

CONTENTS

PAGE 1	WINNER OF THE 2010/2011 MARION SIMMONS QC MEMORIAL ESSAY PRIZE: SAM BISHOP
PAGE 5	BOOK REVIEWS JONATHAN LEWIS
PAGE 6	LEGAL UPDATE KENNETH HAMER
PAGE 10	ARDL DINNER JAYNE ASTLEY
PAGE 11	FORTHCOMING EVENTS

WINNER OF THE 2010/2011 MARION SIMMONS QC MEMORIAL ESSAY PRIZE: SAM BISHOP, LAW SCHOOL AT BPP UNIVERSITY COLLEGE OF PROFESSIONAL STUDIES

PUBLIC REGULATION FOR PUBLIC FUNDS: IS IT TIME TO REGULATE MPS LIKE OTHER PROFESSIONALS?

'I hope that colleagues are absolutely clear about the need to turn over the page and introduce a transparent system with proper auditing, so that everybody here is affected and everybody out there knows that we have our expenses policed in the same way as everybody else who is in public service and in the public pay.'

Rt Hon Simon Hughes, MP¹

The scandal that erupted over Parliament in 2009 following publication of details of MPs' expenses in *The Daily Telegraph* shook public confidence in this august and ancient institution. Faced with an increasing furore over revelations about MPs 'flipping' second

¹ *Hansard*, 3 July 2008: Column 1111.

homes, and investing in duck-houses, the government of the day embarked on a partial overhaul of the Parliamentary regulatory system for the House of Commons². In analysing this new regulatory framework it is notable that to a large extent MPs have already come under a strict regulatory regime similar to that covering other professionals. It is also instructive to compare the effectiveness and rigour of the new Westminster system with that implemented by the devolved parliaments and those in other jurisdictions, which share fewer characteristics of professional regulatory bodies. But fundamentally this debate is about the very nature of politicians today; can we, and indeed, should we, regard British politicians of the twenty-first century as 'professionals'? The trend over the past half century has been to regard them as such, but in proposing to regulate politicians as a profession we would stand at a crucial turning point, and in approaching this juncture it is important to have regard for what might be lost.

There is no doubt that the recent changes in the system for regulating MPs' expenses are a part of a trend which has seen a departure from tradition for the Commons; a move towards hard regulation from softer forms; from 'etiquette to edicts'³. The United Kingdom has an unwritten constitution and traditionally Parliament (and the public in turn) has relied heavily on customary norms to regulate its practice⁴. It was believed that the probity of MPs would be assured by their public spirit and the risk to reputation should they infringe accepted behavioural standards. This unwritten enforcement mechanism has been referred to as 'psychological constitutionalism'⁵. However, the mechanism was very reliant on the perceived openness of MPs about their interests, and any revelations that

² See for example, *Michael Gove 'flipped' homes: MPs' expenses*, *The Daily Telegraph*, 11 May 2009; and *MPs' expenses: the most bizarre claims*, *Telegraph*, 13 May 2009.

³ M. Mancuso, *Edicts and Etiquette – Regulating Conflicts of Interest in Congress and the House of Commons*, *Corruption and Reform* 1992, 7 (1), 1 – 18.

⁴ Although the existence of 'constitutional' statutes, to borrow a phrase from Sir William Wade, such as the Bill of Rights or the Human Rights Act 1998, might make such statements about the 'unwritten constitution' arguable

⁵ Dawn Oliver, *Psychological constitutionalism*, *C.L.J.* 2010, 69(3), 639-675.

compromised this perception damaged public trust⁶. In the modern age of mass media and probing investigative political journalism, this trust looked increasingly tarnished and, in 1975, the House of Commons voted to introduce a dedicated regulatory committee, the Committee on Members' Interests. This system was relatively 'light-touch' and it was not until 1996, and further concerns over corruption, that the House of Commons adopted a fully-fledged Code of Conduct, overseen by a dedicated regulator, the Parliamentary Commissioner for Standards. Thus, the decision to overhaul the system in 2009 following yet another scandal continues the trend of public disgrace leading to a loss of public trust in unsupported customary rules and an increased ratcheting of the strength of regulation⁷.

This trend, however, fits very closely with a similar trend witnessed in the professions. The archetypal Weberian professions of medicine and law did not see the creation of their professional bodies until the nineteenth century, the Law Society being founded in 1825 and the General Medical Council in 1858. Further, the legal profession in particular has seen a marked tightening in regulation in recent years in response to criticism that solicitors were taking an insufficient interest in client care, a breach of the traditional 'psychological' trust placed in the profession. In 2007 the Solicitors Regulation Authority (SRA) was created by the Law Society, which delegated some of its powers to the new body in order to lend greater independence to its regulatory functions. It is notable that the SRA's strategy states that it aims 'to set, promote and secure in the public interest standards of behaviour and professional performance necessary to ensure that clients receive a good service and that the rule of law is upheld'. This suggests that increasing 'public' trust in the profession is at the core of the new regime, just as it is for the new regulations for MPs⁸.

More generally, it is clear that the unique manner in which MPs and professionals are regulated defines them as a class of individuals and that the two share some key characteristics. Professionalism has been defined as a 'peculiar type of occupational control' where the members retain control over their work and as a result enjoy state sanctioned autonomy to regulate themselves as they see fit⁹. In fact, it is the very act of

denying that any other body than an association of the professionals has the capability of regulating their complex world that creates a profession in the first place¹⁰. The state focuses on incentivising the profession to regulate itself, rather than licensing or regulating the individual members. Turning to MPs, it is clear that members of the Commons regulate themselves as a group, being as a body corporate and - following the Parliament Acts - sovereign. Just as solicitors regulate themselves through their own voluntary Code of Conduct, so Parliament chose to regulate its members through a voluntary Code of Conduct. This code is overseen by the Parliamentary Commissioner for Standards, who is an independent officer of the House of Commons¹¹. If he discovers breaches of the code, he may make reference to the Committee of Standards and Privileges, which in turn has the discretion to discipline the member or even recommend banishment.

The similarities between the basic regulatory theory behind Parliament and the professions is even more striking if we consider the other possible regulatory structures that the Government could have implemented in 2009 - systems that have been implemented within the United Kingdom itself and in other Commonwealth jurisdictions. Despite their common purpose, the Codes of Conduct in operation in the House of Commons, Scottish Parliament, Northern Ireland Assembly and National Assembly for Wales display considerable variation. In contrast to Westminster, where Parliamentary privilege provides the basis for self-regulation, the devolved institutions have had their powers and privileges granted by legislation and a derogation of power from the sovereign centre. Thus, the devolved bodies have chosen to implement their regulatory regimes through legislation. The failure to register or declare an interest is a criminal offence, and regulation, as a consequence, is partly the function of an outside body¹².

The Scottish Parliament in particular has a very strong regulatory regime with a clear statutory footing. This is best seen in the contrasting attitudes of the Scottish Standards Committee and the Westminster Committee on Standards and Privileges. When the former recommended a statutory commissioner the crucial

⁶ Oliver, p. 647.

⁷ Jack Beatson, *Reforming an unwritten constitution*, *L.Q.R.* 2010, 126(Jan), 48-71, p. 48.

⁸ Solicitors Regulation Authority, *Regulating for the future: SRA strategic plan 2010-13* (www.sra.org.uk/strategy)

⁹ Johnson, *Professions and Power*, (1972: Macmillan, London), p. 45.

¹⁰ Mark Davies, *The demise of professional self-regulation? Evidence from the 'ideal type' professions of medicine and law*, *Professional Negligence* 2010, 26(1), 3-38, p. 4.

¹¹ Parliament, *More on the Commissioner's role and remit* (www.parliament.uk/mps-lords-and-offices/standards-and-interests/pcfs/remit)

¹² Diana Woodhouse, *Delivering public confidence: codes of conduct, a step in the right direction*, *Public Law* 2003, Aut, 511-533, p. 511

factor was that, unless they gave a commissioner statutory powers, he or she would be dependent upon the Committee and that this might affect his independence. Thus, the Scottish commissioner has the power to call for persons, papers and records and to determine when and how to carry out any investigation¹³.

In contrast, the Westminster Committee of Standards and Privileges felt that giving the commissioner quasi-judicial powers might in turn lead to encroachment by the courts on Parliament's privilege to regulate itself. Crucially, the courts have concluded that the decisions of the commissioner are not subject to judicial review. In *R v Parliamentary Commissioner for Standards*, ex parte Al Fayad, the commissioner had concluded that Michael Howard had no case to answer, a decision which Mohammad Al Fayad sought to have reviewed. The Court of Appeal concluded that whilst the 'administrative' activities of the Parliamentary Ombudsman could be reviewed, those of the commissioner, which formed part of the activities of Parliament, could not.

It is perhaps the issue of sovereignty that is the source of the differing choices about the enforceability of regulations. Looking to other Commonwealth jurisdictions it is notable that where legislation has been employed to regulate legislators' conduct, the legislature in question has not been sovereign. For example, the Ontario Legislative Assembly chose not to implement a voluntary code of conduct but instead implemented its rules of conduct as a statute, the Members' Integrity Act 1994. This allowed for judicial intervention. Thus, we must doubt whether Westminster could ever choose to implement a statutory regulatory system.

It is the reluctance to allow the courts to impinge upon Parliamentary privilege that provides the greatest distinction between the self-regulation of the professions and the self-regulation of MPs. Parliament could at any time regulate the professions through statute rather than relying on Self Regulatory Associations (SRAs), undermining the very nature of the professions¹⁴. In fact, some commentators have suggested that with the passage of the Legal Services Act 2007, which has allowed for Alternative Business Structures (ABS) partially owned by non-lawyers to take on the work of pure legal practices, Parliament has done exactly that with regard to lawyers¹⁵. By breaking the self-regulated monopoly of solicitors' practices,

Parliament has fundamentally undermined the notion that the provision of legal services is a single profession.

In contrast, MPs would have to consent to a statutory regime to regulate their own conduct. Even then, in the absence of a written constitution, this regime could simply be reversed through the passage of another statute¹⁶. In fact, although the response to the recent expenses scandal was swift, the final Parliamentary Standards Act 2009 (as amended by the Constitutional Reform and Governance Act 2010) was much watered down from the original bill by the Commons and the Lords to protect Parliamentary privilege. Although the Act did establish an Independent Parliamentary Standards Authority (IPSA) and the position of the Commissioner for Parliamentary Investigations (since renamed the Compliance Officer for the IPSA), two of the proposed new criminal offences created to catch MPs abusing the expenses system were abandoned: failing to comply with the rules on registering interests; and breaching the rules against paid advocacy. This left only knowingly providing false or misleading information in a claim for an allowance on the statue book. Most importantly, the original bill had allowed the Compliance Officer to report directly to Parliament. But as enacted the Compliance Officer only reports to the Standards and Privileges Committee. This powerful Committee retains a final power of discretion over the investigation, allowing for political decisions to replace quasi-judicial investigation. Ultimately, the Committee's decision is a political one, not subject to judicial review. Finally, the Lords removed the ability for a serving judge to serve as a member of the IPSA and the following rider was added: 'Nothing in this Act shall be construed by a court in the United Kingdom as affecting Article IX of the Bill of Rights 1689'¹⁷.

The principal barrier to those seeking an effective regulator of MPs' conduct is Article 9 of the Bill of Rights 1689. Article 9 provides that 'proceedings in Parliament ought not to be impeached or questioned in any place out of Parliament'. A famous series of cases culminated in the compromise expressed in 1839 in *Stockdale v Hansard*¹⁸, whereby the courts maintained their right to say whether a particular privilege existed, but Parliament retained exclusive jurisdiction over the application and enforcement of the privilege.

¹³ Woodhouse, p. 526.

¹⁴ Term sourced from, Julia Black, *Constitutionalising Self-Regulation*, Mod. L. Rev. 1996, 59, 24-55, p. 24.

¹⁵ Davies, p. 9.

¹⁶ Assuming that the statute did not succeed in reaching the status of a 'constitutional' statute within only a few years. See above.

¹⁷ Detail taken from, Caroline M., *Misbehaving Members of Parliament and how to Deal with Them*, Queen Mary University of London, School of Law Legal Studies Research Paper No. 69/2010, pp. 10-11.

¹⁸ (1939) A & E 1.

Therefore, as long as MPs defend the borders of privilege there would appear to be no jurisdiction for the courts to take action to combat misconduct if Parliament chooses not to act. Some have criticised this determined maintenance of privilege as a display of ‘complacency and arrogance about the need for regulation’¹⁹. Indeed, in light of the recent expenses scandal, it does seem questionable as to whether investigations of MPs’ expense claims would genuinely threaten Parliamentary privilege. In fact, the Supreme Court has recently stated as much.

In *R v Chaytor* the Supreme Court determined that MPs cannot rely on Parliamentary privilege to challenge the jurisdiction of the Crown Court to try them for false accounting arising out of allegations relating to Parliamentary expenses, and determined that neither the Bill of Rights 1689 nor exclusive cognisance of the House of Commons posed any bar to jurisdiction²⁰. Lord Philips reiterated the statement of Lord Denman CJ in *Stockdale v Hansard* that MPs could not declare a matter as being covered by Parliamentary privilege. It was for the courts to decide on the basis of existing privileges²¹. Then, considering existing authorities, he noted in particular that the decision in *Greenway*²² lent support for a narrow interpretation of Article 9 and supported the proposition that the principal matter to which Article 9 is directed is freedom of speech and debate in the Houses of Parliament and in parliamentary committees, rather than all statements made by MPs within the Palace of Westminster. The submission of claims forms to apply for expenses does not qualify for privilege, leaving MPs open to prosecution for fraudulent claims. Nor was the matter within the exclusive cognisance of Parliament as Parliament had legislated in the area (Lord Clarke went further suggesting that individuals could never rely on this second type of privilege, particularly if Parliament had waived its privilege in this area²³). He concluded by noting that ‘Parliament by legislation and by administrative changes has to a large extent relinquished any claim to have exclusive cognisance of the administrative business of the two Houses²⁴.’ Thus, whereas the decision on how to administrate is privileged, the actual administration is not.

¹⁹ Woodhouse, p. 513.

²⁰ [2010] UKSC 52. See also, *Halsbury’s Laws of England* (5th edn), 1078 (The position of the courts of law), note 4, and 1082 (Freedom of speech and proceedings in Parliament), note 1.

²¹ (1839) 9 Ad & E 1 at pp. 147- 148.

²² [1998] PL 357.

²³ [2010] UKSC 52, p. 48.

²⁴ [2010] UKSC 52, p. 35.

This is an important conclusion, for although MPs have never been protected from criminal prosecution while they sit in the House, much of the above debate has assumed that Parliament *could* maintain its assertions of privilege over the payment of expenses by referring all investigations to the Committee on Standards and Privileges to decide on. However, as providing false or misleading information in claims for expenses is now a criminal offence (and a relatively wide one as defined), Chaytor now allows the courts a relatively wide jurisdiction to regulate the *administration* of MPs’ expenses, even though this is an activity of or within Parliament. Nonetheless, despite some progress, the courts can go no further than questioning expenses claims. They cannot, under the present system regulate MPs’ conduct, particularly since the offence against breaching the rules on paid advocacy was dropped.

At this point, we should step back from this inexorable trend towards the enforcement of hard regulation against MPs and ask whether this is the right solution. While MPs and professionals by their nature share some characteristics, most notably their reliance largely on self-regulation, there are still some major and important differences. Professional bodies generally require their members to sit exams to prove their competency and their suitability to practise within the profession. Clearly, such examinations and minimum entrance qualifications do not apply to MPs. In fact, such qualification requirements would be deemed highly undemocratic and would violate a citizen’s right to stand in elections. Although MPs take the Parliamentary oath, there are few other demands made of them before they take their seats in the House. Nonetheless, many regard MPs as belonging to a political ‘profession’ or a ‘political class’. Although this ‘profession’ is much more open today and is no longer predicated on the basis of *social* class, there have been other changes over the generations which might support the notion of a unified profession.

The most important change is that many senior politicians today entered politics full-time direct from university and did not develop a first career outside of Westminster. This narrowing of the experiences of the political class has been a growing concern identified clearly by former Foreign Secretary Douglas Hurd when he lamented:

‘The [P]alace of Westminster is thronged with eager young men and women who have done nothing but politics all their lives. The highly professional politician is particularly vulnerable to the single issue and the pressure groups. They have not learned in

*practical work-a-day careers how to balance conflicting interests before they reach a decision*²⁵.'

The lack of engagement of the new politician with the non-political world, with his or her constituents, has divorced them from the norms of their own constituents. This was highlighted in the recent expenses scandal where MPs appeared unable to comprehend their constituents' disgust that they could claim annually the median income of a citizen of the United Kingdom in interest payments on their mortgage alone. MPs have made some concessions to wider standards when determining their remuneration, for instance, delegating decisions as to the annual increase in their salaries to the Senior Salaries Review Body (SSRB) which calculates the increase as an average of the increase in a basket of fifteen groups of civil service salaries²⁶. However, it is submitted that they could go considerably further, by, for example, linking their salary fluctuations to the change in the median income in the United Kingdom, thereby providing an incentive to improve the condition of the average citizen. Above all, however, Hurd's concerns should lead us to consider other, more effective, methods of regulation. MPs should not be regarded as professionals but as representatives of their constituents.

The proposed Parliamentary Reform Bill takes us towards such a vision by allowing for MPs to be recalled by their constituents should a sufficient percentage of their electorate demand that recall take place. This would facilitate new elections. In many ways this would be a return to traditional 'psychological' constitutionalism, with the ultimate sanction of censure by the voting public being increased in potency. There are concerns about such a model of direct democracy which might fundamentally alter our otherwise representative democracy. Yet, as 'professionalised' politicians grow further and further away from the experiences of their constituents, this perhaps offers voters the greatest opportunity to ensure that politicians are serving *their* interests rather than those of their fellow professionals when they draw up and amend their codes of conduct.

To conclude, it is clear that as the inclination to regulate increases in Westminster following repeated scandal, there has been a move towards the self-regulation practised by professionals since the nineteenth century. But it is clear that these

²⁵ Douglas Hurd, *The Whig Illusion*, Prospect February (1997: London, England), p. 3. (Also available at http://www.prospect-magazine.co.uk/highlights/whig_illusion/index.)

²⁶ www.ome.uk.com/Senior_Salaries_Review_Body.aspx

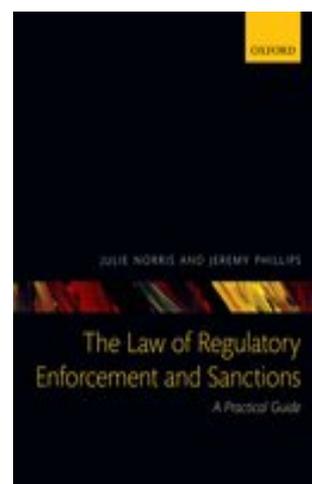
professional regulatory monopolies are coming under pressure themselves in our increasingly globalised and market-based world. Both politicians and professionals are finding themselves subject to new legislation, and whilst MPs have tried to limit its scope, this legislation has granted a new role for the courts to regulate the administration of expenses and of public funds. Yet, there are dangers to the regimentation of a group of individuals intended to represent the political will of the people. Professional bodies are essentially monopolies, and these monopolies are effective as long as their power is controlled by the state. But when a body constitutes the motive will behind the state, only an expansion of the role of democracy can ensure that *its* decisions are properly regulated. Consequently, the power to recall combined with the watchful eye of the courts over administration should prove the best hope for Parliamentary renewal.

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BOOK REVIEWS

The Law of Regulatory Enforcement and Sanctions – A Practical Guide – J Norris & J Phillips (Oxford University Press, 2011, 384 pages, £59.95)



This book is one of the first textbooks to deal definitively with the Regulatory Enforcement and Sanctions Act 2008. It caters for a wide readership, from those new to the area to experienced practitioners and enforcement officers. It is broken down into three parts: the coordination of local authority enforcement; the civil sanctions; and appeal and judicial review.

Chapter 1 provides an insight into the 2008 Act from a theoretical and policy perspective, which helps to provide context for the following chapters which contain a complete review of the applicable legislation, its history and its potential ramifications.

The authors also consider the operation of the Tribunals Courts and Enforcement Act 2007, providing a detailed treatment of appeals, including judicial review, and appeals to the First-tier Tribunal. There is also coverage of relevant human rights jurisprudence.

Chapter 2 explains the nature and functions of the Local Better Regulation Office. Chapter 3 concentrates on the 'primary authority' scheme, a central tenet of the 2008 Act and considers how primary authorities will impact on regulated individuals and businesses. Chapters 4 to 7 consider in some detail the core aspects of the new civil sanctions regime and Chapter 8 deals with appeals and judicial review.

The book is very clearly set out, making use of the current approach in practitioner textbooks of having numbered paragraphs. Each section is clearly broken down with sub-headings which provide signposts as to where each section is heading. Diagrams are cleverly used to breakdown some of the complex mechanics of the Act (such as the summary of agreement provisions for enforcement on p 67).

Of particular help is the authors' review of the processes for obtaining and using the civil sanctioning powers. Careful attention is given to the safeguards that have been put in place to ensure consistency in the use of sanctions and prevent their misuse. The book provides a practical guide as to how regulators should approach applying for, imposing, and implementing the new civil sanctioning powers.

With the coming into power of the Coalition Government, it is not entirely clear how the 2008 Act will be applied. However, this book will provide an invaluable resource no matter what approach Government takes to its application.

Disciplinary and Regulatory Proceedings – Harris QC and Carnes (6th Edition, March 2011, Jordans Publishing Ltd, Hardback, £95)

This remains one of the leading textbooks in the field of disciplinary and regulatory proceedings, providing an authoritative examination of the general principles that apply to the majority of regulatory and disciplinary tribunals. Its focus remains on healthcare, the FSA and legal services.

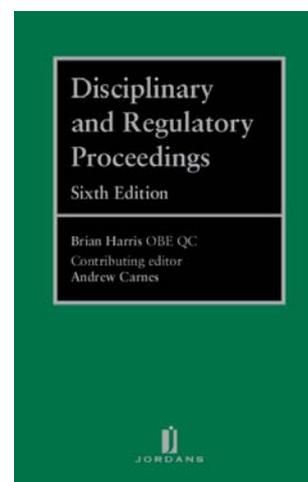
The book is divided into two parts (Disciplinary and Regulatory Proceedings and Disciplinary and Regulatory Arrangements in Practice) and spans 24

chapters. It not only provides insight into the general principles governing regulation but also provides guidance as to the practical application of those principles.

This edition looks at the new regulatory proposals for financial services, developments in healthcare and the fundamental reforms in the regulation of legal services by the Legal Services Act 2007, considering how it is likely to play out in practice.

It provides detailed discussions of a number of key decisions handed down since the last edition, of which the following are only a few: *R (Remedy UK Ltd) v GMC* (fitness to practise); *Mallon v GMC* (the meaning of 'misconduct' and 'serious professional misconduct'); *Kulkarni v Milton Keynes Hospital NHS Foundation Trust* (the right of medical practitioners to be legally represented); *Akzo Nobel Chemicals v Commission* (concerning the position of employed lawyers generally); *R v Rollins* (the remit for FSA to prosecute offences).

Jonathan Lewis
Henderson Chambers



LEGAL UPDATE

- ***Re: Zia v General Medical Council, 18 May 2011***

A hospital trust that had employed Z complained about his performance and competence to the GMC. The GMC's registrar referred Z for a performance assessment pursuant to rule 7(3) of the General Medical Council (Fitness to Practise) Rules 2004. Z refused to submit to the assessment and the registrar referred the allegations to the GMC's fitness to practise panel. The panel found the allegations proved and ordered Z's suspension from the register. Z appealed against that

decision and in the High Court argued, as a preliminary issue, that the registrar's referral to the fitness to practise panel was impermissible as contrary to the obligation to refer any allegation in the first instance to case examiners. The Court of Appeal allowed the GMC's appeal against the decision of the High Court in favour of Z on this point. The Court of Appeal held that the stated objective of the Medical Act 1983, as set out in section 1, was for the GMC to protect, promote and maintain the health and safety of the public and the purpose of the 2004 Rules was to achieve a balance between meeting that aim and regulating the procedure for investigation and resolution of allegations against medical practitioners. Whilst the majority of cases were considered by both the registrar and case examiners, there was no inflexible requirement that a matter had always to be considered by the case examiners before proceeding further. The rules enabled the registrar to carry out his own investigation and to direct a performance assessment, and because of Z's non-compliance the registrar's decision to refer the allegations directly to the panel was lawful.

- ***R (On the application of D) v Independent Police Complaints Commission, 24 May 2011***

D was raped in January 2005 when she was 15. F, a police officer, was assigned to the case as the sexual offences investigation trained officer. In the months leading up to the trial of D's alleged assailant, D's mother asked F many times about mobile telephone records which would corroborate D's account. F confirmed each time that the call data was available. In fact it was never obtained by the police and D's alleged assailant was in consequence acquitted. Following an internal police inquiry, the IPCC undertook its own investigation into D's complaint that F had not given her the right information about the call data. The IPCC concluded that it was not possible to prove on the balance of probabilities that F had been dishonest or had failed in her duties, and there was insufficient evidence to conclude that there had been misconduct. The Administrative Court (Collins J) granted judicial review and held that F gave D and her mother inaccurate information and she should have known it was inaccurate. F failed in her duty to D and her family and it was an important factor that F knew that D was vulnerable, and was nervous about giving evidence, and might not do so if she knew that there was no corroborating telephone call evidence. There was a prima facie case that F's conduct fell well below what was required by the Police (Conduct) Regulations 2004, and the IPCC's decision not to request disciplinary action against her was bad in law. However because of the substantial lapse of time since the events in question, there was no longer any point in

ordering disciplinary proceedings. Instead, a declaration that the IPCC's decision was unlawful was adequate.

- ***R (Puri) v Bradford Teaching Hospitals NHS Foundation Trust [2011] EWHC 970 (Admin)***

The claimant, P, was employed by the defendant trust as a consultant neurologist until his dismissal following an internal disciplinary hearing on the grounds of misconduct. Essentially, the issue for the High Court on judicial review was whether Article 6 of the ECHR was engaged in the disciplinary proceedings that led to P's dismissal, and if so whether the disciplinary panel of the trust which decided to dismiss him was independent and impartial so as to comply with Article 6. Blair J concluded that this was not a case in which the effect of the disciplinary proceedings had been to deprive P of the right to practise his profession, within or outside the NHS. Further, there were important distinctions between the present case and *Kulkarni v Milton Keynes Hospital NHS Trust [2009] EWCA Civ 789*. The charges against Dr. Kulkarni, if proved, would have constituted a criminal offence, and no such issue remotely arose in the present case. The instant case was not a case where an NHS doctor faced charges which were of such gravity that, in the event they were found proved, he would be effectively barred from employment in the NHS. Blair J went on to say that had he held that Article 6 was engaged, he would not have held compliance required a disciplinary panel comprised of persons external to the trust. Although the disciplinary panel was chaired by the chairman of the trust, and predominantly made up of trust members and employees, the court concluded that the panel was not non-compliant by reason of its composition.

- ***Thaker v Solicitors' Regulation Authority [2011] EWHC 660 (Admin)***

T appealed against the decision of the Solicitors' Disciplinary Tribunal that he be struck off the Roll of Solicitors. The issue was the way in which the charges had been drafted and the case opened by the Solicitors' Regulation Authority. The Administrative Court (Jackson LJ and Sweeney J) allowed T's appeal and ordered a rehearing before a new panel. The first ground was that the Tribunal erred in failing to grant an adjournment at the start of the hearing. The court readily acknowledged that the question whether or not to adjourn was a matter of the discretion of the Tribunal, but said that as the opening proceeded it became clear that the case presented by the Solicitors Regulation Authority went far beyond the allegations in the rule 4 statement containing details of the allegations, and at the very least the Tribunal should have granted a period of adjournment for T to consider

matters. Further, by allowing the proceedings to range far and wide, and allowing submissions and evidence beyond the identified relevant transactions, the Tribunal unwittingly caused injustice to T. Additionally there were erroneous findings of fact made by the SDT. Jackson LJ said that drawing the threads together, if a solicitor is going to be struck off the Roll for acts of dishonesty and gross recklessness, he is entitled to a fair process and a fair hearing before that decision is reached. In this case T did not receive either a fair process or a fair hearing. This occurred because of the manner in which the case against him was pleaded and presented to the Tribunal. If the rule 4 statement alleged that T knew or ought to have known certain matters, the facts giving rise to that actual or constructive knowledge should be set out, and in a complex case the Tribunal needs to have a coherent and intelligible rule 4 statement, in order to do justice between the parties.

- ***R (Vali) v General Optical Council [2011] EWHC 310 (Admin)***

The allegation against the appellant, V, was that her fitness to practise was impaired because at a consultation with a patient in July 2005 when the appellant recorded intraocular pressure measurements which were abnormal but allegedly did not repeat the recording either immediately and/or at a different time of day, did not perform a visual field test, and did not make a referral of the patient to a medical practitioner concerning the abnormal intraocular pressure measurements. Ouseley J rejected V's arguments on the admissibility of the patient's witness statement (the patient being in Ethiopia), and the appellant's arguments on the findings of misconduct, but concluded that the finding by the fitness to practise panel on impairment could not be justified and the panel's decision should be quashed. The consultation occurred four and a half years before the hearing. The panel had positive evidence that there had been no complaints either to the General Optical Council or by those for whom the appellant cared about the way in which she dealt with patients over the period since July 2005. They also had, from a variety of sources, testimonials and support which was not consistent with somebody having so basic a failing in knowledge as the panel supposed. The appellant's career was on a good upwards trajectory, including supervision and teaching. There was also evidence of recent acquisition of relevant skill base. The court said it was unfortunate that the committee used the language it did about the appellant's lack of insight. Absence of insight, if it means no more than that the appellant's evidence was not accepted, was an inappropriate use of the concept as a basis for a finding of impairment. The court

concluded that it was hard to conceive that somebody who is a continued risk to public safety or to public confidence in the competence and standing of the profession would have progressed as the appellant had done.

- ***Razza v General Medical Council [2011] EWHC 790 (Admin)***

R appealed against the decision of the GMC's fitness to practise panel that his fitness to practise was impaired by his misconduct and the decision to impose upon him a sanction of 12 months' suspension. It was alleged that R conducted himself in the course of a consultation with a patient in a way which was inappropriate, sexually motivated and an abuse of his professional position. The submissions on appeal relevant to the issue of impairment were (a) this was an entirely innocent incident, (b) R's record was an unblemished one, and (c) there was no pattern of predatory behaviour which had been identified or established by the evidence adduced before the panel. In allowing R's appeal, the Administrative Court (His Honour Judge Pelling QC) criticised the panel's finding that the matters complained of stemmed from R's 'underlying attitude'. The reasons given by the panel did not define what that attitude was alleged to have been and, more fundamentally, failed to explain the basis for the conclusion and how it was consistent with the points made on behalf of the doctor. This was an isolated incident by a doctor with an otherwise unblemished record. The judge considered the panel was wrong to dismiss the steps taken by the doctor to now always have a chaperone present when examining women patients as being to protect himself rather than the protection of the patients. The court concluded that the panel's obligation to decide whether, and then to explain why, the doctor's current fitness was impaired by reason of his past misconduct had not been discharged correctly. In the court's view the panel did not explain, even to the modest standards imposed on tribunals in these circumstances, why they reached the conclusion that they did. That of itself would justify quashing its decision.

- ***Council for Healthcare Regulatory Excellence v (1) Nursing and Midwifery Council, (2) Paula Grant [2011] EWHC 927 (Admin)***

CHRE appealed against a decision of the NMC's conduct and competence committee that the second respondent, G, a registered nurse and midwife, was guilty of misconduct but that her fitness to practise was not impaired. G worked as a midwifery sister in a hospital. The charges against her included that she had, over a period of some 20 months, failed to provide assistance to a junior colleague and subjected that

colleague to bullying and harassment for reporting her; failed to provide appropriate care to a patient admitted for delivery of her baby who had died in utero, and failed properly to record that a baby born at 20 weeks gestation had been born alive. The committee found that the charges were proved and amounted to misconduct. However, they found that G's attitude had improved and that she had addressed her poor performance, so that her fitness to practise was not currently impaired. In allowing CHRE's appeal, supported by the NMC, but opposed by G, the Administrative Court (Cox J) said that it was essential, when deciding whether fitness to practise was currently impaired, not to lose sight of the need to protect the public and the need to declare and uphold proper standards of conduct and behaviour so as to maintain public confidence in the profession. A panel should consider not only whether the practitioner continued to present a risk to members of the public in his or her current role, but also whether the need to uphold professional standards and public confidence in the profession would be undermined if a finding of impairment was not made. The committee in the instant case had not referred in its reasons to the importance of wider public interest considerations or to the need for substantial weight to be given to the protection of the public, the maintenance of public confidence in the profession and to the upholding of proper standards of conduct and behaviour. Nor was there anything in the reasons to suggest that they had in fact had regard to these wider considerations without making any express reference to them.

- ***Hazelhurst and others v Solicitors Regulation Authority [2011] EWHC 462 (Admin)***

This was an appeal by four partners in a firm of solicitors against orders of financial penalty made against each partner by the Solicitors Disciplinary Tribunal. Between February 2003 and May 2006, an employee of the firm, M, stole £101,826 from the firm's client account. The thefts were discovered by chance. Subsequent enquiries by the firm revealed widespread misuse of private funds. The firm immediately self-reported the matter to the Solicitors Regulation Authority and appointed a locum to examine its files in order to identify the full nature and extent of the misuse of funds by M. All funds were repaid to the accounts by the partners within the firm. Indemnity insurance was insufficient for this purpose, and as a consequence the partners of the firm paid between £80,000-£90,000 in order to meet the liabilities. No client of the firm suffered any loss. There was no suggestion that any appellant was involved in dishonest practice. M was dismissed from employment by the firm. The case against the

appellants was founded upon breaches of the Solicitors Accounts Rules and a breach of the Solicitors Practice Rules, namely a failure to supervise an employee who was discovered to be dishonest. The appellants pleaded guilty to all charges. The sanction imposed was that each appellant was to pay a penalty of £4,000 and costs. No appeal was raised as to the costs order, but the appellant relied upon two matters: (1) during the three years of the thefts, the firm's accounts were independently audited by accountants in accordance with the guidance contained in the Solicitors Accounts Rules, and the auditors discovered nothing untoward, and (2) M was a trusted employee of the firm who had worked there for eight years and until the discovery of the fraud, there was no reason to believe she was anything other than trustworthy. In allowing the appeal and quashing the orders of the financial penalties made by the SDT, and substituting a reprimand, Nicola Davies J said that, in short, the acceptance of a failure to supervise which was made primarily on the basis of a fraud carried out over a period of three years, had to be balanced against the fact that others had failed to identify any wrong-doing and that such wrong-doing was perpetuated by a member of staff whose conduct had given no cause to question her honesty. In the judge's view, the SDT had failed in their written reasons to adequately address the submissions of the appellants as to why the thefts went undiscovered for a period of three years. In failing to address the appellant's submissions, the SDT did not provide adequate reasons for their findings as to the breaches of the Rules and specifically the lack of supervision.

- ***Levy v Solicitors Regulation Authority [2011] EWHC 740 (Admin)***

In dismissing the appellant solicitor's appeal against a decision of the Solicitors Disciplinary Tribunal suspending him from practice for nine months for breaches of the Solicitors Accounts Rules, the Administrative Court (Jackson LJ and Cranston J) said that it was imperative that a tribunal did not proceed to sanction before having announced the basis of its findings on the substantive allegations. As a general principle fairness demands that disputed issues which can substantially affect sanction should be resolved and be resolved in a procedurally fair manner, and that parties should then be able to address the tribunal on the appropriate sanction. The tribunal should announce its findings on any matters having a bearing on sanction and then provide ample opportunity for representations to be made on behalf of the solicitor about the sanction to be imposed. In the instant case, on the facts, there was no breach of these principles. The tribunal had resolved in a procedurally fair manner the key issue affecting sentence, namely, it had discarded the

dishonesty allegation. The tribunal knew about the defendant and his background and was aware of the nature of the firm, its size and the work it undertook.

- ***Karwal v General Medical Council [2011] EWHC 826 (Admin)***

This was an appeal against a further nine months' suspension imposed by the GMC's fitness to practise panel at a review hearing. In June 2008 an earlier panel found that the appellant doctor, K, had knowingly made false representations to a professional colleague about an investment scheme so as fraudulently to reassure him that £188,000 he had invested would be repaid. The panel suspended K from the medical register for 12 months. At a review hearing in March 2010, the panel found K's fitness to practise was still impaired and she was further suspended for nine months from the expiry of the current suspension. A key question was whether K had sufficient insight into or had fully appreciated the gravity of the original offence. The review panel had determined that K's behaviour continued to demonstrate lack of insight and a real acceptance of the original findings of dishonesty. In the Administrative Court, Rafferty J said that in her judgment the panel was not only entitled, but obliged to address K's dishonesty but also her lack of insight. The GMC's Indicative Sanctions Guidance provides that a review panel will need to satisfy itself that the doctor has fully appreciated the gravity of the offence, has not re-offended, and has maintained his or her skills or knowledge. Rafferty J said that insight – in the sense of determining whether the doctor had appreciated gravity – was inevitably an issue at a review. Dishonesty by a doctor, albeit unconnected with the practice of medicine, undermines the profession's reputation and public confidence. The appellant had always maintained her innocence of the original findings. The court was not persuaded that equating maintenance of innocence with lack of insight was the same. The panel was scrupulous to make clear that it did not see acceptance of culpability as a condition precedent for insight. The findings of the panel demonstrated its justifiable view that K had not fully appreciated the gravity of her offence, rather than that she sought to minimise it.

Kenneth Hamer
Henderson Chambers

ARDL DINNER

The Savoy played host to the ARDL 10th annual dinner on 19 May; the hotel reopened recently after the most ambitious hotel restoration in British history.

Some 380 guests from regulators, law firms and chambers arrived via the beautifully restored Edwardian front hall. They enjoyed meeting and mingling, an aperitif in hand, amid the Art Deco surrounds before entering the banqueting room for a convivial dinner accompanied by the finest wine that only ARDL membership can buy!

The ability to enjoy such splendour was due to the resourcefulness of the inimitable Lydia Barnfather of QEB Hollis Whiteman and Peter Steel of Capsticks. The unenviable task of the administration of the event was deftly handled by Russell Jones & Walker.

Dinner was followed by the chairman, Tim Dutton QC, awarding the essay prize to Sam Bishop, a student at the Law School at BPP University College of Professional Studies, whose winning essay is published in this bulletin.

Guests were entertained over coffee by a string of amusing and self-effacing anecdotes from the after dinner speaker, David Etherington QC, who amongst other 'bar-room' tales gave the audience a humorous insight into the diverging paths of his and the chairman's legal careers. The ghost of Oscar Wilde, a former resident of the Savoy, nodded approvingly at the aphorisms.

After the speeches, there was ample time for catching up with colleagues and for introductions to future comrades-in-arms at all corners of this iconic hotel. Here, over cocktails in the elegant American bar, was the appropriate scene to reflect on the chairman's plea that we all use the experience from our different fields of regulation to the benefit of each other.

Whether we be in healthcare, legal or financial regulation or professional discipline, we should be wary of becoming the isolated communities with 'nothing to learn' as so compellingly portrayed by HG Wells, a regular of the American bar.

Jayne Astley
Accountancy and Actuarial Discipline Board

FORTHCOMING EVENTS UPDATE

ARDL SEMINAR – 'Corruption in sport', an exploration of recent key cases and a discussion on the parallels with mainstream regulatory law, the lessons that can be learned and the opportunities going forward.

Date: 7 July 2011
Venue: Hollis Whiteman Chambers, 1-2
Laurence Poutney Hill, London EC4R
0EU
Time: Registration at 17.45 for a 18.15 start
Seminar chair: Timothy Dutton QC, Fountain Court
Chambers, chairman of ARDL
Guest speaker: Oliver Codrington

Oliver Codrington is a director of Global Sports Integrity, a consultancy specialising in the provision of advice regarding the rules, regulations and procedures necessary to protect the integrity of sport in the modern betting environment. Before co-founding GSI, Oliver was head of compliance and licensing at the British Horseracing Authority.

Ticket Price: £15

A drinks reception will follow the seminar. Please note places are limited.

The seminar will attract one hour Bar Standards Board and Solicitors Regulation Authority Continuing Professional Development points.

For further information, please contact Irene Rumble – i.rumble@rjw.co.uk

LEXIS NEXIS CONFERENCE – 'Practising in regulatory and disciplinary tribunals', Central London.

Date: 7 July 2011

REQUEST FOR COMMENTS AND CONTRIBUTORS

We would welcome any comments on the Quarterly Bulletin and would also appreciate any contributions for inclusion in future editions. Please contact any of the members of the editorial committee with your suggestions. The editorial committee is:

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