyth in *Administrative Law*²¹ considered that it was not clear whether the mere presence of a non-member will be fatal to the proceedings.

[4-19] However, "it would be most improper on general principles of law that extraneous persons, who may or may not have independent interests of their own, should be present at the formulation of that judicial decision."²²

1.8 Prosecution counsel

[4-20] Often in a disciplinary tribunal, the prosecution of the disciplinary charges are legally represented by counsel. Their role is similar to a prosecution counsel in criminal cases. Traditionally the prosecutor (and hence prosecution counsel) should not draft decisions.²³ Such was the case of counsel to the Insider Trading Tribunal who played a role quite similar to the prosecutor. However, in Canada, it appears to be permissible for the prosecution counsel for a commission of inquiry to assist in the drafting of the commission's report.²⁴ The Ontario Court of Appeal²⁵ has also

- 16 *Medical Council of Hong Kong v Helen Chan* (2010) 13 HKCFAR 248, [2010] 4 HKC 539 [43] (Bokhary PJ).
- 17 (2010) 13 HKCFAR 248, [2010] 4 HKC 539, [2010] 4 HKC 539.
- 18 *Judith Mary Longstaff v Medical Council of Hong Kong* [1980] HKLR 858, 865, [1980] HKCU 76; *Medical Council of Hong Kong v Helen Chan* (2010) 13 HKCFAR 248, [2010] 4 HKC 539 [38].
- 19 *Ibid.*
- 20 *Medical Council of Hong Kong v Helen Chan* (2010) 13 HKCFAR 248, [2010] 4 HKC 539 [38] (Bokhary PJ).
- 21 Wade and Forsyth, *Administrative Law* (10th Edn), p 259.
- 22 *Middlesex County Valuation Committee v West Middlesex Assessment Area Committee* [1937] Ch 361 (CA, Eng) (per Lord Wright MR); *Medical Council of Hong Kong v Helen Chan* (2010) 13 HKCFAR 248, [2010] 4 HKC 539 [46].
- 23 *R v The London County Council, ex p Akkersdyk* [1892] 1 QB 190, a case on renewal of music and dancing licence. At p 192 AL Smith J said that "no man can be plaintiff or prosecutor in any action, and at the same time sit in judgment to decide in that particular case, either in his own case, or in any case where he brings forward the accusation or complaint on which the order is made". This case was often cited, for example in *Frome United Breweries Company Ltd v Keepers of the Peace and Justices for County Borough of Bath* [1926] AC 586 (HL). For a case where the prosecutor interrupted a magistrate when giving judgment, see *HKSAR v Law Wai Kin* [2000] HKCU 688 (unreported, HCMA 594/2000, 26 August 2000).
- 24 *Canada (Attorney General) v Royal Commission of Inquiry on the Blood System in Canada* (1997) 207 NR 1 (Can CA).
- 25 *Re Sawyer and Ontario Racing Commission* (1989) 99 DLR (3rd) 561 (Ont CA).

held that it was improper for prosecuting counsel to write the tribunal's decision. A distinction was drawn between the role of, on the one hand, prosecuting counsel and, on the other, the role of a legal assessor.²⁶ Therefore the question as to the role and extent of participation of the prosecutor in drafting the decision may depend on the circumstances of the case, but it may normally be expected that the practice of prosecuting counsel drafting decisions without being directed by the relevant disciplinary tribunal will be viewed most suspiciously.

1.9 Counsel for the Disciplinary Tribunal

[4-21] Can counsel for the Disciplinary Tribunal draft decisions? The Divisional Court of the High Court of Ontario²⁷ has considered it impermissible for counsel for a disciplinary tribunal to have a hand in the drafting of the tribunal's decision. But the Court of Appeal of Ontario²⁸ appears to have taken the opposite view. The Court of Final Appeal in Hong Kong²⁹ however did not consider that those decisions were of much assistance.

[4-22] In Hong Kong, in the case of *Dato Tan Leong Min v Insider Dealing Tribunal*,³⁰ the Chairman of the Insider Dealing Tribunal had asked counsel for the tribunal to help in the writing of the tribunal's report. The Court of Appeal³¹ held that counsel for a tribunal should never be invited to assist in the writing of the report or to make submissions upon the draft report. The tribunal should never meet with counsel privately and involve them in the judicial function or the decision-making process. But there may be exceptional circumstances in which it is convenient for the tribunal to meet counsel to discuss administrative matters or even a new line of inquiry after the hearings have begun.

1.10 Legal adviser

1.10.1 Presence of legal adviser is common but not always necessarily a requirement

[4-23] The presence of a legal adviser at disciplinary tribunal hearings is a common feature. Such provision of a legal adviser advising the tribunal is commonly found in statutes or the articles of association or membership rules of the professional body. The obvious exceptions appear to be the case of Solicitors Disciplinary Tribunal and the Barristers Disciplinary Tribunal.

- 26 As discussed in *Re Glassman and Council of College of Physicians & Surgeons* (1966) 55 DLR (2d) 674 (Ont CA). As to the role of prosecuting counsel, the case of *Sawyer* (above at p 564) said that there was "no doubt that his role was to prosecute the case against the appellant and he was not present in a role comparable to that of a legal assessor to the Commission as discussed [in the case of *Glassman* at p 692]".
- 27 *Bernstein v College of Physicians and Surgeons of Ontario* (1977) 76 DLR (3d) 88.
- 28 *Khan v College of Physicians and Surgeons of Ontario* (1992) 94 DLR (4th) 193 (Ont CA).
- 29 *Medical Council of Hong Kong v Helen Chan* (2010) 13 HKCFAR 248, [2010] 4 HKC 539 [49-50] (per Bokhary PJ).
- 30 [1999] 2 HKC 83 (CA).
- 31 [1999] 2 HKC 83 (CA), 97D-98I (Mortimer VP (as he then was)).

[4-24] The legal adviser of a disciplinary tribunal is not an 'extraneous person'.³² His interests only lie in the proper performance of the tribunal's duties.

[4-25] It is not necessarily a requirement that a legal adviser should be present. The Registrar or the Council of the Hong Kong Society of Accountants, in the discharge of their duties, are not required under the Professional Accountants Ordinance to take advice before making a decision.³³

1.10.2 Tribunals that have legal advisers

[4-26] A list has been set out in *Helen Chan*³⁴ on those tribunals with legal advisers:

- (1) a Disciplinary Committee under the Pharmacy and Poisons Ordinance (Cap 138);
- (2) the Dental Council of Hong Kong under the Dentists Registration Ordinance (Cap 156);
- (3) the Midwives Council of Hong Kong under the Midwives Registration Ordinance (Cap 162);
- (4) the Nursing Council of Hong Kong²⁷ under the Nurses Registration Ordinance (Cap 164);
- (5) the Supplementary Medical Professions Council under the Supplementary Medical Professions Ordinance (Cap 359);
- (6) the Architects Registration Board under the Architects Registration Ordinance (Cap 408);
- (7) the Engineers Registration Board under the Engineers Registration Ordinance (Cap 409);
- (8) the Surveyors Registration Board under the Surveyors Registration Ordinance (Cap 417);
- (9) the Planners Registration Board under the Planners Registration Ordinance (Cap 418);
- (10) the Chiropractors Council under the Chiropractors Registration Ordinance (Cap 428);
- (11) the Social Workers Registration Board under the Social Workers Registration Ordinance (Cap 505);
- (12) the Landscape Architects Registration Board under the Landscape Architects Registration Ordinance (Cap 516);
- (13) the Veterinary Surgeons Board under the Veterinary Surgeons Registration Ordinance (Cap 529);
- (14) the Chinese Medicine Practitioners Board under the Chinese Medicine Ordinance (Cap 549); and
- (15) the Housing Managers Registration Board under the Housing Managers Registration Ordinance (Cap 550).

³² *Middlesex County Valuation Committee v West Middlesex Assessment Area Committee* [1937] Ch 361, 376 (per Lord Wright MR). See also *Medical Council of Hong Kong v Helen Chan* (2010) 13 HKCFAR 248, [2010] 4 HKC 539 [46].

³³ *Peter Po Fun Chan v Hong Kong Society of Accountants* [2002] HKCU 34 (unreported, HCAL 637/2001, 14 January 2002) [38].

³⁴ *Medical Council of Hong Kong v Helen Chan* (2010) 13 HKCFAR 248, [2010] 4 HKC 539.

1.10.3 Statutory appeal tribunals that have legal advisers

[4-27] In addition to the previous list, there are many statutory appeal boards and tribunals in Hong Kong for which a legal adviser may be appointed.

[4-28] They are (or include):

- (1) a Disciplinary Board with respect to registered safety auditors and registered scheme operators under the Factories and Industrial Undertakings (Safety Management) Regulation made under the Factories and Industrial Undertakings Ordinance (Cap 59);
- (2) a Disciplinary Board under the Fire Service (Installation Contractors) Regulations made under the Fire Services Ordinance (Cap 95);
- (3) the Liquor Licensing Board under the Dutiable Commodities (Liquor) Regulations made under the Dutiable Commodities Ordinance (Cap 109);
- (4) the Immigration Tribunal under the Immigration Ordinance (Cap 115);
- (5) a Disciplinary Board with respect to authorized persons, registered structural engineers and registered geotechnical engineers under the Buildings Ordinance (Cap 123);
- (6) a Disciplinary Board with respect to registered general building contractors under that Ordinance; the Licensing Appeals Board under the Public Health and Municipal Services Ordinance (Cap 132);
- (7) the Asbestos Administration Committee under the Air Pollution Control Ordinance (Cap 311);
- (8) a Disciplinary Board with respect to registered lift engineers and registered escalator engineers under the Lifts and Escalators (Safety) Ordinance (Cap 327);
- (9) a Disciplinary Board with respect to registered lift contractors and registered escalator contractors under that Ordinance; an Appeal Board under that Ordinance;
- (10) a Transport Tribunal under the Road Traffic Ordinance (Cap 374);
- (11) a Board of Review under the Film Censorship Ordinance (Cap 392);
- (12) a Disciplinary Tribunal and an Appeal Board under the Electricity Ordinance (Cap 406);
- (13) a Drainage Appeal Board under the Land Drainage Ordinance (Cap 446);
- (14) an Appeal Board under the Amusement Rides (Safety) Ordinance (Cap 449);
- (15) a Disciplinary Tribunal under the Builders' Lifts and Tower Working Platforms (Safety) Ordinance (Cap 470);
- (16) an Appeal Board under the Builders' Lifts and Tower Working Platforms (Safety) Ordinance (Cap 470);
- (17) the Chinese Medicines Board under the Chinese Medicines Traders (Regulatory) Regulation made under the Chinese Medicine Ordinance (Cap 549);
- (18) an Appeal Board under the Construction Workers Registration Ordinance (Cap 583); and
- (19) an Appeal Board under the Energy Efficiency (Labelling of Products) Ordinance (Cap 598).

(iv) Position of legal adviser is different from Counsel for the Tribunal

[4-29] In the case of *Dato Tan Leong Min v Insider Dealing Tribunal*,³⁵ the Court of Appeal had held that the Chairman of the Insider Dealing Tribunal should not ask counsel for the tribunal to help in the writing of the tribunal's report. Here, it may be noted that the position of a legal adviser who merely advises a tribunal is "materially different from that of counsel for a tribunal. Typically, the duties of counsel for a tribunal include presenting documents, examining and cross-examining witnesses and making submissions."³⁶ In this regard, it may also be noted that the duties of counsel for the Insider Dealing Tribunal included those duties (which in the case of the Medical Council are undertaken not by its Legal Adviser but by its Secretary or by the complainant's counsel or solicitor).

[4-30] With regard to the Nursing Council,³⁷ the chairman and members of the Council (through the chairman) may put questions to the parties or to any witness during the hearing as they may think expedient. Or, at the request of the chairman, the legal adviser may put forward such questions.

1.10.4 Legal adviser may be present during deliberation

[4-31] In the case of the Medical Council, the Court held³⁸ that it is perhaps a matter for the Medical Council itself whether to permit its legal adviser to be present in the same room when it deliberates. However, perhaps the better course would be to deliberate on its own and only call upon the legal adviser to attend if his advice is required.³⁹

[4-32] The question of whether a legal adviser should be present during the deliberations, and if so his role was considered in the case of *Dr Chan Hei Ling Helen v Medical Council of Hong Kong*.⁴⁰ In the Court of Appeal, it was submitted that first, it was wrong in principle for the legal adviser to have been present during the deliberations of the Council and, second, that it was wrong for him to have been involved in the drafting of the findings.

[4-33] The Court of Appeal held in *Dr Chan Hei Ling Helen*⁴¹ that a non-member who is present during the tribunal's deliberations plainly is in a position to communicate with the Council and therefore in principle should be objectionable. The Court took a hard-line approach:

35 [1999] 2 HKC 83 (CA).

36 *Medical Council of Hong Kong v Helen Chan* (2010) 13 HKCFAR 248, [2010] 4 HKC 539 [42].

37 Regulation 37(5), Nurses (Registration and Disciplinary Procedure) Regulations (Cap 164A).

38 *Wu Hin Ting v Medical Council of Hong Kong* [2004] 2 HKC 367, 385H-I (CA) (per Ma CJHC (as he then was)).

39 In that case, in any event, any advice given to [the Medical Council] must be disclosed to the parties as required by reg 8(1) of the Medical Registration (Miscellaneous Provisions) Regulation (Cap 161D); *Wu Hin Ting v Medical Council of Hong Kong* [2004] 2 HKC 367, 384 (CA).

40 [2009] 4 HKLRD 174, [2009] HKCU 626 (CA).

41 [2009] 4 HKLRD 174, [2009] HKCU 626 (CA) [16] (per Le Pichon JA) after citing cases referred to by counsel for the solicitor: *Au Wing Lun William v Solicitors Disciplinary Tribunal* [2002] HKCU 1064 (unreported, CACV 4154/2001, 9 September 2002) (CA) [12]-[17], *Solicitor v Law Society of Hong Kong* [2005] 3 HKLRD 622, [2005] 2 HKC 573 (CA) [22], and *Law Society of Hong Kong v A Solicitor* [2006] HKCU 64 (unreported, CACV 62/2005, 11 January 2006) (CA) [24]-[29].

The authorities cited made clear, in no uncertain terms, that communication in any form by a non-member with a tribunal in the absence of the parties would give rise to a perception of unfairness, that justice would not be seen to be done inasmuch as the tribunal might have been influenced by what might have been communicated.

A non-member who is present during the tribunal's deliberations plainly is in a position to communicate with the Council. Whether he actually does so is irrelevant because his mere presence would give rise to a perception of unfairness.

Equally, the involvement of a non-member in the drafting of the decision, even a first draft which is subject to review by the members of the tribunal, inevitably, would open up the possibility of the tribunal having been influenced as to the contents of the decision, for example, through using or adopting thoughts and expressions in the decision emanating from the non-member that might not otherwise have featured in the decision.

[4-34] The presence of legal advisers during deliberation was thus objectionable.

[4-35] The decision of the Court of Appeal was overturned in the Court of Final Appeal.⁴² Namely, the legal adviser in the expression of the tribunal's reasons is not unnatural – even lawyers serving on a disciplinary tribunal may desire such help. As to the appearance of whether a tribunal is independent when the legal adviser is present during its deliberation, the Court held that it is a question of how things would appear to the hypothetical fair-minded and informed observer. Being taken to be informed, the hypothetical observer must be taken to be aware of the practice of the disciplinary tribunal.

1.10.5 The role of legal adviser is to tender advice when asked

[4-36] The role of legal adviser was discussed in *Judith Mary Longstaff v Medical Council of Hong Kong*:

Primarily the legal adviser's duty is to tender advice when asked. In addition he must not allow the Council to be misled and, if a party advances a submission which is bad in law or if he becomes aware that the Council in the course of their deliberations are misdirecting themselves, it is his duty of his own motion to put matters right.⁴³

1.10.6 Legal advice should be repeated in public after it was given in private

[4-37] There seems to have been a change in attitude of the Court over the years on whether advice should be repeated in public after it was given in private.

[4-38] In *Re Chien Sing-Shou*,⁴⁴ it was held that the legal adviser was a full member of the Architects' Disciplinary Board and as such, he was under no obligation to repeat in public anything said by him in the privacy of the board's deliberations. Nor was the legal adviser under any obligation to make a summing-up of the cases to his colleagues in the presence of the parties, and the appellant's complaint that there had been a failure to hold 'due inquiry' was devoid of substance and had been rightly rejected by the Supreme Court of Hong Kong.

42 *Medical Council of Hong Kong v Helen Chan* (2010) 13 HKCFAR 248, [2010] 4 HKC 539 (CFA) [30] (Bokhary PJ).

43 [1980] HKLR 858 (CA), 865 (Huggins VP).

44 [1967] 1 WLR 1155 (PC).

[4-39] In this case, counsel for the appellant in the course of his address to the Board submitted that: "...it was desirable in the interests of natural justice that there should be a summing-up by the legal adviser to the board in the presence of the parties." After an adjournment, the Board ruled that the legal adviser was not to be compared to a legal assessor or a judge advocate because by section 5(2) of the Buildings Ordinance, 1955 his status was that of a full member of the Board like any other member of the Board. The Board pointed out that their procedure in the past had not involved that the legal adviser, before the retirement of the Board, should give legal advice to the Board in the presence of the parties. They stated that he had of course joined in their deliberations and had done so with particular reference to any legal aspects of a case. They did not propose to depart from their practice.

[4-40] This case may be explained on the basis that the appellant's application for leave to apply for an order of *certiorari* was based upon the grounds that the Board had failed to hold a due inquiry. In breach of the rules of natural justice, the legal adviser (who had the conduct of the inquiry) did not give, within the hearing of the parties, any or sufficient legal advice to the Board of which he was a member, on the many points of law arising in the course of the said inquiry, or in such a manner that his advice could form part of the record or be ascertained from the record for the purposes of the parties either at the hearing before the Board, or on appeal. In addition, it was contended that any communication to the Board by the legal adviser should, as a matter of obligation have been made in the presence of the parties in a manner comparable to that laid down by regulation 33⁴⁵ of the Medical Practitioners (Registration and Disciplinary Procedure) Regulations 1957.⁴⁶ The Court however did not accept these contentions and held that:

- (a) The absence in the Buildings Ordinance of any provision comparable to that of the then Medical Practitioners Regulations serves to show the contrast between the roles of the two respective legal advisers.
- (b) The legal adviser in the present case was a full member of the board and the board had no obligation to repeat what was said in private deliberations.

45 Regulation 33 provides that:

"(1) When the legal adviser advises the council on any question of law as to evidence, procedure or any other matter, in any inquiry under section 20 of the Ordinance he shall do so in the presence of every party to the proceedings or the person representing each party or, if the advice is tendered after the council has commenced to deliberate as to its findings, every such party or persons as aforesaid shall be informed of the advice that the legal adviser has tendered. (2) In any case where the council does not accept the advice of the legal adviser on any such question as aforesaid, every such party or person shall be informed of this fact." The current version is section 8 of Medical Registration (Miscellaneous Provisions) Regulation (Cap 161D): "(1) When the Legal Adviser to the Council advises the Council on any question of law as to evidence, procedure or any other matter, in any inquiry under section 21 of the Ordinance, an appeal hearing from a decision of a committee or a meeting of the Council pursuant to an election petition under the Medical Practitioners (Electoral Provisions) (Procedure) Regulation (Cap 161B), he shall do so in the presence of every party to the proceedings or the person representing each party or, if the advice is tendered after the Council has commenced to deliberate as to its findings, every such party or person as aforesaid shall be informed of the advice that the Legal Adviser has tendered."

46 Which were made in the exercise of the powers conferred by section 31 of the Medical Registration Ordinance 1957 (No 25 of 1957).

- (c) The Court also treated the question as a matter of statutory interpretation and drew a distinction with the situation in *Medical Council*.

[4-41] The position of the legal adviser in the context of the Medical Council and Dental Council is different from that of the Building Authority.

[4-42] In *Dr Mu Lie Lian v Medical Council of Hong Kong*,⁴⁷ a doctor was charged with canvassing. The Court of Appeal stated that the duties of the legal adviser included that to advise on the essential ingredients of the charge. This is particularly the case when it is necessary to keep the balance, as, for example, where counsel acting for the Secretary had, in his submissions to the Medical Council, gone "wide off the mark and has failed to direct the Council's mind to the essential ingredients of the charge which had to be proved."⁴⁸ The Court went on: "... the function of the legal adviser is a difficult one and he or she may be called upon to give advice at short notice. But in the circumstances of a case like this the legal adviser should not have been caught by surprise. He should have realised that the charge as such was formulated in an obtuse fashion, and that the essential ingredients which had to be established in order to constitute professional misconduct might not readily have emerged by simply reading the charge. He should accordingly have been fore-armed." Thus the legal adviser is expected to prepare himself well before the hearing to avoid making wrong advice or giving rise to any unnecessary delay or adjournment.

[4-43] Then in *Lam Kwok Pun v Dental Council of Hong Kong*⁴⁹ the Court held that the legal adviser should have made her submissions in public and thus have afforded the dentist's counsel an opportunity of commenting upon it. It would not appear to be a satisfactory procedure for a legal adviser to adjourn with the Board when it is deliberating upon the material which has been placed before it.

[4-44] The Court of Appeal's concern was not with the fact that the legal adviser had been present at the tribunal's deliberations. It was mainly with the fact that she had advised the tribunal in private so that the dentist's counsel had no opportunity to address the tribunal on the accuracy or otherwise of such advice. As it turned out, the advice was in error. And it was for the error that the dentist's appeal was allowed.

[4-45] In *Wu Hin Ting v Medical Council of Hong Kong*,⁵⁰ the Court of Appeal accepted that the legal adviser may retire with the Medical Council to give advice, but such advice should be available to the parties. Here, the Legal Adviser told the parties that while the Council was in deliberation, she was also present not to take part in the deliberation, but to be available should any legal questions arise. She explained to the parties that following the decision of the Court of Appeal in *Lam Kwok Pun* where Mayo VP observed, obiter, that while it was not advisable for a legal adviser to retire with a disciplinary tribunal when it was deliberating, the Medical Council had adopted the following procedure. The legal adviser would if possible provide any legal advice in front of the parties before the Medical Council retired, but when the Council retired, the legal adviser would also retire with the members. If any legal advice was provided to the Council while it was in deliberation, this advice would, in accordance with Regulation 8 of the Medical Registration (Miscellaneous Provisions)

47 [1994] 3 HKC 8 (CA)

48 Ibid, [18].

49 [2000] 4 HKC 181, 184I-185A (per Mayo VP).

50 [2004] 2 HKC 367 (CA)

Regulation (Cap 161D), be disclosed to the parties. In the present case, this was exactly what was done. The Legal Adviser informed the parties of the contents of the advice she had given to the Medical Council while it was deliberating on its decision.

1.10.7 When should the legal adviser begin to draft the decision

[4-46] While there is nothing wrong about a professional disciplinary tribunal relying on a legal adviser to prepare a draft of the tribunal's decision, "[n]o drafting by the legal adviser may commence until after the tribunal ... has arrived at its decision and has made its decision, findings and reasoning known to the legal adviser".⁵¹

[4-47] The Court of Final Appeal in *Medical Council of Hong Kong v Helen Chan* had held that there was no problem about legal adviser drafting a decision so long as there were safeguards. The safeguard requirements would include:⁵²

- (a) The tribunal must deliberate without any participation by the legal adviser apart from giving it legal advice.
- (b) No drafting by the legal adviser may commence until after the tribunal – having so deliberated – has arrived at its decision and has made its decision, findings and reasoning known to the legal adviser. What the legal adviser drafts must embody the tribunal's findings and reasoning.
- (c) The tribunal must scrutinise the draft.
- (d) If necessary, the tribunal must modify the draft to ensure that it is the tribunal's product, not the legal adviser's, and that it says what the tribunal means.
- (e) The practice under which the Legal Adviser produces draft decisions for the Medical Council includes all of the above safeguards. Indeed it includes a further safeguard, namely that the drafting is done in the Medical Council's presence. This further safeguard is at least desirable.
- (f) The Court however leaves open whether it is always essential for other tribunals.

[4-48] The Court of Final Appeal in *Helen Chan* also held that the practice of the Medical Council for the legal adviser to be present during its deliberation and drafting the decision, properly understood and pursued, makes a valuable contribution to the safeguarding of the right to a competent, independent and impartial tribunal:⁵³

... there is no question here of justifying an adverse impact upon a constitutional right. It is a matter of holding that the constitutional right involved is not adversely impacted upon by the practice concerned and, indeed, benefits by it. This is because the practice, properly understood and pursued, makes a valuable contribution to the safeguarding of the right to a competent, independent and impartial tribunal. It does so, first, by seeing to it that the tribunal is able, where the law is concerned, to seek the competent and impartial advice of a lawyer who acts under its instructions and subject to its approval so as to preserve its independence. Secondly, it makes it easier to see on what understanding of the law the tribunal had proceeded.

51 *Medical Council of Hong Kong v Helen Chan* (2010) 13 HKCFAR 248, [2010] 4 HKC 539, [62] (per Bokhary PJ).

52 *Ibid.*, at [61] (per Bokhary PJ).

53 (2010) 13 HKCFAR 248, [2010] 4 HKC 539 [62].

1.10.8 The better practice for the future

[4-49] The Court of Final Appeal in *Helen Chan* stated that it is desirable that the Legal Adviser should, immediately before retiring and in the presence of the Medical Council and the parties in the hearing room, make a full and accurate statement of the practice that will be followed, explaining clearly what will and what will not be done. While failure to make such a statement will not of itself invalidate the decision, the advantages of such a course are twofold: First, it should help to allay any suspicions of the parties. Secondly, it would serve to remind the Legal Adviser of his own limited functions in the retiring room and the Medical Council of its responsibility to reach its own decision and give its own reasons unprompted by the Legal Adviser.

1.10.9 There should not be microscopic analysis of the transcript to examine the conduct of legal adviser

[4-50] The behaviour of the legal adviser should not be approached by way of a microscopic analysis of the transcript. In appeals, the Court has said that it deprecates an emergent trend towards microscopic analysis of the transcript of the proceedings with the aim of formulating a technical argument that the legal adviser has 'crossed the line', thereby rendering otherwise perfectly sensible and well-run disciplinary proceedings as potentially susceptible to subsequent judicial interference.⁵⁴

1.10.10 Both legal adviser and legal officer being government counsel does not necessarily constitute bias

[4-51] In *Lee Hong Dispensary Superstore Co Ltd v Pharmacy and Poisons Board*,⁵⁵ the appellant, a body corporate, was subject to a disciplinary committee to inquire into the appellant's conduct.⁵⁶ The committee heard the case presented by the legal officer, which consisted of documentary evidence only. On the same day, after deliberation, the committee announced its decision. Before doing so, the legal adviser disclosed at the resumed hearing that he had given legal advice to the committee during its deliberation on the proper interpretation of section 17(2)(b) of the Pharmacy and Poisons Ordinance (Cap 138). The committee then announced its decision.

[4-52] In the appeal, the appellant took the point that there was a real danger of bias or appearance of bias, as both the legal adviser and the legal officer of the disciplinary committee were government counsel from the Civil Division of the Department of Justice.

[4-53] As regards actual bias, the appellant submitted that because both the legal adviser and the legal officer were government counsel from the Civil Division of the Department of Justice, the legal adviser could have "unconsciously thought in the

54 *Ip Wing Kin v Medical Council of Hong Kong* [2010] 5 HKC 5 (per Stone J). This remark was said to be apt to the facts of the case in *Young Yau Yau Cecilia v Dental Council of Hong Kong* [2010] HKCU 2775 (unreported, CACV 72/2010, 20 December 2010) (CA) [19] (per Hartmann JA (as he then was)).

55 [2007] HKCU 379 (unreported, HCMP 1545/2006, 2 March 2007).

56 The appellant employed a Mr Ho to man its drug store. Mr Ho was not a pharmacist. Mr Ho was convicted of selling antibiotics without proper medical prescriptions. The appellant was required to submit in writing any explanation for the convictions and reminded the appellant that it might attend the inquiry in person or by counsel or solicitor.

same way as the legal officer instead of protecting the interest of the appellant".⁵⁷ He relied on the case of *Re Otis Elevator Co (HK) Ltd.*⁵⁸

[4-54] The court accepted the argument of the respondent, and said: "...there is nothing in the evidence to suggest that the legal adviser who advised the committee was motivated by any misplaced sense of loyalty, even if only unconsciously, to his colleague in the Civil Litigation Unit."⁵⁹

[4-55] In the view of the court, *Re Otis Elevator* was wholly distinguishable on the facts. In that case, the relevant legislation provided for the Director of Electrical and Mechanical Services to be both the prosecutor/complainant, as well as a member of the disciplinary board hearing the complaint. Those facts were far removed from the facts in the present case. The grounds of appeal were rejected. What made the court feel that there was lack of evidence was apparently the context and factual matrix of the case:

...although both the legal adviser and the legal officer were government counsel working in the Civil Division of the Department of Justice, they belonged to different units headed by different law officers. ...

... the legal adviser only assumes an advisory role and provides advice on legal matters to the committee during the disciplinary proceedings. Both as a matter of practice and in the present case, the legal adviser does not give and indeed has not given any advice or representation to the secretary to the board in any matter concerning the latter's conduct of the disciplinary proceedings. The legal adviser would not be aware of the legal officer's case before the inquiry and would not have sight of the hearing bundle until it was presented to the committee at the commencement of the disciplinary proceedings.

... The legal adviser would advise the disciplinary committee on any legal issues or procedural matters that may arise in the course of the disciplinary proceedings. Where the legal adviser has given any legal advice to the committee during its deliberation in private, the advice so given would be disclosed and recorded when the public hearing resumes after the deliberation stage. The legal adviser is not involved in the committee's determination as to whether the defendant is guilty of the charge and the level of punishment to be imposed.

In accordance with established practice ... the legal adviser and the legal officer did not communicate with each other in the present case whether before or during the disciplinary proceedings, officially or otherwise. Moreover, the legal advice given by the legal adviser to the committee during its deliberation was disclosed and recorded at the public hearing.

1.11 Secretary to the Disciplinary Committee

1.11.1 The role of the Secretary varies in different disciplinary tribunals

[4-56] The role of the Secretary may vary. They may play a purely administrative role; sometimes they may act as prosecutor. However, in the context of being a prosecutor, they are not supposed to give independent expert evidence.

⁵⁷ [2007] HKCU 379 (unreported, HCMP 1545/2006, 2 March 2007) [21].

⁵⁸ [1994] 1 HKC 740.

⁵⁹ [2007] HKCU 379 (unreported, HCMP 1545/2006, 2 March 2007) [22].

[4-57] In the case of dentists, the Secretary to the Dental Council is both a conduit between the general public and the Council; he is also, in effect, a prosecutor in disciplinary proceedings.⁶⁰

[4-58] In the case of accountants, the Secretary to the disciplinary committee could not give expert evidence of value as an independent expert witness.⁶¹

[4-59] In the case of doctors, it was held⁶² that under the Medical Practitioners (Registration and Disciplinary Procedure) Regulations,⁶³ where the Chairman of the Committee directs that a complaint or information be referred to the Committee, the Secretary is required, among other things, to inform the respondent of the substance of the complaint or information.

[4-60] In the case of solicitors, it was held⁶⁴ that the enactment of subordinate legislation which set aside a fundamental rule of natural justice, by permitting the secretary of the tribunal to draft the report for the approval of the discipline committee, was invalid as conflicting with the enabling statute although, had it been enacted by the legislature itself, it would be valid.

1.12 Clerks

[4-61] A clerk to the tribunal is often taken as responsible for administrative duties only. In this regard, the role of the clerk in a solicitors' disciplinary tribunal has given rise to much attention.⁶⁵

[4-62] It has been held that the clerk (to the tribunal) should not draft findings of the Solicitors Disciplinary Tribunal. In *Au Wing Lun William v Solicitors Disciplinary Tribunal*,⁶⁶ there was an appeal against the order as to costs made by the Solicitors Disciplinary Tribunal. The appeal was allowed by a majority.⁶⁷ Justice Rogers VP noted⁶⁸ that the costs in respect of the tribunal's clerk were calculated on the basis that the clerk had drafted the tribunal's findings. The learned Vice President said obiter that he considered it wrong for the findings of the Solicitors Disciplinary Tribunal to have been drafted by the clerk to the tribunal.⁶⁹

1.13 Other staff

[4-63] The Federal Court of Appeal of Canada⁷⁰ appears to have considered it permissible for independent and impartial members of the staff of a lay tribunal to

⁶⁰ *Secretary of the Dental Council of Hong Kong v Dental Council of Hong Kong* (unreported, HCMP 1430/1994, 11 October 1994).

⁶¹ *Hong Kong Institute of Certified Public Accountants v Disciplinary Committee* [2005] HKCU 1601 (unreported, HCAL 135/2005, 11 November 2005) (Reyes J).

⁶² *Dr Leung Kam Chung Kenneth v Medical Council of Hong Kong* (1996) 6 HKPLR 409.

⁶³ Regulation 12(2) of the Medical Practitioners (Registration and Disciplinary Procedure) Regulations (Cap 161E).

⁶⁴ *Re Emerson and Law Society of Upper Canada* (1983) 5 DLR (4th) 294, 326 (Ont HC).

⁶⁵ See further Chapter 24 below on solicitors.

⁶⁶ [2002] HKCU 1064 (unreported, CACV 4154/2001, 9 September 2002) (CA).

⁶⁷ Rogers VP and Le Pichon JA, with Yuen JA dissenting.

⁶⁸ [2002] HKCU 1064 (unreported, CACV 4154/2001, 9 September 2002) (CA) [8].

⁶⁹ *Ibid*, [9]-[17].

⁷⁰ *Weerasinghe v Minister of Employment and Immigration* [1994] 1 FC 330.

Briefly stated,³ the statutory scheme for the consideration and determination of complaints is a three tier system. The first is an initial check by the Chairman or the Deputy Chairman as to whether there is any substance to a complaint. It is supposed to be a prompt appraisal of a complaint, including any materials supplied, to remove an obvious case that is frivolous or groundless, and should not proceed further. The case can only be dismissed after consultation between the Chairman and the Deputy Chairman. If a complaint is not dismissed after the first check, a second more rigorous check by the PIC is conducted as to whether or not to refer the case for inquiry and determination by the Council for inquiry. This involves a more detailed consideration of the complaint and where the medical practitioner can submit information in response. In deciding that no inquiry is to be held, the PIC has the option to issue a letter of advice to the medical practitioner. It is on the basis that the case should be inquired into that a referral is made to the Council for inquiry by way of a formal charge. Finally, if the PIC makes such a referral, the Council for inquiry then determines by way of formal hearing whether the complaint of "misconduct in a professional respect" is established.

There are on average about twenty Medical Council hearings a year. A total of 26 cases (including 4 cases to be continued in 2017) were heard in the year of 2016. In 19 of the 22 completed cases (86.4%), the Council found the registered medical practitioners concerned guilty.

Many of them involve breaches of the advertising or canvassing the Medical Code or short clinical issues such as the simple mis-prescription of a drug. Very occasionally, the charges at the inquiry involve complex clinical issues. An example was, in 2013, a doctor was charged for misconduct when performing an amniotomy on the patient in a clinic. The case involved the use of the drug Syntocinon, presence of fetal distress in the first and second stages of labour, alleged failure to arrange a paediatrician to resuscitate the patient's baby when the baby was born depressed, the patient's baby subsequently had a subaponeurotic haemorrhage, and the lack of transfer to a neonatal intensive care unit as and when required.

This chapter covers the wide range of questions arising from the Preliminary Investigation Committee, the kind of conduct that may be considered as misconduct, the disciplinary process and appeals arising therefrom. In recent years a number of cases involving important legal principles have emerged. These focused on what may constitute misconduct, and the various safeguards to doctors under disciplinary proceedings as a result of human rights considerations.

1. PRELIMINARY INVESTIGATION COMMITTEE (PIC)

1.1 Object of PIC is to screen out groundless complaints

[9-1] In *Dr Leung Kam Chung Kenneth v Medical Council of Hong Kong*,⁴ the Court of Appeal said that the statutory scheme was intended to save medical practitioners from being vexed with groundless complaints, by having complaints screened by an independent body.

³ *Law Yiu Wai Ray v Medical Council of Hong Kong* [2016] 4 HKC 1 [44].

⁴ (1996) 6 HKPLR 409.

1.2 Legislative development of PIC

1.2.1 Since 1997

[9-2] The Medical Registration Ordinance (Cap 161) was subject to substantial amendment in 1996. The amendments came into effect in January 1997.

[9-3] The Ordinance empowers the Medical Council to establish a number of committees for the better performance of its duties.⁵ Amongst the committees which it is empowered to establish is the Preliminary Investigation Committee, which is to have such functions as are assigned to it by the Ordinance and delegated to it by the Council.⁶

1.2.2 The Committee

[9-4] Part III of the Ordinance provides for the composition and functions of a Preliminary Investigation Committee (PIC) established by the Council. The PIC is established pursuant to section 20BA(2)(d) of the Ordinance and its composition is provided for by section 20S. It consists of a Chairman and Deputy Chairman, who are elected by the Medical Council from among its members. Section 20T of the Ordinance provides for the functions of the Preliminary Investigation Committee:

- (1) The Preliminary Investigation Committee has the following functions —
- (a) to make preliminary investigations into complaints or information touching any matter that may be inquired into by the Council or heard by the Health Committee and to give advice on the matter to any registered medical practitioner;
 - (b) to make recommendations to the Council for the holding of an inquiry under section 21;
 - (c) to make recommendations to the Health Committee for conducting a hearing;
 - (d) to make preliminary investigations upon a referral by the Education and Accreditation Committee.
- (2) A matter brought to the attention of the Preliminary Investigation Committee for determining whether the Health Committee should be recommended to conduct a hearing or whether the Council should be recommended to hold an inquiry shall first be considered by the chairman of the Preliminary Investigation Committee or, in his absence, the deputy chairman thereof.
- (3) The Preliminary Investigation Committee, its chairman and deputy chairman shall act in accordance with such regulations in relation to their procedure made under section 33.

[9-5] Under section 33 the Medical Council may make provision by regulation for the receipt of complaints; the submission of complaints and information to the PIC; the preliminary investigation of any complaint or information by the PIC; the formulation of charges arising out of complaints and information; the reference to the Council by the PIC of cases arising out of complaints; and the procedure to be followed in relation to inquiries held by the Council. Before the amendment, the regulations under the Medical Registration were only made by the Governor-in-Council. The amended

⁵ Section 20BA, Medical Registration Ordinance (Cap 161).

⁶ Section 20BA(2), Medical Registration Ordinance (Cap 161).

Ordinance divided⁷ that regulation making power between the Governor-in-Council (now the Chief Executive in Council), the Secretary for Health and Welfare, and the Medical Council, according to various subject matters and importance.

[9-6] Under the Medical Practitioners (Registration and Disciplinary Procedure) Regulation (Cap 161E)⁸ before the 1996 amendment, where the Chairman of the Committee directs that a complaint or information be referred to the Committee, the Secretary is required to inform the respondent of the substance of the complaint or information. It is not for the Committee itself to do that. The function of the Committee is only to consider the complaint or information, and the respondent's explanation, put before it by the Secretary.⁹

[9-7] This has not been changed in substance under the 1996 amendment. By Regulation 6, where a complaint is received by the Secretary of the Council that a registered medical practitioner "has been guilty of misconduct in any professional respect", the Secretary is required to submit the complaint to the chairman or deputy chairman of the PIC. If the case is considered to be frivolous or groundless, they may dismiss the case.

[9-8] Otherwise, the matter must be referred to the PIC for its consideration.¹⁰ A date will be fixed to meet for that purpose. Where the chairman of the PIC is of the opinion that a complaint gives rise to a question whether there has been professional misconduct, he may require the complainant to, for example, to make clarification about the complaint or information.¹¹ The Secretary of the Council is then to notify the defendant – that is the doctor against whom the allegation is made:

- (a) of the receipt of the complaint and indicate any matters or allegations which may appear to raise a question whether the defendant has been guilty of misconduct in a professional respect,¹² and
- (b) invite him to submit to the Committee in writing any explanation of his conduct or of any matter alleged in the complaint ... which he may have to offer.¹³

[9-9] Pursuant to section 9 of the Regulation, the complaint must be referred to the PIC for consideration if the Chairman and the Deputy Chairman in consultation with each other, have not dismissed the case.

[9-10] Section 11 of the Regulation sets out the manner in which the PIC can consider the complaint. It provides:

- (1) The Committee shall meet in private.

⁷ Section 33, Medical Registration Ordinance (Cap 161).

⁸ In particular, Regulation 12(2), Medical Practitioners (Registration and Disciplinary Procedure) Regulation (Cap 161E).

⁹ Regulation 12A(1), Medical Practitioners (Registration and Disciplinary Procedure) Regulation (Cap 161E).

¹⁰ Regulation 9, Medical Practitioners (Registration and Disciplinary Procedure) Regulation (Cap 161E).

¹¹ Regulation 8(1), Medical Practitioners (Registration and Disciplinary Procedure) Regulation (Cap 161E).

¹² Regulation 9(2)(b), Medical Practitioners (Registration and Disciplinary Procedure) Regulation (Cap 161E).

¹³ Regulation 9(2)(f), Medical Practitioners (Registration and Disciplinary Procedure) Regulation (Cap 161E).

- (2) At the meeting at which a case is considered by the Committee, the Secretary shall put before the Committee the complaint or information received (if any), any statutory declaration received with it, any written explanation submitted by the defendant, any documents, medical or other reports produced by the defendant, and any other document or matter in the nature of evidence relevant to or in support of the complaint, information or matter and which is available.
- (3) The Secretary shall not present to the Committee any material which has been excluded from disclosure to the defendant under section 10.
- (4) The Committee may postpone its consideration or determination of a case, in whole or in part, to such date or adjourn a meeting from time to time as it thinks fit.
- (5) Where the complaint, information or referral alleges the conviction of a registered medical practitioner of an offence which does not in its opinion affect his practice as a registered medical practitioner, the Committee may refer the case to the Council with the recommendation that no inquiry is to be held.
- (6) Where the Committee considers that the matter indicated to the defendant under section 9(2)(b) should be amended, the Committee may direct the Secretary to make the amendment and advise the defendant of the amendment and invite him to give any further explanation which he may offer.
- (7) Before coming to a decision under subsection (8), the Committee may cause to be made such further investigations or further clarification from the defendant with regard to the case being considered by the Committee and with regard to his written explanation, and may obtain such additional advice or assistance as it considers necessary.
- (8) The Committee shall, having regard to any written explanation submitted by the defendant and all the materials put before it by the Secretary under subsection (2), consider the case, and, subject to subsections (5) and (7), may-
 - (a) decide that no inquiry shall be held;
 - (b) decide that no inquiry shall be held and issue a letter of advice to the defendant in such terms as it thinks fit;
 - (c) refer the case, in whole or in part, to the Council for inquiry;
 - (d) refer the case, in whole or in part, to the Health Committee for a hearing.
- (9) If, after a hearing, the Health Committee certifies and reports back that the defendant is physically and mentally fit to practise medicine, surgery or midwifery, the Committee may proceed with the investigation of the case, take any other appropriate action under subsection (8), or dismiss the matter, as it thinks fit.

[9-11] Upon a decision by the PIC to refer a case to the Medical Council for inquiry, a written notification of the decision containing the matters to be inquired into is submitted to the Chairman of the Medical Council. This document forms the basis of a notice to the defendant and is referred to as the PIC notice. This is provided under section 13 of the Regulation which reads:

- (1) If the Committee decides to refer a case to the Council for inquiry, the chairman of the Committee shall send a written notification of the decision of the Committee to the Chairman specifying the matters as identified by the Committee to be so referred and which form the basis of the charge or charges into which an inquiry is to be held.
- (2) On receipt of a notification under subsection (1) or on a remission of a case to the Council by the Court of Appeal under section 26(1) of the Ordinance, the Chairman shall direct the Secretary to fix a date upon which it is proposed that the inquiry is to be held.
- (3) If the Council decides to conduct an inquiry pursuant to a recommendation of the Health Committee under section 20V(1) of the Ordinance or a recommendation of the Education and Accreditation Committee under section 20N(1)(d) of the

Ordinance, the Chairman shall direct the Secretary to fix a date upon which it is proposed that the inquiry is to be held.

- (4) Except with the written consent of the defendant to a shorter period of notice, the Secretary shall, within 2 months of the receipt of a notification under subsection (1) and at least 28 days before the date fixed for the inquiry, serve on the defendant a notice of inquiry together with a copy of this Regulation and shall inform the complainant of the holding of the inquiry.
- (5) A notice of inquiry must-
 - (a) specify in the form of a charge or charges the matters into which inquiry is to be held; and
 - (b) state the date, time and place at which the inquiry is to be held.

1.2.3 Cases referred to the PIC

[9-12] In 2016¹⁴ a total of 12 meetings were held to consider 154 cases referred to the PIC. Of these 154 cases, 58 were dismissed by the PIC, 57 were referred to the Council for inquiry, 38 were referred to the Council for no inquiry, and 1 case was held in abeyance.

[9-13] In the past, when a complaint case proceeded into the PIC stage, the doctor under complaint would be notified of the receipt of the complaint by way of a PIC Notice. He or she would be invited to make representation, if any, to the particulars of complaint stated in the PIC Notice before the PIC met to discuss the case concerned. Following the comments of the judge in *Law Yiu Wai Ray v Medical Council of Hong Kong*¹⁵, refined measures have been adopted with regard to the process of complaint cases at PIC stage. Those comments included the following:

I must say that this case reveals a lamentable state of affairs in the Council's handling of complaints from members of the public against registered medical practitioners. There appear to be a number of contributing factors for this, the most obvious being the protracted and cumbersome process and procedures for handling complaints, the reliance on medical practitioners and laypersons to handle the complaints on a voluntary and part-time basis, inadequate administrative support and personnel to handle the volume of complaints, and the lack of appropriate guidelines, discipline and structure in handling complaints, including guidelines in relation to the declaration by a member of the PIC of an interest in a case. There also appears to be a lack of appreciation of the precise role and functions by persons designated to handle complaints which could be due to inadequate training and supervision.

1.3 Jurisdiction of the PIC

1.3.1 The PIC is not an investigative body

[9-14] In *Leung Kam Chung Kenneth v Medical Council of Hong Kong*,¹⁶ it was held that it is important that the roles of the Secretary of the Medical Council and the PIC should not be confused. Section 21(1) of the Medical Registration Ordinance does not permit the Council to conduct a disciplinary inquiry upon reference by the Secretary.¹⁷

¹⁴ See the Medical Council of Hong Kong's Annual Report 2016, at https://www.mchk.org.hk/files/annual/files/2016/MCAR_2016_e.pdf (accessed on 6 January 2019).

¹⁵ [2016] 4 HKC 1. The Medical Council conceded the application.

¹⁶ (1996) 6 HKPLR 409.

¹⁷ *Ibid.*, at [26].

The PIC, in order to properly perform its "screening" function, has no investigative role to play.

[9-15] The Court of Appeal held that having reached this point, the function of the PIC at the meeting as convened by the notice of 31 October 1994, was at an end. Any further investigative role was not for the PIC to play.

[9-16] The Court of Appeal held that when the minutes further record:

... It was put to Dr Leung at the PIC meeting that new charges or 'canvassing' as referred to at Section 9.3 and section 10 of the Professional Code and Conduct of the Medical Council of Hong Kong and the Warning Notice of the Medical Council of Hong Kong respectively, would be brought against him ...

the PIC was acting outside the rules.

[9-17] The Court of Appeal considered that there was in effect breach of natural justice:¹⁸

...The respondent was put in an impossible position. He was told in effect that the Committee had already reached an adverse view on the material before it, without hearing any explanation from him: and yet he was told he could give his 'written submission and explanation in response to [the] fresh charges to the Committee'.

1.3.2 Amendment of question for consideration of case by PIC

[9-18] Regulation 11 under the new Regulation is entitled: "Consideration of case by Committee" and Regulation 11(6) provides as follows:

(6) Where the [PIC] considers that the matter indicated to the defendant under Section 9(2)(b) should be amended, the [PIC] may direct the Secretary to make the amendment and advise the defendant of the amendment and invite him to give any further explanation which he may offer.

[9-19] In *Cheung Sau Yi v Medical Council of Hong Kong*,¹⁹ it was held that Regulation 11(6) is not mandatory.

[9-20] Having regard to the material before it as well as the defendant's explanation, the PIC may then:²⁰

- (a) decide that no inquiry shall be held;
- (b) decide that no inquiry shall be held and issue a letter of advice to the defendant in such terms as it thinks fit;
- (c) refer the case, in whole or in part, to the Council for inquiry;
- (d) refer the case, in whole or in part, to the Health Committee for a hearing.

1.3.3 Not mandatory for PIC to direct Secretary to amend question of misconduct

[9-21] However, before making a decision (under subsection (8)), the PIC may cause further investigations or clarification from the defendant with regard to (a) the

¹⁸ *Ibid.*, at [32].

¹⁹ [1998] HKCU 2718 (unreported, HCAL 16/1998, 23 July 1998) (Stock J (as he then was)).

²⁰ Regulation 11(8), Medical Practitioners (Registration and Disciplinary Procedure) Regulation (Cap 161E).

case being considered by the PIC and (b) his written explanation, and may obtain such additional advice or assistance as it considers necessary.²¹

[9-22] If the PIC refers the case to the Council, a written notification of its decision must be sent to the Chairman of the Council specifying the matters as identified by the PIC to be so referred and which forms the basis of the charge or charges into which an inquiry is to be held.²²

[9-23] On receipt of that notification the Chairman shall direct the Secretary to fix a date to hold the inquiry.²³

[9-24] The Secretary of the Council is then required²⁴ to serve on the defendant a notice of inquiry which must:

- (a) specify in the form of a charge or charges the matters into which inquiry is to be held; and
- (b) state the date, time and place at which the inquiry is to be held.

[9-25] Regulation 12 further provides that:

- (1) If the Committee decides that no inquiry is to be held, the chairman of the Committee shall direct the Secretary to, and the Secretary when so directed shall, inform the complainant and the defendant of the decision of the Committee.

1.3.4 Scope of complaint referred to the PIC

[9-26] The Chairman of the PIC is not restricted to the specific complaint made by the complainant.²⁵ He is entitled to consider the accompanying materials provided by the complainant to see whether they contain or disclose 'any matters or allegations which may appear to raise a question whether the defendant has been guilty of misconduct in a professional respect'.²⁶ And if after consideration and investigation, these matters or allegations do exist, the Chairman of the PIC is quite entitled to refer the case to the PIC for consideration in relation to them, whether in addition to or instead of the specific complaint originally made by the complainant.

[9-27] In order to properly identify and formulate the issue(s) of professional conduct that may be involved, the Chairman of the PIC is entitled to seek assistance and advice from outside sources.²⁷

21 Regulation 11(7), Medical Practitioners (Registration and Disciplinary Procedure) Regulation (Cap 161E).

22 Regulation 13(1), Medical Practitioners (Registration and Disciplinary Procedure) Regulation (Cap 161E).

23 Regulation 13(2), Medical Practitioners (Registration and Disciplinary Procedure) Regulation (Cap 161E).

24 Regulation 13(4), Medical Practitioners (Registration and Disciplinary Procedure) Regulation (Cap 161E).

25 *Dr Li Wang Pong Franklin v Medical Council of Hong Kong & Anor* [2009] HKCU 17 (unreported, HCAL 12/2008, 7 January 2009) [55].

26 Section 9(2)(b), Medical Registration Ordinance (Cap 161).

27 *Dr Li Wang Pong Franklin v Medical Council of Hong Kong & Anor* [2009] HKCU 17 (unreported, HCAL 12/2008, 7 January 2009) [56]-[65].

1.3.5 PIC can review its own decision

[9-28] In *Dr U v Preliminary Investigation Committee of the Medical Council of Hong Kong*²⁸ and *Yeung Kam Wah v Medical Council and The Preliminary Investigation Committee of the Medical Council of Hong Kong*,²⁹ the Court confirmed the PIC has power to re-consider the Decision of its own motion.

1.3.6 Council has power to consolidate cases

[9-29] Regulation 16 empowers the Council to consolidate cases against the same defendant, and to amend a notice of inquiry where that notice appears to the chairman to be defective.

1.3.7 Order of procedures must be observed

[9-30] Under Regulation 25, which sets down the procedures to be observed at an inquiry, stipulates that the order of procedures "must be observed".

1.3.8 No power to obtain documents from Hospital Authority

[9-31] In *Chairman and Deputy Chairman of The Preliminary Investigation Committee of The Medical Council of Hong Kong v Hospital Authority*,³⁰ the Court of First Instance rejected an application by the Chairman of the PIC for (a) documents from the Defendant (in this case, the Hospital Authority (HA)) in connection with complaints made against doctors in their treatment of patients in hospitals managed by the HA; and (b) a mandatory injunction ordering HA to produce the requested documents for the Chairman's inspection.

[9-32] In that case the Chairman claimed that:

- (1) The requested documents were necessary to enable him to perform his statutory duties in handling complaints against registered medical practitioners under the Medical Registration Ordinance (Cap 161) and the Medical Practitioners (Registration and Disciplinary Procedure) Regulation (Cap 161E) ("the necessity ground").
- (2) There is strong public interest in the proper administration of professional disciplinary proceedings, particularly in the field of medicine, to investigate and eradicate medical misconduct or improper practice. The public interest will invariably outweigh the confidentiality of the patients save in exceptional cases ("the public interest ground").
- (3) The Chairman has power at common law to compel the HA to provide the requested documents in the absence of patients' consent ("the common law power ground").

28 [2016] 4 HKLRD 31, [2016] HKCU 1501 [185] per Zervos J, relating to an operation on the Transurethral Resection of the Prostate that resulted in complications including urinary incontinence which necessitated further treatment.

29 [2018] HKCFI 1805, [2018] HKCU 2609 [18] per Chow J, on a complaint of carrying out an excisional biopsy (by way of a wide local excision) without explaining to her the less intrusive option of diagnostic core biopsy, or proposing or providing any other alternative procedure.

30 [2018] 2 HKLRD 842, [2018] HKCU 1279.

- (4) The Chairman has power under section 40(1) of the Interpretation and General Clauses Ordinance (Cap 1) to compel the HA to provide, despite the absence of patients' consent, documents which are "reasonably necessary" to enable the Chairman to carry out his statutory functions ("the Interpretation and General Clauses Ordinance ground").
- (5) The HA's disclosure of the documents would not be a breach of patient confidentiality and privacy because the exemption under section 58(2) of the Personal Data (Privacy) Ordinance (Cap 486) applies to the use of personal data for the Council's disciplinary proceedings ("the PDPO ground").

[9-33] The HA resisted production of the documents on the following principled grounds:

- (1) The right to privacy is guaranteed by the Hong Kong Bill of Rights Ordinance (Cap 383). The HA cannot provide the documents without the patient's consent in breach of this constitutional right;
- (2) On a proper construction of the Medical Registration Ordinance and the Medical Practitioners (Registration and Disciplinary Procedure) Regulation, prior to an inquiry under the Ordinance, even the full Council has no power to compel the production of documents by any person to the Council; and
- (3) Even if the exemptions under section 58(2) of the Personal Data (Privacy) Ordinance (Cap 486) were to apply, that would not give rise to a legal obligation on the part of the HA to provide the documents to the Chairman.

[9-34] On the public interest ground, the Court held that compelling the HA to make disclosure to the Chairman of the PIC (as opposed to the Council) is unlawful interference within the meaning of the Hong Kong Bill of Rights.

[9-35] On the common law ground,³¹ the Court also considered the HA's objection that the powers claimed by the Chairman is even greater than what the civil court would recognize. Effectively, the Chairman is seeking a *Norwich Pharmacal* order without having to satisfy the threshold test. On the Chairman's own case, there is not sufficient evidence to go forward without the documents. The equivalent of a *Norwich Pharmacal* order would unlikely be granted. Even if there is sufficient evidence to go forward, the Chairman is not the proper applicant for disclosure under the Medical Registration Ordinance and the Medical Practitioners (Registration and Disciplinary Procedure) Regulation. The common law power ground is not substantiated.

[9-36] On the necessity ground, the Court held that the mere need for the documents, without more, cannot justify the orders for disclosure and inspection now sought if the governing statute does not authorize the Chairman to seek such orders.

31 *Dr Li Wang Pong Franklin v Medical Council of HK* [2009] 1 HKC 352; followed in *Law Yiu Wai Ray v Medical Council of Hong Kong* [2016] 4 HKC 1 at [126] and [127]; and *Dr U v Preliminary Investigation Committee of the Medical Council of Hong Kong* [2016] 4 HKLRD 31, [2016] HKCU 1501 [108]. Zervos J talks of this as a power and necessary to perform their statutory duty and function and in order to further the overall aim of the provisions of the Medical Registration Ordinance and the Medical Practitioners (Registration and Disciplinary Procedure) Regulation.

[9-37] On the data privacy ground, the Court held that the exemption under section 58(2) of the Personal Data (Privacy) Ordinance³² could only be relevant to the use of personal data if it is in the possession of the Chairman. The exemption does not give rise to a legal obligation on the part of HA to disclose confidential patient records, still less confer a power on the Chairman to compel disclosure.³³

1.4 Referral back to the PIC

[9-38] Regulation 15 provides that the Council may refer a case back to the PIC,³⁴ if further information is subsequently produced in writing which suggests that an inquiry should not be held.

[9-39] This regulation envisages that information has come to hand which 'suggests' that an inquiry should not be held; and the case is referred back specifically 'for further consideration'.³⁵

1.4.1 New evidence or information may justify referral

[9-40] Regulation 15 envisages the emergence of some new evidence or information which justifies further thought by the PIC:

- (a) a re-evaluation of its original decision to refer the charge to the Council, which may indeed result in a decision by the PIC to go back upon its original decision to refer case to the Council for an inquiry.
- (b) But it may on the other hand result in a decision by the PIC to investigate the fresh information further; or
- (c) to seek clarification from the person who has provided the fresh information; or
- (d) to go to the complainant, perhaps, and ask what he has to say about the new information.³⁶

32 This is an exemption from the use of data for purposes including the "prevention, preclusion or remedying (including punishment) of unlawful or seriously improper conduct, or dishonesty or malpractice, by persons": see section 58(1)(d), Personal Data (Privacy) Ordinance (Cap 486).

33 Following *Chan Yim Wah Wallace v New World First Ferry Services Ltd* [2015] 3 HKC 382 [85] and footnote 61 of the case per Bharwaney J.

34 "15. Referring back to committee

- (1) Where, after a case has been referred to the Council for inquiry, further information is subsequently produced in writing which suggests that an inquiry should not be held, the Chairman may refer back the case to the Committee, the Health Committee or the Education and Accreditation Committee, as the case may be, for further consideration.
- (2) As soon as may be after the case is referred back to the Committee, the Health Committee or the Education and Accreditation Committee, as the case may be, the Chairman of the Committee shall direct the Secretary to, and the Secretary when so directed shall, advise the complainant and the defendant accordingly."

35 Had it been intended that the referral back could solely be a consequence of a conclusion by the Council that there was, in the light of the fresh information, nothing which warranted an inquiry or further investigation, terminology in a different vein would have been used.

36 *Cheung Sau Yi v Medical Council of Hong Kong* [1998] HKCU 2718 (unreported, HCAL 16/1998, 23 July 1998) [19] (Stock J (as he then was)).

1.5 The function of the Chairman of the PIC

1.5.1 An ambiguous role?

[9-41] The Court of Appeal in *Leung Kam Chung Kenneth v Medical Council of Hong Kong*³⁷ held that, under the old Medical Registration Regulations, the Chairman of the PIC has a slightly ambiguous role. He presides over the Committee's meeting: having made a preliminary determination and directed the Secretary³⁸ to refer the complaint or information to the Committee (with whom the Chairman is again a member). But the Committee as a body shares no such ambiguity. They determine complaints as placed before them by the Secretary.

[9-42] Upon receipt of the notification of the PIC's decision "the Chairman shall direct the Secretary to fix a date upon which it is proposed the inquiry shall be held"³⁹

[9-43] Once a notice of inquiry has been sent by the Secretary containing the charge(s), the statutory duty of the Council is to inquire into the case.⁴⁰ The Secretary within one month of the determination of the Committee, shall, serve on the defendant a notice of inquiry.⁴¹ A notice of inquiry is required to:

- (a) specify in the form of a charge or charges the matters into which inquiry is to be made; and
- (b) state the date, time and place at which the inquiry is proposed to be held.

1.5.2 Due enquiry

[9-44] This issue was raised in *Lo Shing Kei v Medical Council of Hong Kong*,⁴² where the doctor was charged with stealing drugs from a hospital. It was argued that the Medical Council could only investigate into what was referred to it. In rejecting the argument, the Court of Appeal said that the statute⁴³ did not confine the Council to hold an inquiry into a charge as formulated by the PIC. Its function is to inquire into "any case referred to it by the Preliminary Investigation Committee"

[9-45] The Council probably could not properly allow an amendment by which the matter to be inquired into became a different case.⁴⁴ But the question may boil down to a different one, namely: "Within the ambit of a 'due inquiry', does the Council have, by necessary implication under the statutory scheme, the power to allow the Secretary to formulate and to then reformulate the charge in such a way as to best facilitate 'due inquiry' of the matter referred to it by the Preliminary Investigation Committee?"⁴⁵

37 (1996) 6 HKPLR 409.

38 Regulation 12(1), Medical Practitioners (Registration and Disciplinary Procedure) Regulation (Cap 161E).

39 Regulation 13(2), Medical Practitioners (Registration and Disciplinary Procedure) Regulation (Cap 161E).

40 Regulation 14(1), Medical Practitioners (Registration and Disciplinary Procedure) Regulation (Cap 161E).

41 Regulation 14(2), Medical Practitioners (Registration and Disciplinary Procedure) Regulation (Cap 161E). The Notice should be in accordance with Form 5 in the First Schedule together with a copy of the regulations.

42 [1994] HKCU 42 (unreported, CACV 89/1993, 3 February 1994) (CA).

43 Section 21(1), Medical Registration Ordinance (Cap 161).

44 *Lo Shing Kei v Medical Council of Hong Kong* [1994] HKCU 42 (unreported, CACV 89/1993, 3 February 1994) (CA).

45 *Ibid.*, at [16].

[9-46] In this regard, section 21(1) of the Medical Registration Ordinance confers powers on the Council to conduct a "due inquiry into any case referred to it by the Preliminary Investigation Committee". Subsection (2) then goes on to state that "due inquiry" means an inquiry by the Council conducted substantially in accordance with procedure prescribed by regulations made under section 33. Thus whilst the regulations do not expressly empower the Council to amend the charge, nevertheless if "due inquiry" of the case as referred by the PIC so requires then Regulation 14(3) (a) is wide enough to accommodate an amendment. Technically it is the notice of inquiry which is amended, to specify the amended charge.⁴⁶

2. THE MEDICAL COUNCIL

2.1 The problem of limited membership

2.1.1 Test for recusal: real danger of bias

[9-47] A small profession often gives rise to problem of perception of conflict of interest and bias. The Court accepted *Re Prudential Enterprise Ltd*⁴⁷ which held⁴⁸ that the test in a recusal application was whether there was any real danger of bias.

[9-48] In *David Chow Siu Shek v Medical Council of Hong Kong*,⁴⁹ the doctor applied for judicial review and his complaint was based on an alleged real danger of bias on the part of the Medical Council. The fact relied upon in support is that of the 18 Council members who had participated in the decision to refuse the applicant's application, 9 have participated in the hearing of his earlier application in September 1998. The Medical Council pointed out that under section 3(2) of the Medical Registration Ordinance only a limited number of members are appointed to the Medical Council. The terms of their office are also prescribed by statute.⁵⁰ If the applicant's contention is valid, it will create a practical problem of insufficient quorum available for dealing with disciplinary proceedings regarding medical practitioners. The Court accepted this argument.

2.1.2 Education and Accreditation Committee of the Medical Council

[9-49] In *Dr X v Education and Accreditation Committee, Medical Council of Hong Kong*,⁵¹ the challenge was made to two decisions (one for Dr X and the other Dr Y) of the Medical Council hearing an appeal against the decision of its Education and Accreditation Committee (EAC), the governing body responsible for the registration of medical practitioners in Hong Kong, on the basis of apparent bias. The alleged bias arose from the fact that the Preliminary Investigation Committee (PIC), also established by the Medical Council, could make preliminary investigations into complaints or information relating to a registered medical practitioner, and

46 *Ibid.*

47 (unreported, HCCW 594/1999, 27 September 2000).

48 *Per Le Pichon J* (as she then was).

49 [2002] HKCU 548 (unreported, HCAL 337/2001, 3 May 2002).

50 Section 3(3).

51 [2013] 1 HKLRD 167, [2012] HKCU 2409 (CA).

recommend that the Council hold a disciplinary inquiry. The Court of First Instance⁵² ruled that the decision concerned were tainted with apparent bias because four of its members in each case were involved in preliminary investigations through the PIC. The Court of Appeal reversed the Court of First Instance's decision on this point.

[9-50] However, the Court of Appeal disagreed on the basis that the decision in question was related to the particular scenario where the medical doctor was ordered to be removed from the general register (GR) and subsequently the special register (SR).

[9-51] Under the statutory regime, a doctor has to be registered under the general register to practice. However, inclusion of a doctor's name under the SR does not entitle that person to practice medicine in Hong Kong but entitles him to be known as a specialist in the relevant specialty in question.

[9-52] Under Section 19(1) of the Medical Registration Ordinance, if the Council orders the removal of a person's name from the GR under Section 19(1), and that person's name is also included in the SR, the Registrar shall, at the same time he removes that person's name from the GR, also order the removal of his name from the SR. The Medical Council may, on the recommendation of the EAC and without conducting an inquiry order the removal of a person's name from the SR either permanently or for a period as it thinks fit.⁵³

[9-53] Where notice of any complaint or information relating to the suitability of a registered medical practitioner to have his name included in or removed from the SR comes to the EAC, it may recommend to the Council the removal of the registered medical practitioner's name from the SR.⁵⁴

[9-54] The registered medical practitioner may within 14 days of the EAC's written notice to him of such recommendation, request the EAC to review its decision.⁵⁵ The EAC shall, upon such request, review its decision and notify the registered medical practitioner in writing of its decision after review.⁵⁶

[9-55] Under Section 20O of the Ordinance, the registered medical practitioner may appeal to the Council against the EAC's decision after review. The Council may affirm, vary or reverse the decision of the EAC appealed against and its decision is final.⁵⁷

[9-56] The Council has power to hold a disciplinary inquiry in relation to a registered medical practitioner in respect of seven categories of cases, including an allegation of professional misconduct. The PIC will make preliminary investigations into complaints or information relating to a registered medical practitioner and, if it thinks fit, make a recommendation to the Council to hold such an inquiry.

[9-57] The PIC consists of 7 members, two of whom (its Chairman and Deputy Chairman) are members of the Council, four of whom are registered medical practitioners but not members of the Council and 1 of the 4 lay members of the

52 Applying the principles in *Wong Tak Wai v Commissioner of Correctional Services* [2010] 4 HKLRD 409, [2010] 6 HKC 58 (CA), [37] and *Deacons v White & Case LLP* (2003) 6 HKCFAR 322, 332, [2003] 3 HKC 374 (CFA).

53 Section 19B(2), Medical Registration Ordinance (Cap 161).

54 Section 20N(1), (1)(d), Medical Registration Ordinance (Cap 161).

55 Section 20N(2), (3), Medical Registration Ordinance (Cap 161).

56 Section 20N(4), Medical Registration Ordinance (Cap 161).

57 Section 20O(3), (4), Medical Registration Ordinance (Cap 161).

Council.⁵⁸ The quorum for a meeting of the PIC is 3, at least 1 of whom shall be a lay member and the Chairman or Deputy Chairman must preside at the meeting.⁵⁹ If the Council holds an inquiry under Section 21, either 5 members of the Council or not less than 3 members of the Council and 2 assessors shall form a quorum.⁶⁰ A member of the PIC who is also a member of the Council shall not attend a meeting of the Council while it is inquiring into a complaint or information in respect of which that PIC member took part in the preliminary investigations.⁶¹

[9-58] In the case of *Dr X*, in 2009 both *Dr X* and *Dr Y* were each separately subject to a disciplinary inquiry and were found guilty of professional misconduct. The Council ordered their names be removed for a certain period of time.

[9-59] In the case of *Dr X*, he was removed from the GR and then the EAC recommended removal of his name from the SR.

[9-60] In the case of *Dr Y*, he was removed from the GR and this was suspended. He then appealed. Then the EAC recommended his removal from the SR. *Dr Y* then appealed.

[9-61] The difference between the case of *Dr X* and *Dr Y* was that in the case of *Dr Y*, because of his appeal against the Section 21 order, the removal of the name of *Dr Y* was suspended until the EAC recommended that he be removed.⁶²

[9-62] Another difference between the two cases is that the basis of the EAC's Recommendation Decision on *Dr Y* and the EAC's Review Decision on *Dr Y* included the EAC's view as to the competence of *Dr Y* as a specialist, whereas no such view formed part of the basis for the EAC's Recommendation Decision on *Dr X*.

[9-63] As a matter of statutory interpretation, the Medical Council contends that for *Dr X* and *Dr Y*, the Medical Registration Ordinance intends, allows and requires there to be overlapping membership between the Council and its committees involved in the disciplinary process and the removal from the SR process. This raises, in both appeals of *Dr X* and *Dr Y*, the issue of whether the proper construction of the Medical Registration Ordinance intends, allows and requires overlapping membership between the Council and its committees involved in the disciplinary process and the removal from the SR process.

[9-64] In the case of *Dr X*, she was recommended to be moved from the SR at a time when she was removed from the GR.

[9-65] The Court of Appeal held that:

- (a) Sections 20J and 20K of the Medical Registration Ordinance provide that only a registered medical practitioner with the requisite specialist competence may have his name included on the SR. Being a registered medical practitioner is a prerequisite for inclusion in the SR and it must follow that it must also be a prerequisite for a person's name to remain on the SR.

58 Section 20S(1), Medical Registration Ordinance (Cap 161).

59 Section 20S(2) & (3), Medical Registration Ordinance (Cap 161).

60 Section 21B, Medical Registration Ordinance (Cap 161).

61 Section 21(4A), Medical Registration Ordinance (Cap 161).

62 Under the Medical Registration Ordinance.

- (b) By virtue of the removal of Dr X's name from the GR, it was inevitable that the EAC must recommend that her name be removed from the SR since being a registered medical practitioner (ie having one's name registered in the GR) is a prerequisite to being included in the SR.
- (c) Since removal from the SR is inevitable where a person's name is removed from the GR, it follows that the Council was bound, both when considering the appeal and whether to follow the EAC's recommendation to remove her name from the SR, to dismiss the appeal and remove her name accordingly.
- (d) The Court of Appeal therefore held that in the case of Dr X, since the result was inevitable and did not involve any judgment or discretion as to whether Dr X's name should be removed from the SR, there was no question of any member of the Council hearing the appeal or considering the recommendation of the EAC being influenced by any prior involvement in the PIC investigation.

[9-66] For Dr Y, the EAC's recommendation on Dr Y was made on the basis of: "[his] competence as a specialist had fallen below the standard required for a person to remain on the [SR]". The underlying basis for that conclusion was the finding of the Council at its section 21 inquiry into the allegations of professional misconduct against Dr Y. However, it was not a practical impossibility, when the Council heard Dr Y's section 200 appeal and when it considered its decision under s 19B(2) to make the Council's SR Decision on Dr Y, for the Council to have been constituted by members who had not previously been involved in the PIC investigation in respect of Dr Y. Therefore the Court of Appeal held that the hearing of the Medical Council was tainted:

- (a) There is no express provision in the Medical Registration Ordinance which permits overlapping members tainted by apparent bias sitting in the relevant bodies.
- (b) If this is intended, allowed, and required, it must be something that arises by necessary implication.
- (c) No such implication is necessary.

2.2 Parties

2.2.1 Constitution

[9-67] The Medical Council has 28 members, four of which are lay members. When a disciplinary hearing is convened there will be the Council sitting with a legal adviser. The Secretary to the Council will present the case. The complainant will have the opportunity to present his or her case and may be represented by lawyers. The doctor under complaint will have the right to appear and legally represented as well.

2.2.2 Complainant is a party

[9-68] In *Dr Darren Vivian Mann v Medical Council of Hong Kong*,⁶³ the Medical Council held that a complainant was a party to the disciplinary committee proceedings.

⁶³ [2007] HKCU 1650 (unreported, HCAL 21/2007, 2 October 2007) [48]-[49].

2.3 Hearing open to public

[9-69] The hearing is open to the public. Members of the public may have the right to know the names of the legal adviser and members of the Medical Council at the disciplinary hearing.⁶⁴

3. PROFESSIONAL CODE OF CONDUCT OF THE MEDICAL COUNCIL

3.1 Professional Code and Conduct

[9-70] By way of guidance on professional standards, the Medical Council publishes (and from time to time revises) a "Professional Code and Conduct". Infractions of the Code may lead to the Council disciplining a doctor. The Medical Council of Hong Kong has revised its latest code of conduct in January 2016.

3.2 The Hippocratic Oath

[9-71] The profession of medicine is distinguished from other professions by a special moral duty of care to save lives and to relieve suffering. Medical ethics emphasises the priority of this moral ideal over and above considerations of personal interests and private gains. The earliest code of medical ethics may be traced back to the Hippocratic Oath, which dates back to the 4th century BC.

3.3 Self-regulation with a strict code of conduct

[9-72] The Medical Registration Ordinance (Cap 161) allows the medical profession considerable freedom of self-regulation. On the other hand the profession has the obligation to abide by a strict code of conduct which embodies high ethical values, protects patients' interests, and upholds professional integrity.

[9-73] Needless to say, trust is essential to the practice of medicine. The patient's trust is said to impose upon the doctor a corresponding duty to be trustworthy and accountable. There is a fiduciary duty imposed on the doctor to his patient. Whereas a patient's trust is fundamental to the process of healing, the ability to heal depends importantly on the doctor's professional knowledge and skills. It is therefore important and necessary for doctors to attain continuous professional development through continuous and lifelong learning to fulfil their duty of care to patients.

3.3.1 History: Warning Notices (1957)

[9-74] The Code of Professional Conduct for medical doctors was originally published as a Warning Notice in 1957 and as the Professional Code and Conduct in 1994. In line with the need for medical ethics to evolve with changing social

⁶⁴ 吳錫偉 *v Medical Council of Hong Kong* [2014] HKCU 1817 (unreported, CACV 14/2014, 30 July 2014), after considering *Társaság a Szabadságjogokért v Hungary* [2009] ECHR 618, (2011) 53 EHRR 3. See also Philip Coppel, *Information Rights: Law and Practice* (4th Edn, 2014) paras 3-009 and 3-010.

circumstances, the Medical Council has kept the Code under continuous review. International practices, local peer opinion, legal requirements, public expectations and moral obligations have all played an important role in the development of the Code.

[9-75] The Code includes two cardinal values of the medical profession. It is committed to maintaining high standards of proper conduct and good practice to fulfil doctors' moral duty of care. In addition, the Code upholds a robust professional culture to support self-governing through identifying specific obligations and virtues of the profession. The Code emphasises that the hallmark of a profession is its distinctive identity and continuous self-development. The Code also marks the profession's commitment to integrity, excellence, responsibility, and responsiveness to the changing needs of both patients and the Hong Kong public.

3.4 The Code is a guide and not exhaustive

[9-76] The Code is understandably only a guide. It is by no means exhaustive. It is also not a legal document and should be given a fair interpretation in order to attain the objects of the relevant provisions.

4. MISCONDUCT IN A PROFESSIONAL RESPECT

4.1 Meaning

[9-77] The term 'misconduct in a professional respect' is not defined in the Medical Registration Ordinance but has been interpreted by the Court of Appeal as conduct falling short of the standards expected among registered medical practitioners.⁶⁵

4.1.1 Wide meaning given to 'in a professional respect'

[9-78] McCarthy J in the New Zealand case of *Re Mudie*⁶⁶ gave a wider meaning of the words 'in a professional respect':

One construction which can be given to those words is that the impropriety must arise in the course of the exercise of the doctor's professional care of his patient, but I consider that a wider meaning should be given, and that any act which is performed by the practitioner as part of the conduct of his profession can be said to be 'in a professional respect.

4.1.2 Disgraceful, dishonourable or unethical conduct included

[9-79] The phrase 'misconduct in a professional aspect' includes conduct involving dishonesty or moral turpitude, and also any act, whether by commission or omission, which has fallen below the standards of conduct which is expected of members of the profession. It also includes acts which are reasonably regarded as disgraceful, dishonourable or unethical by medical practitioners of good repute and competency.

⁶⁵ See Part II of the Code of Professional Conduct, titled "Professional Conduct and Responsibility".

⁶⁶ [1957] NZLR 689.

[9-80] The Medical Council is obliged to judge whether a doctor's conduct has fallen short of the expected standard after considering the evidence in each individual case. Both written and unwritten rules of the profession are to be considered.

4.1.3 Unwritten rule allowed

[9-81] In *Dr Chan Hei Ling Helen v Medical Council of Hong Kong*,⁶⁷ it was held that it is clear from the code itself that it is not exhaustive. Rather, it merely provides, by way of illustration, common examples of transgression. Further, the conduct or norm may be unwritten. An unwritten rule can form the basis of professional misconduct.⁶⁸

4.2 Effect of warning notice

[9-82] The Medical Council has published a 'Warning Notice'. It is not a statutory instrument. It is a pamphlet which proclaims itself to be 'for the guidance of medical practitioners' and begins by exhorting those practitioners, in their own interests, to familiarise themselves with, inter alia, the Medical Registration Ordinance.⁶⁹

[9-83] The Warning Notice pamphlet concludes with 'Conclusion' and a 'Note' which proceeds on the basis that registered medical practitioners should know the basics of the ethics of their profession.⁷⁰ The Court of Appeal had held⁷¹ that this approach was right.

4.3 Examples of misconduct

[9-84] Misconduct that has been charged and considered by the courts includes the following:

- (a) advertising;⁷²
- (b) canvassing;⁷³

⁶⁷ [2009] 4 HKLRD 174 (CA).

⁶⁸ See *Gardiner v General Medical Council* (1961) 105 Sol Jo 525 (PC), where Lord Morris of Borth-y-Gest said:

"Within the profession the line between the unobjectionable and objectionable publication should present no difficulties of recognition for any reasonable practitioner, even though the accepted ethical standards might not be formulated precisely or in any written code."

⁶⁹ In particular, section 21 thereof.

⁷⁰ It provides:

"Conclusion.

It must be emphasised that the categories of misconduct described in this booklet cannot be regarded as exhaustive, since from time to time with changing circumstances, the Council's attention may be drawn to new forms of professional misconduct. Any abuse by a medical practitioner of any of the privileges and opportunities afforded to him, or any dereliction of professional duty or breach of medical ethics may give rise to a charge of professional misconduct."

⁷¹ *Lee Chiu Tong v Medical Council of Hong Kong* [1996] HKCU 318 (unreported, CACV 220/1995, 28 May 1996).

⁷² *Keeson Shum v Medical Council of Hong Kong* [1980] HKLR 868, [1980] HKCU 82 (CA); *Dr Chau Kwok-On Gordon & Ors v Medical Council of Hong Kong* [2011] HKCU 490 (unreported, CACV 63/2006, 8 March 2011).

⁷³ *Re a Doctor* [1988] HKCU 6 (unreported, CACV 116/1987, 5 February 1988); *Leung Kam Chung Kenneth v Medical Council of Hong Kong* (1996) 6 HKPLR 409.

1. ACCOUNTANTS

1.1 Critical role in commerce

[21-1] It has been said⁴ that the accountancy profession plays a critical role in ensuring the orderly and lawful conduct of commercial activities. Dishonesty, dereliction or culpability on the part of its members can and does have a far-reaching effect, not only in the sphere of business activities but in matters concerning the financial well-being of individuals.

2. REGULATORY FRAMEWORK

2.1 Professional Accountants Ordinance

[21-2] The profession of accountants in Hong Kong is regulated by the Professional Accountants Ordinance (Cap 50). The Ordinance came into effect on 1 January 1973, but significant amendments were made in 1994.

[21-3] The Hong Kong Society of Accountants was the statutory body established⁵ to regulate the practice of the accountancy profession in Hong Kong, to represent the views of that profession, to conduct examinations, and to safeguard professional interests of its members.

2.2 Hong Kong Institute of Certified Public Accountants

[21-4] The Hong Kong Society of Accountants was renamed as the Hong Kong Institute of Certified Public Accountants (HKICPA) in 2004.⁶ It is the only body authorized by law to register and grant practicing certificates to certified public accountants in Hong Kong.

[21-5] The HKICPA is a statutory body corporate with perpetual succession.⁷

2.3 Objects of the HKICPA

[21-6] The objects demanded of the HKICPA, by section 7 of the Professional Accountants Ordinance include these:

- ...
- (b) to regulate the practice of the accountancy profession;
- ...
- (g) to represent the views of the profession and to preserve and maintain its reputation, integrity and status;

⁴ *Chao Pak Ki, Raymond & Arthur Andersen & Co v The Hong Kong Society of Accountants* [2004] HKCU 1388 (unreported, HCAL 134/2003, 30 November 2004) [16] Hartmann J, *AB & An accountant firm v Hong Kong Institute of Certified Public Accountants* [2005] HKCU 883 (unreported, HCAL 65/2005, 30 June 2005) [25].

⁵ It was set up in 1974 with the assistance of the Association of Chartered Certified Accountants (ACCA) as the local statutory accountancy body in Hong Kong.

⁶ Amended 23 of 2004.

⁷ Section 3, Professional Accountants Ordinance (Cap 50).

- (h) to discourage dishonourable conduct and practices by certified public accountants, and for this purpose to hold inquiries into the conduct of certified public accountants, firms and corporate practices ...;
- (j) to take such action as the Institute considers necessary in any matter affecting the professional interests of the accountancy profession;
- (k) to do all such other things as are incidental or conducive to the attainment of the above objects.

3. COUNCIL OF THE HKICPA

[21-7] Under the Professional Accountants Ordinance, there is established a Council of the HKICPA.⁸ It is empowered⁹ to regulate its own procedure. The Council is the body responsible for the management of the HKICPA and with the implementation of the objects of the Ordinance.

[21-8] Accountancy matters may be of great complexity. The Council receives informed, professional advice to enable it to exercise its discretion and in this regard the Council has two 'advisory' bodies; namely a Monitoring Committee or an Investigation Committee.

3.1 Composition of the Council

[21-9] The Council of the HKICPA consists¹⁰ of the Financial Secretary or his representative, the Director of Accounting Services or his representative, 14 certified public accounts with not less than 6 being in full time practice, not less than 6 not being in full time practice, the immediate past president, and 4 lay persons appointed by the Chief Executive.

3.2 Powers of Council

- [21-10] The Council has the power to issue or specify any:
- (a) statement of professional ethics; or
 - (b) standards of accounting, auditing and assurance practices, required to be observed, maintained or otherwise applied by any certified public accountant.

3.3 Registrar

[21-11] The Council appoints a Registrar to assist in the Council's work. At present, the Registrar also serves as the Institute's Chief Executive Officer. The HKICPA has a Compliance Department which is responsible for inquiring into complaints about the conduct of certified public accountants and their firms.

⁸ Section 10, Professional Accountants Ordinance (Cap 50).

⁹ By Section 17, Professional Accountants Ordinance (Cap 50).

¹⁰ Section 10, Professional Accountants Ordinance (Cap 50).

4. DISCIPLINARY PROCEEDINGS

4.1 Disciplinary Panel

[21-12] Part V of the Professional Accountants Ordinance (entitled 'Disciplinary Proceedings') requires the establishment of a Disciplinary Panel.

[21-13] Section 33 provides that there are two disciplinary panels. Panel A consists of not less than 18 lay members and Panel B consists of not less than 12 certified public accountants. Members of the Council are disqualified from membership of the Disciplinary Panels.

5. REGISTRAR MAY REFER COMPLAINT TO COUNCIL

5.1 Complaints

[21-14] Complaints within one or more of the categories¹¹ shall be referred by the Registrar of the HKICPA to the Council, which may in its discretion refer the complaint to the Disciplinary Panel. The policy of the HKICPA is that where the Council concludes that a complaint is sufficiently serious to warrant the exercise of its discretion to refer the matter to the Disciplinary Panels, a Disciplinary Committee will be convened to consider the complaint.¹²

[21-15] In *Dr Peter Po Fun Chan v The Hong Kong Society of Accountants*,¹³ the Court¹⁴ considered that, in order to discharge its responsibility to ensure the preservation of standards, the Society (acting through the Registrar) is empowered to consider any matter coming to its attention other than by means of a formal, identifiable complaint.

[21-16] That power comes from section 34(1A)¹⁵ of the Ordinance, which enables the Registrar to refer any matter that he "has reason to believe" reveals professional misconduct or negligence of a member.

6. PRACTICE REVIEW COMMITTEE MAY REFER TO REGISTRAR

[21-17] It may be useful to mention that there is a Practice Review Committee (PRC). The practice review programme was introduced in 1992 by the addition of Part IVA to the Professional Accountants Ordinance (PAO). The main objective of

11 Section 34, Professional Accountants Ordinance (Cap 50).

12 See <https://www.hkicpa.org.hk/en/Standards-and-regulation/Compliance/Disciplinary> (accessed 8 January 2019).

13 (unreported, HCAL 176/2000, 29 June 2000).

14 Ibid, at p 13, (Hartmann J).

15 This reads:

"Where the Registrar has reason to believe that subsection (1)(a) or (b), applies to a professional accountant ... he shall submit the facts to the Council which may, in its discretion, refer the complaint to the Disciplinary Panel."

the programme is to ensure that the professional standard defined by the PAO are applied.¹⁶ The programme is intended to be educational and to assist practice members to improve on their professional standards.¹⁷

[21-18] As to the powers of the PRC and of the reviewer, they are set out in sections 32D and 32E of PAO respectively. Under section 32D(1), the PRC has the power to determine the practice and procedure relating to practice reviews, and to issue instructions to a reviewer on practice reviews generally or regarding particular review.

[21-19] Upon receipt and consideration of the reviewer's report on a practice review, the PRC may make recommendations to the practice unit concerned regarding the application by it of professional standards.¹⁸ It may also instruct the reviewer to carry out a further or follow-up practice review.¹⁹

[21-20] The PRC may also make a complaint to the registrar of the Society if it is of the opinion that there has been a failure to observe, maintain or apply professional standards.²⁰

[21-21] In *Chan Kwok Ki v Hong Kong Society of Accountants*,²¹ the accountant complained that the PRC had imposed on him restrictions on accepting audit engagements when the restrictions are not part of the professional standards set out in Statement of Auditing Standards (SAS 600).²² The applicants contended that:

- (a) Paragraph 73 of SAS 600²³ does not say that an auditor should not accept an engagement where the scope limitation results from the client's conduct.
- (b) The reference to the Companies Ordinance is inappropriate because the PRC is not under a duty of administering the Companies Ordinance.

[21-22] The accountant argued that the restriction related to scope of work that may be undertaken by an auditor in his appointment or reappointment. The restriction was that in deciding whether to accept an audit appointment or reappointment as auditor, the practice unit should consider whether limitations on the scope of its work are likely to be imposed by the client such that it may be frustrated in performing its function as an auditor.

16 Paragraph 2 of Statement 1.400.

17 Paragraph 3 of Statement 1.401.

18 Section 32D(2), Professional Accountants Ordinance (Cap 50).

19 Section 32D(3), Professional Accountants Ordinance (Cap 50).

20 Section 32D(5), Professional Accountants Ordinance (Cap 50).

21 [2002] HKCU 821 (unreported, HCAL 3141/2001, 12 July 2002).

22 Statements of Auditing Standards (SASs) contain basic principles and essential procedures (auditing standards). Auditors are required to comply in the conduct of audit including those of companies applying section 141D of the Companies Ordinance (Cap 622). SASs also include explanatory and other material which is designed to assist auditors in interpreting and applying auditing standards. SAS 600 establishes standards and provide guidance on the form and content of auditors' reports. Much of the guidance provided can be adapted to auditors' reports on financial information other than financial statements.

23 Same as Paragraph 43 of 2000 revision. The crux of paragraph 73 is that an auditor should refuse an engagement if there are scope limitations that may prevent him from properly discharging his role as an auditor.

[21-23] It was then argued that such limitations may result from a client's conduct, including the directors' refusal to provide access to books and records, or to give the required information and explanations, or where the directors prevent certain important but necessary audit steps from being carried out, for example by refusing to organise stock take or allow the auditor to attend any stock take at all, without reasonable grounds, or to bear the costs of significant audit steps.

[21-24] The problem was then that the auditor should accordingly consider whether he should continue to act as auditor as he may not adequately discharge his duties under the Companies Ordinance and may be regarded to be condoning the directors' avoidance of their responsibilities under the Companies Ordinance to produce proper financial statements and to have them properly audited.

[21-25] The Court rejected those arguments and held that:

- (a) the accountant had taken an unduly restrictive view of paragraph 73 of SAS 600;
- (b) the Companies Ordinance governs not only the obligations of directors, but also the duties of auditor. The restriction is neither irrelevant nor inappropriate;
- (c) however, failure to comply with the directions of the PRC *per se* is not a disciplinary matter.²⁴

7. ANONYMOUS COMPLAINT

[21-26] In *Peter Po Fun Chan v Hong Kong Society of Accountants*,²⁵ the Court held that evidence of anonymous complaint is admissible:²⁶

The fact that evidential material has been received anonymously does not render it inadmissible if, standing as its own, it possesses evidential value and is therefore relevant to the matter at hand. The manner of its receipt may go to the weight to be accorded but does not determine its admissibility.

[21-27] The Court was concerned with whether the evidence was relevant, not how it was obtained.²⁷

24 The court goes on at [65]:

"The applicant maintains that practice review is not only educational, and that the PRC, when making recommendations, is determining questions that affect the rights of the practice unit. He contends that failure to comply with the recommendations of the PRC carries consequences of disciplinary proceedings. He refers to two cases ... but in both ... cases, the accountants were not disciplined for non-compliance with recommendations made in a practice review. They were disciplined for their failure to comply with review procedure and refusal to assist and co-operate with the reviewer. As [Counsel for the Society] points out, failure to comply with the directions of the PRC *per se* is not disciplinary matter. The PRC does not determine the substantive rights of the person being reviewed."

25 [2002] HKCU 34 (unreported, HCAL 637/2001, 14 January 2002).

26 Ibid, at [18].

27 *Kuruma v R* [1955] AC 197, applied in *Peter Po Fun Chan v Hong Kong Society of Accountants* [2002] HKCU 34 (unreported, HCAL 637/2001, 14 January 2002) [19].

8. DISCIPLINARY OFFENCES THAT MAY FOUND A COMPLAINT

[21-28] Regarding what offences may be referred as complaints to the Registrar, section 34(1)(a) is relevant:

34. Disciplinary provisions

(1) A complaint that –

(a) a professional accountant –

- (i) has been convicted of any offence under Part V (Perjury) of the Crimes Ordinance (Cap 200);
- (ia) has been convicted of any offence under section 31 of the Financial Reporting Council Ordinance (Cap 588); (ib) has been punished by the Court of First Instance under section 32(2)(b) of the Financial Reporting Council Ordinance (Cap 588) for failing to comply with a requirement imposed under section 25, 26, 27 or 28 of that Ordinance or for being involved in the failure; (ic) has been punished by the Court of First Instance under section 45(2) (b) of the Financial Reporting Council Ordinance (Cap 588) for failing to comply with a requirement imposed under section 43 of that Ordinance or for being involved in the failure;
- (ii) has been convicted in Hong Kong or elsewhere of any offence involving dishonesty;
- (iii) whether as a professional accountant or not –
 - (A) falsified or caused to be falsified any document;
 - (B) made any statement which is material and which he knows to be false or does not believe to be true, in respect of any document;
- (iv) has been negligent in the conduct of his profession;
- (v) without reasonable excuse, failed or neglected to comply with any direction issued under section 32F(2) and with which he was required by the Practice Review Committee to comply;
- (vi) failed or neglected to observe, maintain or otherwise apply a professional standard;
- (vii) without reasonable excuse, failed or neglected to comply with any requirement made under section 42D in relation to him by an Investigation Committee;
- (viii) has been guilty of professional misconduct;
- (ix) refused or neglected to comply with the provisions of any bylaw or rule made or any direction lawfully given by the Council;
- (x) was guilty of dishonourable conduct;
- (xi) while a director of a corporate practice, rendered any service as, or purporting to be, a director of a company whose name did not appear in Part II of the register at the time when the service was rendered, or
- (xii) being such a director, practised accountancy as such a director at a time when the corporate practice was covered by professional indemnity insurance either not at all or not to the extent required by this Ordinance;

shall be made to the Registrar who shall submit the complaint to the Council which may, in its discretion but subject to section 32D(7), refer the complaint to the Disciplinary Panel."

[21-29] There might also be cases in which there was public concern about the professional conduct of an accountant, where there had been a report by a regulatory authority, but where nonetheless there was insufficient evidence for the Council to refer the matter to the Disciplinary Committee.²⁸

9. RECENT EXAMPLES OF DISCIPLINARY COMPLAINTS

[21-30] Recent examples that ended up in Court in the past three years are set out below.

[21-31] *Registrar of the HKICPA v Cheung Yiu Hung*²⁹ was a case where the disciplinary hearing took two days to decide on five complaints relating to quality control,³⁰ requirement for adequate evidence to perform audits³¹ and requirement of documentation of audit work.³²

[21-32] *Law Fei Shing v Disciplinary Committee of the HKICPA*³³ was a case where the auditor made a qualification of the audited accounts for year ending 31 March 2009 with an impairment provision. However this was not made for 2010 or 2011, although the same impairment provision was made in the financial statements.

[21-33] *The Registrar of the Hong Kong Institute of Certified Public Accountants v Chan Bing Chung*³⁴ was a case where the Disciplinary Committee found that Mr Chan had failed to maintain professional knowledge or skill and/or failed to act diligently as the engagement quality control reviewer for the audit performed by KM Choi & Auyeung Ltd of the Financial Statements of Sing Lee Software Group Ltd and its subsidiaries for the year ending 31 December 2009. The failure of the respondent was in relation to IFRS 2 which stipulated that Share Options should be measured at market price. If the market price was not available, then a valuation technique should be used to estimate the price in an arm's length transaction between knowledgeable, willing parties. The respondent [Mr Chan] should have identified that the engagement team's acceptance of the exercise price of the share options as the only consideration in determining fair value did not follow the provisions as set out in IFRS 2.

10. INVESTIGATION COMMITTEE

[21-34] In 1994 a number of amendments were made to the Professional Accountants Ordinance. One of the more controversial was the establishment (under Part VA of the Ordinance) of a power to constitute an Investigation Committee.

28 This was mentioned in *Ernst & Young (a firm) v The Hong Kong Society of Accountants* (unreported, HCAL 139/1999, 16 March 2000).

29 [2018] HKCA 560, [2018] HKCU 3006.

30 Hong Kong Standard on Quality Control 1.

31 Hong Kong Standard of Auditing 500 paragraph 6.

32 Hong Kong Standard of Auditing 230 paragraph 5.

33 [2018] HKCU 4068 (unreported, HCAL 750/2018, 26 November 2018).

34 [2018] HKCA 158, [2018] HKCU 912.

10.1 Investigation separate from disciplinary machinery

[21-35] The main purpose of the 1994 amendment to the Professional Accountants Ordinance was:³⁵

- (a) The main purpose was to strengthen the Society's self-regulatory framework through the introduction of investigatory powers to be conferred to an Investigation Committee appointed by the council of the Society.
- (b) The former system discouraged complaints. A person making a complaint has to be prepared to fully investigate the matter in question, to gather evidence and to present his case at a Disciplinary Committee hearing. If the evidence available was inadequate to support a prima facie case, the disciplinary proceedings did not come into play. There was no mechanism whereby the Society can compel the professional accountant to respond to enquiries arising therefrom.
- (c) An investigation is also appropriate where there is a public concern over the professional conduct of a professional accountant, or where a report is made by a regulatory authority against the professional conduct of a professional accountant, but there is lack of evidence in its hands for the council to refer the case to a Disciplinary Committee.
- (d) An Investigation Committee quite separate from its disciplinary machinery would enable the Society to be pro-active in its regulation of the profession and demonstrate its determination to self-regulate.

10.2 Appointment of Investigation Committee

[21-36] The Council of the Society has the power to appoint an Investigation Committee.³⁶

[21-37] Under section 42C of the Professional Accountants Ordinance, where the Council believes that a certified public accountant or firm has breached professional standards, the Council may constitute an Investigation Committee. The Investigation Committee will then consider the matter of the alleged breach and inform the Council as to whether the certified public accountant or firm would have a case to answer in relation to the suspected breaches.

[21-38] An Investigation Committee consists of five members, three of whom (including the chairman) are lay persons and two of whom are accountants.

10.3 If there is a case to answer

[21-39] If the Investigation Committee finds that an accountant or his firm has a case to answer, it will inform the Council. The Council may then refer the matter to its Disciplinary Panels who will convene a Disciplinary Committee. The Disciplinary Committee will determine whether a disciplinary offence has been committed. If an accountant or firm was found liable, the Disciplinary Committee may impose

35 Explained by the Legislative Council in 1994: see *BDO Binder (a firm) v The Hong Kong Society of Accountants* [2000] HKCU 675 (unreported, HCAL 15/2000, 1 September 2000).

36 Section 42C, Professional Accountants Ordinance (Cap 50).

sanctions on the accountant or firm. The accountant or firm may appeal against the decision of the Disciplinary Committee decision to the Court of Appeal.

10.4 Advisory body with powers of access to documents

[21-40] The Investigation Committee is an advisory body. Its function is to advise the Council, if a complaint was made, whether or not there would or would not be a prima facie case to support such a complaint.

[21-41] The Investigation Committee is not obliged to rely on the voluntary co-operation of all persons who are asked to assist it.

[21-42] Section 42D of the Ordinance confers certain powers on the Investigation Committee. More particularly, section 42D(1)(a) provides for the power to seek documents and the duty on the accountant under investigation to provide the same.

[21-43] Section 42D(2) is subject to subsection (1)(a):

Subsection (1)(a) applies to the professional accountant to whom the Investigation Committee's proceedings relate or to that accountant's employer (if any), any former employer of such accountant and employee or former employees of such accountant.

[21-44] An Investigation Committee possesses the following features:

- (1) The Investigation Committee is a statutory body, not merely an informal body relying solely on voluntary co-operation.
- (2) Even if the goodwill of an accountant is not questioned, it can compel evidence which the accountant would otherwise be prohibited from providing because it would amount to a breach of client and accountant confidentiality.
- (3) It can also compel evidence from employers and former employers, they being third parties who might otherwise have been reluctant to co-operate.
- (4) Under sanction of criminal penalties, all matters coming before it are subject to stringent rules of secrecy. Co-operation, therefore, especially from third parties, is given a statutory protection of confidentiality.
- (5) Notwithstanding there may be a contractual duty of confidence, that duty is overridden by the power of the Investigation Committee to require the production of documents, under section 42 of the Ordinance.³⁷

10.5 No self-incrimination privilege

[21-45] A person is not excused from complying with a requirement of the Investigation Committee on the ground that to do so this might tend to incriminate him. But if he claims that an answer might incriminate him then his answer may not be used in subsequent criminal proceedings.³⁸

37 *Deloitte Touche Tohmatsu v The Hong Kong Society of Accountants (a body corporate)* (unreported, HCAL 97/2000, 31 May 2000) pp 52-53, applying *Ernst & Young v The Hong Kong Society of Accountants (a body corporate)* [2000] HKCU 119 (unreported, HCAL 193/1999, March 2000).

38 Section 42D(4), Professional Accountants Ordinance.

10.6 Investigation Committee is not quasi-judicial body

[21-46] In *HLB Hodgson Impey Cheng (a firm) & others v The Hong Kong Institute of Certified Public Accountants*,³⁹ HLB is a firm of certified public accountants. Mr Cheng and Mr Lai were partners of HLB. HLB were Tiffit's auditors between 2003 and 2005. In 2006 the SFC referred concerns over the standard of HLB's work as Tiffit's auditors to the Institute. The Institute then convened an Investigation Committee (IC).

[21-47] HLB sought judicial review of the Institute's decision rejecting HLB's complaints about the conduct of the IC, including objections to its membership, and also the Institute's decision refusing to reconstitute a different IC.

[21-48] HLB's Counsel submitted that, although its role is limited to investigation and evaluating whether there is a case to answer, an IC should still maintain "a requisite degree of independence and impartiality". HLB complained that the members of the IC over-stepped that requisite degree of independence and impartiality by considering the reports prepared by the Compliance Department before applying their own reasoning and reaching their own conclusion that there was a case for HLB to answer.

[21-49] The Court held that the Investigation Committee was, like the police, not carrying out a quasi-judicial function, having regard to the nature of the decision maker and the consequence of its decision:⁴⁰

The IC is not a tribunal. It investigates and makes a report based on its investigation. There is no formal process which an IC must strictly follow when carrying out its investigation and preparing its report. It may interview witnesses. But it is not obliged to give the party under investigation the opportunity to cross-examine the persons interviewed. It does not conduct hearings where adversarial submissions are advanced, although as a matter of fairness and good practice it normally invites submissions from the party being investigated at some point in its investigations. What the IC does is preliminary and its recommendation may not even be adopted by the Council.

10.7 Investigation Committee has to be impartial

[21-50] In *HLB Hodgson Impey Cheng v The Hong Kong Institute of Certified Public Accountants*, the Court found that the "requisite degree" of independence and impartiality for an IC would be more closely analogous to that expected from the police;⁴¹ that is, to "weigh the evidence impartially, without showing favour to any particular interest".⁴²

39 [2010] 6 HKC 232. Appeal dismissed and application for leave to the Court of Final Appeal was dismissed by the Court of Appeal: *Messrs HLB Hodgson Impey Cheng (a firm) v Cheng Chung Ching, Raymond & Ors* [2011] HKCU 2222 (unreported, CACV 192/2010, 17 November 2011).

40 Ibid, at [53] (per Reyes J).

41 Ibid, at [55].

42 See also *Christopher John Moran v Lloyds* [1981] 1 Lloyd's Rep 423, 426-427 (Lord Denning MR).

- [21-51] The Court of Appeal⁴³ agreed with the Court of First Instance that:
- The real question is what the "requisite degree" of independence and impartiality is which the IC must show.
 - There is a whole spectrum of independence and impartiality. The more formal the nature of the decision-maker and the more significant the consequences of its decision, the more rigorous the degree of independence and impartiality that such entity must show.

10.8 When investigation may be made

[21-52] Section 42C(2)⁴⁴ provides for reasonable suspicion or belief for a prima facie case in order to exercise discretion so that an investigation will be instituted.

[21-53] Section 42C(1) provides that where, pursuant to such a referral, the Investigation Committee tells the Council that in its opinion there is a prima facie case against the professional accountant, the Council may in its discretion refer the matter to the Disciplinary Panels and constitute a Disciplinary Committee pursuant to section 33(3) and the Disciplinary Committee will then proceed as if the referral were a complaint under section 34.

[21-54] In *Deloitte Touche Tohmatsu v The Hong Kong Society of Accountants (a body corporate)*⁴⁵ the Court held that where a decision-making body is provided with information by a respectable professional firm which on its face suggests that there were accounting errors which ought to have been detected upon audit, then it would suffice to give rise to a reasonable suspicion of negligence. However it should be considered as a mere suspicion.

11. INVESTIGATION POLICY

[21-55] The investigation policy was stated during the Second Reading of the Bill in the Legislative Council to amend the Professional Accountants Ordinance:

Checks have been built into the provisions of the Bill restricting the powers of the Investigation Committee to prevent abuse of the system. Moreover the Council of the Society will lay down guidelines to define the circumstances under which investigations can be initiated.

43 *Messrs HLB Hodgson Impey Cheng (a firm) & others v The Hong Kong Institute of Certified Public Accountants* [2011] HKCU 2222 (unreported, CACV 192/2010, 17 November 2011) [4]. This was an application for leave to the Court of Final Appeal against the Court of Appeal judgment dated 1 August 2011, and the application was dismissed.

44 "(2)(a) Where the Council reasonably suspects or believes that –

- a professional accountant has acted in a manner described in section 34(1)(a)(iii), (xi) or (xii);
- subparagraph (iv), (v), (vi), (vii), (viii), (ix) or (x) of section 34(1)(a) applies to a professional accountant or a firm of certified public accountants or public accountants (practising),
- section 34(1)(a) or (b), as applied by section 34(1AA), applies to a corporate practice, (Added 23 of 2004 s. 46), the Council may, in its discretion, constitute an Investigation Committee and direct the Committee, having considered the matter, to inform the Council as to whether in its opinion, were such a complaint made against him or it, the professional accountant or firm concerned would have a case to answer."

45 (unreported, HCAL 97/1999, 31 May 2000) p 45 (per Stock J (as he then was)).

[21-56] In the January-February 1995 edition of 'The Hong Kong Accountant', the Council published the 'Policy to Circumscribe the Instigation of Investigations'.⁴⁶

[21-57] The Society of Accountants accepted⁴⁷ that the policy statement published in the January 1995 edition of "The Hong Kong Accountant" imparted to members of the Society in Hong Kong a legitimate expectation that they would, should the circumstances arise, be treated in accordance with the policy.

[21-58] The Court has held that the formal Investigation Committee route (having compulsory powers against members) were not to be used against members who refused or were unable voluntarily to co-operate with the HKSA.⁴⁸

[21-59] At present the website of the HKICPA has this statement:

Policy

Where the Council concludes that a complaint is sufficiently serious to warrant the exercise of its discretion to refer the matter to the Disciplinary Panels, a Disciplinary Committee will be convened to hear the complaint.

12. NO RIGHT TO BE HEARD ON A DECISION TO APPOINT AN INVESTIGATION COMMITTEE

[21-59] In *Deloitte Touche Tohmatsu v The Hong Kong Society of Accountants (a body corporate)*,⁴⁹ the Court⁵⁰ held that there is no right to be heard to a decision to

46 It reads as follows:

"Policy to Circumscribe the Instigation of Investigations

- Council shall consider the appointment of an Investigation Committee under section 42C in the following circumstances:
 - when a matter concerning the professional conduct or integrity of a professional accountant or a firm of CPAs has attracted public concern or significant public attention; or
 - when the Council receives or becomes aware of a report from a regulatory authority casting doubts on the professional conduct or integrity of a professional accountant or a firm of CPAs; or
 - when the Council receives a report from a Committee appointed by the Council and reasonably suspects that a professional accountant or a firm of CPAs has acted in a manner described in section 34(1); or
 - when the Council receives a complaint against a professional accountant or a firm of CPAs, which gives the Council a reasonable suspicion that the professional accountant or firm has acted in a manner described in section 34(1).
- Council shall not appoint an Investigation Committee:
 - unless the Council is of the view that in order to conclude the matter satisfactorily, it will require more than the voluntary co-operation of the members concerned; and
 - in circumstances other than those prescribed in 1. a. to d. above, unless there is a unanimous decision of all the members of the Council.
- This policy shall be made known to all members of the Society."

47 *Ernst & Young (a firm) v The Hong Kong Society of Accountants (a body corporate)* [2000] HKCU 119 (unreported, HCA 139/1999, 16 March 2000), *BDO Binder (a firm) v The Hong Kong Society of Accountants (a body corporate)* [2000] HKCU 675 (unreported, HCAL 15/2000 HCAL 16/2000, 1 September 2000).

48 *Deloitte Touche Tohmatsu (a firm) v The Hong Kong Society of Accountants (a body corporate)* (unreported, CACV 247/2000, 600/2000, 601/2000, 19 June 2001).

49 (unreported, HCAL 97/1999, 31 May 2000) p 28.

50 Per Stock J (as he then was).

appoint an Investigation Committee. The appointment of an Investigation Committee does not entail the making of a complaint against the firm or individual accountant — this is evident from the terms of section 42C. As a consequence, there is no reasonable suggestion that the professional accountant has a right to be heard in opposition to a proposal to lay a complaint.

[21-61] As soon as the Investigation Committee has been appointed and is permitted to get on with its work, the applicants would no doubt meet, on one or on many occasions, with members of the Investigation Committee, to discuss the concerns of the Committee, to answer its questions, to pore over working papers, and to study allegations. There can be little doubt that, in reality, the professional accountant will know the case against him.

[21-62] In addition, notwithstanding there may be a contractual duty of confidence, that duty is overridden by the power of the Investigation Committee to require the production of documents, under section 42 of the Ordinance.⁵¹

13. DRAWBACK OF THE INVESTIGATORY PROCESS

[21-63] In a disciplinary proceeding,⁵² the Disciplinary Committee was dealing with a case where the complaint was in relation to the undertaking of a conflict of interest situation where the accountant was accused of playing both the role of auditor and at the same time performing or seen to be performing executive functions for the audit client. The Investigation Committee was formed almost 6 years after the last audited accounts were undertaken by the firm of accountants. The Disciplinary Committee also commented on the delay in the Investigating Committee's report being completed and finally submitted to the Council for its consideration as being regrettable and inexcusable. The Disciplinary Committee was also of the view that a number of matters ought to have been covered by the Investigation Committee and/or the Complainant before the case was brought before the Disciplinary Committee.

14. DISCIPLINARY HEARING

14.1 Functions of Council

[21-64] Where a complaint is referred to the Disciplinary Panel, the Council is required to constitute a Disciplinary Committee to deal with it.⁵³ The purpose of a Disciplinary

51 *Deloitte Touche Tohmatsu v The Hong Kong Society of Accountants (a body corporate)* (unreported, HCAL 97/2000, 31 May 2000) pp 52-53, applying *Ernst & Young v The Hong Kong Society of Accountants (a body corporate)* [2000] HKCU 119 (unreported, HCAL 193/1999, March 2000).

52 *An Investigation Committee of the Hong Kong Institute of Certified Public Accountants v Ernst & Young, Catherine Yen Kai Shun, Anthony Wu Ting Yuk*, Proceeding No. D-03-IC16H. See https://www.hkicpa.org.hk/-/media/HKICPA-Website/HKICPA/section6_standards/compliance/disciplinary/2014/07/determination-D-03-IC16H.pdf?la=en&hash=A30492496571111530F17C736335E6F0 (accessed 8 January 2019).

53 See section 33(3), Professional Accountants Ordinance (Cap 50).

Committee is to deal with formal complaints concerning allegations of misconduct by members, member practices or registered students.⁵⁴ The proceedings are governed by the Disciplinary Committee Proceedings Rules. If a Disciplinary Committee finds the charges against the member, practice or registered student proven, it will make disciplinary orders setting out the sanctions it considers appropriate to the circumstances.

[21-65] A Disciplinary Committee comprises five independent persons.⁵⁵ If the Disciplinary Committee is satisfied that a complaint⁵⁶ is proved, it may impose penalties which include removal of the culpable accountant from the register; a fine; a reprimand; the payment of costs; and postponement of judgment.⁵⁷

[21-66] Disciplinary Committees are really the supreme disciplinary organs of the HKICPA. It is a matter of no small consequence for an accountant to be called before such a committee and therefore of no small consequence for the Council to appoint one.

15. HEARING IN PUBLIC

[21-67] Disciplinary hearings for accountants are normally conducted in public unless the Disciplinary Committee determines that in the interests of justice a hearing or any part of it shall be held in private.

[21-68] The Court had rejected an order of anonymity of identity of accountant in judicial review proceedings.⁵⁸

[21-69] In *AB & an accountant firm v Hong Kong Institute of Certified Public Accountants*,⁵⁹ the accountants applied for judicial review to quash the decision to make the hearing public. At that time the Disciplinary Committee Proceedings Rules still directed that⁶⁰ unless a committee otherwise decides, hearings shall be in camera.⁶¹

[21-70] The Court held that the disciplinary committee is the master of its own proceedings. While a committee will no doubt take account of rulings before other committees that may be relevant to its own proceedings, it is not bound by those rulings, certainly not in respect of purely procedural matters.

54 Pursuant to section 34 of the Professional Accountants Ordinance and by-law 34 of the Professional Accountants By-laws.

55 It is selected as follows:

“...three persons, including the Chairman, from Disciplinary Panel A, which comprises no fewer than 18 lay members appointed by Government; and two persons (at least one of whom must hold a practising certificate) from Disciplinary Panel B, which comprises not less than 12 members appointed by the Council of the Institute.”

56 Referred to it under section 34, Professional Accountants Ordinance (Cap 50).

57 Section 35, Professional Accountants Ordinance (Cap 50).

58 *Chao Pak Ki, Raymond & Arthur Andersen & Co v The Hong Kong Society of Accountants* [2004] 4 HKC 441.

59 [2005] HKCU 883 (unreported, HCAL 65/2005, 30 June 2005).

60 Rule 11(1).

61 Section 36(1)(c) of the Professional Accountants Ordinance, repealed in 2004, gave the general power to admit or exclude the public from disciplinary proceedings. The repealed provision was then replaced by section 36(1A) which directs that every hearing of a disciplinary committee shall be held in public unless the committee determines that the interests of justice demand that it be held in private.

15.1 Detrimental effect on reputation not sufficient to require hearing not open to public

[21-71] In *HLB Hodgson Impey Cheng (a firm) & others v The Hong Kong Institute of Certified Public Accountants*,⁶² the Court rejected the submission that public disciplinary hearings may have a detrimental effect on the reputation of a professional accountant. The Court considered that adverse allegations made against a person are a hard fact of life.⁶³

[21-72] The Court also said that⁶⁴ the legislature has placed the responsibility of governing the accountancy profession on the profession itself. Therefore there is all the more reason for court proceedings which arise out of the manner in which the profession is attempting to regulate itself to be transparent.

16. POWER TO APPOINT MEMBERS BY CHAIRMAN

[21-73] In *Chao Pak Ki, Raymond & Arthur Andersen & Co v The Hong Kong Society of Accountants*,⁶⁵ it was held that on a true construction of the Ordinance, the chairman of a disciplinary committee has the jurisdiction to appoint a member to the committee to replace one who has died or for bona fide reason has stood down.

[21-74] Under certain circumstances the committee may be dissolved:⁶⁶

- (a) where a Disciplinary Committee is unable to decide whether an order should be made; and the committee's inability to decide is because one of its members is absent or unable to participate in the committee's deliberations regarding the decision; or
- (b) because an objection made which has not been withdrawn or because of the death, illness or other incapacity or the absence from Hong Kong of the person who is the chairman of a Disciplinary Committee, it is impracticable for the committee to continue to deal with the complaint.

17. STANDARD OF PROOF

[21-75] It has now been finally settled that the standard of proof in disciplinary proceedings is that of the civil standard. See *Registrar of Hong Kong Institute of*

⁶² [2010] 6 HKC 232 [72-74] (per Reyes J).

⁶³ Indeed, the Court did not see how a premature application for judicial review can stave off having to deal with such aspersions substantively, since judicial review hearings are themselves typically conducted in open court. The court said if "...the aspersions against one are somehow misconceived, then one will presumably vindicate one's self and one's reputation by refuting those aspersions in any disciplinary hearing or appeal therefrom".

⁶⁴ At [17].

⁶⁵ [2004] 4 HKC 441.

⁶⁶ Section 33B(3), Professional Accountants Ordinance (Cap 50). See also *Chao Pak Ki, Raymond & Arthur Andersen & Co v The Hong Kong Society of Accountants* [2004] 4 HKC 441.

Certified Public Accountants v Chan Kin Hang Danvil which the Court of Appeal rejected a "heightened standard of proof".⁶⁷

18. NEW ALLEGATIONS OTHER THAN THE COMPLAINT

[21-76] In *Registrar of the Hong Kong Institute of Certified Public Accountants v X & Y*⁶⁸ the Court of Appeal held that the complaint was different from what the Disciplinary Committee had convicted and allowed the appeal.

[21-77] The grounds of appeal may be broadly described as follows:

- (1) The Committee found the respondents guilty of a disciplinary charge that was completely different from the complaint.
- (2) The Committee erred in law in holding that the respondents had a professional duty under HKSA 700 to demonstrate adequately the auditors' evaluation of the complexity and context of the financial statements.
- (3) The Committee's approach was inconsistent with the complainant's acceptance that if he failed to persuade the Committee to accept his interpretation of HKFRS⁶⁹ 3, the complaint should be dismissed, and also with the Committee's rejection of the second complaint made.

[21-78] In that case the disciplinary complaints concerned the accounting treatment of the acquisition of a subsidiary by a company in 2009. In July 2009, the company entered into a sale and purchase agreement whereby it agreed to acquire from third-party vendors a majority holding of the issued shares in [Company B] for a total consideration of HK\$1,621,863,240. It was agreed that the consideration for the acquisition was to be satisfied by the allotment and issue of 3,243,726,480 shares in the company at HK\$0.5 each. The acquisition was completed on 24 September 2009. As at that date, the published price of the shares of the company was HK\$0.65.

⁶⁷ [2014] 2 HKLRD 723, [2014] HKCU 850 [31] per Poon J. 'Heightened civil standard' was mentioned in *Sadler v General Medical Council* [2003] 1 WLR 2259 [73-74] in the context of previously suspended surgeon of his work considered by the Committee of Professional Performance. The Privy Council mentioned that there might be exceptional cases in which a heightened civil standard might be appropriate, as explained by the House of Lords in *Re H (Minors) (Sexual Abuse: Standard of Proof)* [1996] AC 563. However, the use of 'heightened civil standard' in family cases as analogy to disciplinary proceeds require much careful thoughts. If the misconduct relates to sexual misconduct of children then perhaps the question may be more relevant, but this test must require more deliberation and thoughts. One analogy may be that the direct evidence in sexual abuse is, absent corroboration, almost invariably from the victim and not other sources. If this is the test then it is difficult to accept the standard of proof in ordinary disciplinary proceeds requires a 'heightened standard'. In any case *A Solicitor v The Law Society of Hong Kong* (2008) 11 HKCFAR 117, [2008] 2 HKC 1 [104] the Court of Final Appeal (Bokhary PJ) had considered the passage on 'heightened' civil standard in *Sadler* and apparently not adopted it in disciplinary proceedings as a matter of general approach.

⁶⁸ (unreported, CACV 244/2016, 20 October 2017).

⁶⁹ HKFRS stands for the Hong Kong Financial Reporting Standards, which are standards promulgated to ensure company accounts are understandable and comparable across Hong Kong.

[21-79] In preparing its financial statements for the year ended 31 March 2010, however, the group did not adopt the published price of the company's shares as at the date of acquisition for the purpose of valuing the consideration paid, as suggested, *prima facie*, by paragraph 27 of HKFRS 3. Instead, it adopted the contract price of HK\$0.5 per share for that purpose.

[21-80] In the Registrar's letter of complaint, two complaints were raised against the respondents, namely, that they had failed or neglected to observe, maintain or otherwise apply a professional standard, namely paragraphs 11 and 13 of the Hong Kong Standard on Auditing (HKSA) 700, and in the alternative, that they had failed or neglected to observe, maintain or otherwise apply a professional standard, namely section 100.4(c) as set out in more detail in section 130.1 of the Code of Ethics for Professional Accountants. The wording of the complaints was in substance identical to that set out in the complainant's case.

[21-81] In the Complainant's Case dated 2 December 2014 submitted under the Disciplinary Committee Proceedings Rules, the two complaints raised against the Respondents were set out as follows:

1. In breach of section 34(1)(a)(vi) of the PAO, the Respondents have failed or neglected to observe, maintain or otherwise apply a professional standard, namely paragraphs 11 and 13 of HKSA 700, for their failure to express a modified auditors' opinion in respect of the Company's measurement of the fair value of the Consideration Shares in the 2010 Financial Statements (the "1st Complaint");
2. In the alternative to the 1st Complaint, the Respondents, in breach of section 34(1)(a)(vi) of the PAO, failed or neglected to observe, maintain or otherwise apply a professional standard, namely section 100.4(c) as set out in more detail in sections 130.1 of the Code of Ethics for Professional Accountants, for their failure to act diligently in accordance with HKFRS 3, in relation to the measurement of the fair value of the Consideration Shares, when carrying out the audit of the 2010 Financial Statements (the "2nd Complaint").

[21-82] Further, it was stated in the complainant's case:

18. There is no dispute that, under the relevant standards, a reporting entity should adopt the published price though in "rare circumstances" it may depart from this approach if it could demonstrate that:
 - a. the published price at the date of exchange is an unreliable indicator of fair value; and
 - b. the alternative valuation method is a more reliable measure of fair value.
19. Both the AIB and the Complainant disagree with the Respondents that either the published price was an unreliable indicator of fair value and/or that the alternative method of valuation accepted by the Respondents was more reliable than the published price. In reaching this view, the Complainant agrees with the analysis as set out by the AIB in its Investigation Report dated 26 February 2013 ...

[21-83] The Committee concluded that the second complaint was not established.

[21-84] However, in relation to the first complaint, the Committee came to the following conclusion:

The Committee considers that in relation to the First Complaint, the Respondents have failed to adequately draw the readers' attention to the auditors' consideration of the matters relevant to the auditors' report. The Committee determines that the Respondents did not adequately apply the necessary professional standard in accordance with HKSA 700 paragraphs 11 and 13, namely to demonstrate that they had adequately evaluated

whether they were or were not able to express an unmodified auditors' opinion in respect of the Company's measurement of the fair value of the Consideration Shares in the 2010 Financial Statements. In the absence of a disclosure in its Note 38(a) on the basis of "thinness" of market that rendered the published price unreliable or unsuitable as the fair value of the share considerations, it was incumbent on the Respondents to demonstrate in their auditors' report that they had adequately evaluated the relevant complex matters involved in the Acquisition of the subsidiary, including a very substantial acquisition and connected transaction under Chapter 14A of the Listing Rules. The auditors were required to demonstrate that the "Financial Statements were prepared in accordance with a financial reporting system that is designed to meet the common needs of a wide range of users" (paragraph 1, HKSA 700). ...

The Committee determines that, given the circumstances of the very substantial acquisition and connected transaction and the measurement of value adopted by the directors in valuing the locked-in Consideration Shares, the auditors' report fell below the professional standard as a result of a matter of professional judgment. In the Committee's view, the auditors' report does not adequately demonstrate the auditors' evaluation of the complexity and context of the financial statements for the common needs of a wide range of users.

[21-85] It is plain that the first complaint was based squarely on the company's non-compliance with paragraphs 24 and 27 of HKFRS 3 and the respondents' failure to issue a modified opinion in respect of it. There was never a case brought by the complainant for contravention of paragraphs 11 and 13 of HKSA 700 on the ground that, even if the respondents had acted properly in not giving a modified auditors' opinion because the published price was properly not adopted by the company for valuing the consideration shares, they had nevertheless failed adequately to demonstrate their evaluation of the relevant complex matters involved in the acquisition.

[21-86] The Court of Appeal concluded that on any view of the substance of the matter, the complaint and the Committee's finding are wholly different. The former was concerned with whether or not the auditor was correct, or acted diligently, in evaluating the audit evidence and endorsing the company's use of the contract price rather than the published price of the consideration shares as their fair value. The latter went to the presentation of the audit opinion, irrespective of the correctness of the opinion or the adequacy of the work undertaken in arriving at that opinion.

19. ACCESS TO INFORMATION IN ONGOING DISCIPLINARY PROCEEDINGS

[21-87] In *Law Fei Shing v Disciplinary Committee of the HKICPA*,⁷⁰ the principal issue which arises for determination in this case is whether the applicant, a certified public accountant, who was the subject of on-going disciplinary proceedings brought against him arising out of his audit of the accounts of a company, ought to be given access to information and documents relating to the actions (if any) which the HKICPA have, or may have, taken against the previous auditor of that company.

70 [2018] HKCU 4068 (unreported, HCAL 750/2018, 26 November 2018).

[21-88] In that case the auditor made a qualification of the audited accounts for year ending 31 March 2009 with an impairment provision.

[21-89] Substantial delay to the progress of the disciplinary proceedings against the applicant occurred as a result of, amongst other things, an application by the applicant made on 10 October 2014 for leave to apply for judicial review of the alleged decision of the Council to refer the complaint made against the applicant to the Disciplinary Panels.

[21-90] The application for leave to apply for judicial review was dismissed by Zervos J (as he then was) on 2 February 2015 on the ground that it was "both out of time and without merit".⁷¹ The applicant's application for an extension of time to appeal against the decision of Zervos J was dismissed by the Court of Appeal on 21 April 2016. His further applications for leave to appeal against the decision of the Court of Appeal were dismissed by (i) the Court of Appeal on 20 October 2016, and (ii) the Appeal Committee of the Court of Final Appeal on 29 June 2017 pursuant to Rule 7 of the Hong Kong Court of Final Appeal Rules. The disciplinary proceedings against the applicant resumed thereafter.

[21-91] On 27 April 2018, the Applicant made the application for judicial review of:

- (1) the decision of the Disciplinary Committee contained in the letter of 2 February 2018 to proceed with the disciplinary proceedings against the Applicant before he was informed of the Institute's action (if any) against other practitioners in respect of (allegedly) the same complaint; and
- (2) the continuing decision of the Institute by which it refuses to disclose to the Applicant about the Institute's action (if any) against other practitioners in respect of (allegedly) the same complaint.

[21-92] The principal ground of judicial review was given as:

The Decisions violate the Applicant's right to a fair hearing, enshrined in Article 10 of the Hong Kong Bill of Rights (s.8 of Cap.383, 'BOR') and at common law. They do this by denying him access to information that is relevant to establishing his defence, and/or carrying on with proceedings in circumstances where his right to a fair trial has been put in jeopardy.

[21-93] The Court dismissed the application:

- (1) First, it is well established that the court does not, generally speaking, entertain an application for judicial review of a decision which is merely 'intermediate' or 'procedural' in nature, or which does not give rise to any substantive consequence or is not a decision of a 'decisive nature'.⁷²
- (2) Second, the actions (if any) which have taken by the Institute against the former auditor of the company are irrelevant to the complaint against the applicant. In this regard, it is important to note that one of the complaints was not about the amount, or correctness, of the impairment provision made in relation to the value of the company's investment in the subsidiary as stated in the financial statements. It is

71 See paragraph 59 of Zervos J's decision in *Law Fei Shing v Hong Kong Institute of Certified Public Accountants* [2015] HKCU 248 (unreported, HCAL 132/2014, 2 February 2015).

72 Following *Financial Secretary v Wong* (2003) 6 HKCFAR 476

about the applicant's failure to qualify his audit opinion in respect of the value of the investment in the subsidiary as stated in those financial statements as required by paragraph 18 of HKSA 701, which states as follows:

Where there is a limitation on the scope of the auditor's work that requires expression of a qualified opinion or a disclaimer of opinion, the auditor's report should describe the limitation and indicate the possible adjustments to the financial statements that might have been determined to be necessary had the limitation not existed.

Whether the applicant ought to have expressed a qualified opinion in respect of the value of the investment in the subsidiary due to scope limitation in accordance with paragraph 18 of HKSA 701 is a matter which does not depend on whether the former auditor, rightly or wrongly, failed to express any qualified opinion in respect of the value of the company's investment in the subsidiary in the 2006, 2007 or 2008 audited reports, still less on what actions (if any) have been taken by the Institute against the former auditor in respect of those audited reports after the event.

- (3) Third, the applicant argued that the Institute has had access, and the Disciplinary Committee appears to have had access, to information that is not available to the applicant, and the principle of 'equality of arms' requires that the applicant be given access to the same information. Such information is irrelevant to the proceedings against the applicant at this stage. The Disciplinary Committee has through counsel confirmed that it does not have access to the information in question. The Institute's solicitors has also confirmed that in accordance with the usual practice, all materials that are placed before the Disciplinary Committee (including any statements that may have been made affecting the Applicant) will be copied or otherwise made available to him.

20. EVIDENCE

[21-94] Section 36 of the Professional Accountants Ordinance sets out the powers of these committees in regard to the conduct of proceedings and obtaining of evidence:⁷³

- (1) For the purposes of proceedings under section 35 a Disciplinary Committee shall have the following powers-
 - (a) to take evidence on oath;
 - (b) to summon any person to attend the proceedings to give evidence or produce any document or other thing in his possession and to examine him as a witness;
 - ...
 - (d) to award to a witness such expenses as, in the opinion of a Disciplinary Committee, he has incurred by reason of his attendance.

73 The provision (c), which read: "to admit or exclude the public or any member of the public from the proceedings" was repealed in 2004.