ARDL

Association of Regulatory and Disciplinary Lawyers

Quarterly Bulletin Summer 2023

Contents

Chair's Introduction

Welcome to this Summer 2023 edition of the ARDL Bulletin.

Since the last Bulletin ARDL has seen some changes to the Committee. Thanks go to Nicole Curtis, Julie Matheson and Andrew Katzen who have stepped down from ARDL's work. New Committee member Charlotte Blackbourn is busy editing the Bulletin alongside Kenneth Hamer. Lauren Griffiths has also joined the Committee and is already in the thick of ARDL's work, in particular helping to put together the busy seminar programme. ARDL welcomes both Charlotte and Lauren.

I am pleased to be able to share information about some initiatives that ARDL is working on at the moment. Equality, diversity and inclusion are a priority for ARDL in the years ahead. ARDL's secretary Joanne Harrison and Vice-chair Sam Thomas are ARDL's new joint EDI officers.

There are a number of ideas in planning and we would like to reach out to ARDL's membership to see if there are any volunteers to help with planning and organisation. In March 2024 we would like to hold one, possibly two Iftar events during Ramadan. ARDL members Fameeda Shafiq and Saima Haq have kindly agreed to assist with these events, but we are keen to hear from anyone, particularly

members based in London, who would be interested in joining a small working group. ARDL would also like to organise a group of ARDL members to march during Pride 2024. Again, if there are any ARDL members who would like to join a small working group, then we would love to hear from you. Please contact Joanne.Harrison@carson-mcdowell.com or sthomas@2bedfordrow.co.uk to register your interest.

ARDL has a number of initiatives to assist junior ARDL members and those aspiring towards a career in regulatory and disciplinary law. ARDL has recently awarded the ARDL Mentor of the Year 2023 to Suzie Lyons. Suzie has generously given up to her time to support her mentee over the last year by meeting on a quarterly basis and providing ad hoc advice. Suzie's mentee has benefitted from her guidance, which has led to development opportunities and enabled them to plan their career goals. Congratulations to Suzie who will be a guest of ARDL at the Annual Conference in November. ARDL always needs more mentors so if you are over 10 years PQE/call and would like to volunteer please contact our Junior ARDL lead Laura Hoiles laura.hoiles@capsticks.com to express an interest. We particularly need senior ARDL members to step forward to volunteer to match with mentees who themselves may be approaching 10 years PQE/call.

ARDL has recently introduced an ARDL Ambassador role which will initially be run as a pilot. The role is for members less than 7 years call/PQE who want to assist with the work of ARDL and, in particular, Junior ARDL. Responsibilities will include attending meetings of the Junior ARDL sub-committee, helping to organise Junior ARDL events and assisting in the development of new ideas to supplement the initiatives already being run by ARDL for junior members. The benefits to Ambassadors will be the ability to be involved in a sub-committee of ARDL, raise their profile, develop skills and network. The year-long pilot will start with two individuals being asked to take on the role of ARDL Ambassadors. ARDL has appointed its first two Ambassadors who are Aleja Isip, Solicitor at the Financial Conduct Authority and former Dutton Bursary recipient, and Francesca Snape, Associate at Markel Law who has already been assisting with Junior ARDL in Manchester. We will have a stand at the ARDL Conference in November manned by Committee Members and ARDL Ambassadors where people can find out more information. If the pilot is successful we will look to open applications for the role of further ARDL Ambassadors in September 2024.

We are pleased to confirm that tickets will go on sale on Friday 21 July 2023 at 9.00am for the ARDL Conference taking place on 10 November 2023. Please see the information about the Conference at page 6 of the Bulletin. As ever, there are a number of other educational and social events in the diary for the second half of 2023 with more in the planning. This is a list of the dates fixed so far for 2023-24:

Thursday 13 July 2023 18:00 - 18:45
ARDL Bite Size Webinar: "Pre-publication update on the new version of Good Medical Practice"
Venue: By Zoom
Speaker: Mark Swindells Assistant Director, Standards and Ethics at the General Medical Council
Chair: Fameeda Shafiq, Ward Hadaway

Tuesday 29 August 2023 17:00 - 19:00
ARDL Seminar: "An update on key topics in the regulation of healthcare professionals"
Venue: Anderson Strathern, Edinburgh
Speaker: Jim Percival, Principal Legal Adviser and Deputy General Counsel at the General Medical Council

13 September 2023 17:30 – 21:30
ARDL Manchester Late Summer Social
The Beeswing, Manchester

Thursday 28 September 2023 17:00 - 19:00
ARDL Seminar and Drinks: "Kenneth Hamer Professional Conduct Casebook"
Venue: Edinburgh

Speaker: Kenneth Hamer, Henderson Chambers

Monday 2 October 2023 18:00 – 19:30
ARDL Webinar: "Racist or Racially Motivated/The Limits of Free Speech for Regulated Professionals"
Speakers: Robert Dacre, 2 Hare Court and Ben Rich, 2 Hare Court

Friday 10 November 2023,
ARDL Annual Conference
Museum of London
Tickets on sale: 21 July 2023

Thursday 23 November 2023 19:30 - 23:00
ARDL Scotland Winter Supper
The Scotsman Hotel, Edinburgh
Booking details and ticket prices to follow

Friday 10 May 2024
ARDL Dinner
Guildhall, London

You can find details of all of ARDL's scheduled events on the website: Events - Association of Regulatory & Disciplinary Lawyers (ardl.org.uk)

Rachel Birks
Ward Hadaway LLP

Marion Simmons QC Prize 2023: Winning Essay
Out of Order: The case for indefinite publication of police misconduct decisions

Introduction

Police conduct has come under an unprecedented level of public scrutiny. Much has been said about the police disciplinary process, not least the recent Casey Review,[1] and I do not intend to conduct a wholesale review here. Instead, I wish to bring focus to a little considered but, I aver, significant nook within that vast framework, viz. the reporting of police misconduct outcomes. I argue that the current framework for reporting misconduct outcomes begets several contradictions which render it inadequate. These contradictions include:

(i) a recognition of the public benefit of publishing police misconduct decisions, but only for a prescribed period;
(ii) data which was once held in the public domain may return to being protected data after the expiry of the prescribed period; and
(iii) inconsistency between police forces regarding how data protection principles are applied post the prescribed period.

I conduct primary research which illuminates the above, and reveals the tension between reporting on incidents of police misconduct and the privacy rights of the officers involved. I argue for lifetime publication of misconduct decisions as a way of remedying the contradictions listed.

The duty to publish

The rules around the publication of police misconduct hearings are governed primarily by The Police (Conduct) Regulations 2020 ('PCR 2020'). Section 43 provides:

> **43. Notification of outcome**
> (1) The person conducting or chairing the misconduct proceedings must, before the end of a period of 5 working days beginning with the first working day after the completion of the misconduct hearing or misconduct meeting, submit a report to the appropriate authority
> […]
> (6) Subject to the harm test and to paragraph (10), the person chairing a misconduct hearing must require the appropriate authority or, as the case may be, the originating authority, to publish the report submitted under paragraph (1).
> […]
> (8) Where the appropriate authority or the originating authority publishes a report in accordance with paragraph (6), it must publish

[1] Baroness Casey of Blackstock, *The Casey Review* (2023).

the report on its website for a period of not less than 28 days.

As a result of this provision, the 43 police forces, as the 'appropriate authorities', now publish misconduct decisions on their websites.

While the Regulations do not preclude misconduct decisions remaining published for longer than 28 days, it is common practice to remove such reports once the 28 days have lapsed. A recent exception to this practice is the policy of the Metropolitan Police Service ('MPS') to publish its misconduct outcomes for three months. A spokesperson for the MPS told *The Guardian* that this is because "we want to be more transparent around misconduct as we strive to improve standards and rid the Met of those who should not be here".[2]

The question

This change in policy raises the question of how long such reports should be published. If, as the MPS suggests, publishing reports for three months rather than 28 days promotes transparency and improves standards, should other forces adopt it? And why not three years, or indefinitely?

We must look at this question in its proper context: British policing is in crisis. Public confidence is at an all-time low.[3] From Wayne Couzens to David Carrick, serious cases of police criminality (let alone misconduct) are gripping national attention. The Casey Report has found that the MPS is institutionally racist, sexist and homophobic.[4] The MPS has announced that it will be conducting two to three misconduct cases per week to flush out the force.[5]

Change is needed, beginning with vetting and disciplinary processes. Should, as part of this, misconduct reports be published for longer? The issue may seem tangential, but doing so would improve transparency of the behaviour of those who police us and how that behaviour is managed. It would help ensure that proper disciplinary processes are followed and standards upheld, facilitate accountability, and enable analyses of broad trends. It is a matter of open justice. And in a world where good policies rarely come cheap, this would incur little additional cost.

It would seem, therefore, that both 28 days and three months may be insufficient for the ends they promote – public accountability should not have a time limit. Clearly, the timeframes are arbitrary; in private correspondence with the author, the MPS indicated that its three-month rule is "in line with the time period for MPS news articles". This appears to be an administrative rationale, rather than one based on maximising transparency.

The above comes into focus when considering the implications of removing published reports. Where such reports are no longer reasonably accessible in the public domain, the data of the police officer becomes protected under the Data Protection Act 2018, despite the proceedings being public at the time of the hearing and again once published. Many forces will refuse to release the data due to the employee's "reasonable expectation" that the information will not be disclosed.[6] This results in the absurd situation whereby misconduct reports drop in and out of the public domain. Moreover, partial or full details will remain indefinitely in the public domain where citizens have gone to the effort to reproduce them, while others will disappear forever.

Second, there is a lack of consistency in how data protection rules are applied by police forces. I submitted freedom of information ('FOI') requests to all 43 police forces, requesting all misconduct cases involving the use of force from 1 January 2020. Of those, 22 had no relevant cases, 14 identified relevant cases but did not release them due to the data protection exemption under s.40(2) FOI Act 2000, and two released redacted versions. Upon appeal, two more released redacted versions, two

[2] Andrew Kersley, 'Police in England and Wales 'evading public scrutiny' by deleting misconduct outcomes from websites' (*The Guardian*, 25/03/2023)

[3] Vikram Dodd, 'Half of Londoners unhappy with Met at end of Cressida Dick's term, polls show' (*The Guardian*, 16/02/2022)

[4] *Casey* (n1) page 7.

[5] Vikran Dodd, 'Two or three Met police officers to face trial every week, commissioner predicts' (*The Guardian,* 25/01/2023)

[6] See Requests for personal data about public authority employees, page 12: https://ico.org.uk/media/for%20%20organisations/documents/1187/section_40_requests_for_personal_data_abo ut_employees.pdf

upheld the original decision, with the rest outstanding at the time of writing.

Seven forces refused to provide the information based on the exemption under s.21 of being accessible by other means, despite only publishing for 28 days. Notably, two forces stated that either s.21 *or* s.40(2) applied with the result that, without even needing to consider the individual case, there was *no* circumstance in which those police forces would provide the information. There is clear disagreement among police forces about the bearing data protection rules have on releasing misconduct reports.

Separate concerns have also been raised by *The Guardian* that some misconduct decisions are not being published at all, when it compared local news reports to police force websites (however, there are legitimate reasons why reports may not be published – see s.43(9) PCR 2020).[7]

These inconsistencies certainly do not uphold transparency or accountability and produce unfair differences for the officers themselves in how their misconduct hearings are treated. One way of remedying these contradictions would be to have a clear policy of indefinite publication. This would maximise transparency and accountability, while avoiding data protection concerns altogether.

This may be considered to place an excessive burden on disciplined officers: Should an officer who commits misconduct have this permanently in the public domain? On one level, this question is done away with by the fact that many misconduct cases are partially or fully retained in the public domain already.

More fundamentally, the question goes to what we think misconduct proceedings are for. As Lord Leggatt commented during the hearing of *R (Officer W80) v Director General of the Independent Office for Police Conduct and others* UKSC 2020/0208, "If one looks at what has happened generally in professional conduct over the last 30 years, there has been a move away from considering them as discipline or punishment…toward protecting the public". And the need to protect the public is much greater in cases of police misconduct, compared with misconduct in any other profession. The police are entrusted with the coercive power of the state. They do not exist within it, but rather, comprise it. The health of the police is therefore indicative of the health of the body politic itself. In no other profession are members empowered to interfere with life and liberty in the same manner. It is appropriate, therefore, that the rules and standards we apply to those entrusted with such power are stringent.

Conclusion

This essay contains complicated issues and bold arguments which I cannot hope to fully defend here. But I hope to have demonstrated the contradictions that exist in current policy around the publicity of misconduct decision outcomes, and that these lead toward supporting indefinite publication of police misconduct reports. My hope is that this will assist the police, at this critical juncture, "to increase its accountability…by being more transparent with the public…by explaining their decisions and the reasons for them, and by acting with greater candour".[8]

Jay Staker
Postgraduate Student at University of Law

Report on ARDL Annual Dinner from Nicole Curtis

ARDL was delighted to see so many people at its annual dinner on 12 May 2023. We sold just under 600 tickets in total, and had an extremely good turn-out, despite concerns that the national rail strike might deter attendees. ARDL's President, Rachel Birks, welcomed our speaker, Stephanie Boyce, Past President of the Law Society

[7] *Kersley* (n3)
[8] *Casey* (n1) p16

of England and Wales. In March 2021 Stephanie became the 177th President of the Law Society; she was also the sixth female President and the first person of colour to be appointed to the position.

There are few venues with capacity to host the large numbers of members and guests who attend our dinners, and we are grateful that the Guildhall always makes us feel welcome. Our caterers, Party Ingredients, served us Potted Morecambe Bay Shrimp, then Seared Shorthorn Beef with Truffle Polenta Chips or Allium Goats Cheese, followed by Exotic Chocolate Passion Fruit Cheesecake, all accompanied by a selection of French wines. The environment is always inspiring: the present Guildhall was built in 1411 and, having survived both the Great Fire of London and the Blitz, is the only secular stone structure dating from before 1666 still standing in the City. The medieval Great Hall, where the dinner takes place every year, is the third largest civic hall in England, and has been the setting for famous state trials, including that of Lady Jane Grey in 1553.

The pandemic meant that we were sadly unable to host dinners in 2020 and 2021, and the 2022 dinner was later than initially planned. We are now however back on track, with the usual timing of early summer for our annual dinners in the future.

Nicole Curtis
Capsticks

ARDL Annual Conference 2023

3rd Annual Conference
Friday 10 November 2023
Museum of London
Registration 08.45 – 09.10
Conference 09.10 – 17.00; Drinks reception 17.00 - 19.00

ARDL is pleased to announce details of its 3rd Annual Professional Discipline and Regulation Conference, which will take place on Friday 10 November 2023 at the Museum of London. The conference will be of interest to members of ARDL practising in all aspects of professional discipline and regulation.

Key note speaker:

Martin Forde KC

Sessions will include:

Regulatory Case Law Update with speaker **Kenneth Hamer** Henderson Chambers and Author of *Professional Conduct Casebook*. Chaired by **Joanne Harrison** Senior Associate at Carson McDowell.

Police Misconduct with **Noranne Griffith** Senior Lawyer, Metropolitan Police Directorate of Legal Services, **Anne Studd KC** 5 Essex Court and **Juliet Farrall** Head of the Independent Office for Police Conduct. Chaired by **Rosemary Rollason** Principal at RJ Rollason Law.

Witness to Harm/Holding to Account: Improving patient, family and colleague witnesses' experiences of fitness to practise proceedings chaired by **Kate Steele** Partner at Capsticks with speakers including **Dr Annie Sorbie** Senior Lecturer in Health, Medical Law and Ethics at University of Edinburgh, School of Law and **Dr Gemma Hughes**, Associate Professor of Healthcare Management, University of Leicester, School of Business

Healthcare Regulatory Reform Update chaired by **Surjit Dubb** Partner at Hempsons with speakers including **Sean Marchesi-Denham**, Deputy Branch Head, Professional Regulation Department of Health and Social Care.

Legal Regulation Ethical Panel chaired by **Iain Miller** Partner at Kingsley Napley

Refreshments and lunch will be provided and we hope that delegates will join us for a drinks reception at the close of the event.

Purchasing tickets:

Tickets, for what promises to be another great ARDL event, remain unchanged at £150 and can be

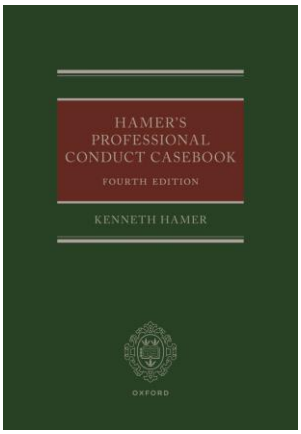
obtained through the members' log in area on the ARDL website from 9.00am on Friday 21 July 2023. Delegates attending this event must be an ARDL member.

Each member can only purchase one ticket. In the event that any member experiences difficulties in making a payment when they log in and book a ticket, they should email ARDL's administrator at ardl@blakemorgan.co.uk and arrangement will be made for an alternative method of payment.

For any firms, chambers or legal teams who would like to book for a number of members at the same time, a single nominated person should contact ARDL's administrator at ardl@blakemorgan.co.uk confirming the names and membership status of those whom tickets are being purchased for, and arrangements can be made for payment.

Tickets are strictly non-refundable. They are, however, transferable to another ARDL member if the person who purchased the ticket is unable to attend.

Hamer's Professional Conduct Casebook Fourth Edition: Book Review



When Rod Fletcher (of blessed memory) and I started ARDL in February 2002, our expectations were limited as to the level of interest it would engender. The primary purposes in starting the Association were first, to seek to persuade the legal directories to include a chapter on regulatory/professional discipline work. This was achieved within a short period of time. The second, was to try to collate regulatory cases to allow practitioners to use the emerging cases from the various regulatory fields. This aim was greatly assisted by the appeal jurisdiction for most professions changing to the High Court.

The ARDL Bulletin was started in 2002 and from the very first publication to date, Kenneth Hamer has provided the 'Legal Update'. It was this exercise that led to Hamer's first publication of his 'Casebook' in 2013. It is therefore, without detracting from the enormous hard work of the author, an ARDL precipitated work which is the living fulfilment of ARDL's second primary purpose. The Bulletin remains today as a thriving source of information. To obtain the cases to include was a marvel of detailed searching back at the start. Of ARDL's many successes over the last 21 years, it is the consistently high standard of its Bulletin that remains, in my view, its longest and finest achievement. After 21 years it still provides the key to open the door to the practitioner conducting regulatory cases.

ARDL very quickly attracted a huge following of practitioners and regulators, with membership now of over 1,000. Just as membership exploded, so did the number of regulators and the number of regulatory cases. Hence, inevitably, that led to a vast increase in the number of appeals.

In the early days, practitioners would earnestly inform Tribunals that they should rely on 'general principles' – i.e. do what I say. Things became a little more formal with the use of Archbold and reliance on the principles applied in criminal cases. Those days are gone. Practitioners can no longer enter the Tribunal arena hoping to wing it on the law. Tribunal members are provided with case law updates, they are lectured on the law and have legally qualified practitioners on the Tribunal. In many areas, Tribunals need to look over both their shoulders in making decisions, with possible appeals by the regulator as well as the practitioner. Lawyers conducting cases therefore need to be well equipped to provide the relevant applicable law. Kenneth Hamer's 'Professional Conduct Casebook' provides a well-resourced comfort to the practitioner. The book is well structured into 91 chapters and analyses about 2,500 cases. It is a sign of the rapid growth of

professional conduct cases that there are over 350 additional cases since the last edition in 2019 and indeed, chapter 91 is in fact an integrated supplement. Most useful for the practitioner is the alphabetical arrangement of subjects. Legal issues arise in the course of a hearing that require coherent responses based on the existing law. Hamer's casebook provides ready access to the building bricks for such a response. The individual chapters, dealing with a specific subject, set out the legal framework, the general principles involved and then the relevant cases from a variety of professions, with further sub-divisions relating to the specific subject if necessary. At the end of each chapter is a 'Commentary' which is a helpful summation or overview of the subject of that chapter. It is an indication of how useful such a summary is that it may be more proficient to place it at the start of the chapter and not at the end. Following the 'Commentary' the reader has the advantage of seeing the references to other chapters which may touch on the subject of the chapter. It is abundantly clear from the chapter subjects chosen that Hamer has extensive experience in the coal face of hearings. The chapters provide the touchstones for every eventuality. It is unquestionably a book that one needs to have by one's side in a hearing. The book can also be provided in an electronic download form which has many advantages. Its only disadvantage being that the Tribunal members will not see that you have the law to hand.

The 'Casebook' has the cases well summarised by Hamer with exceptionally helpful pithy sidenotes giving the point or points that emerge from the case. It allows the reader to quickly scan the sidenote to find the most relevant authority dealing with the legal issue that has arisen during the hearing. Of course, the 'Casebook' allows the practitioner preparing legal issues at a more leisurely pace, to consider the leading cases from a variety of fields and use those as a stepping stone for further research on a particular or narrow point.

The regulatory field of law is destined to burgeon. Hamer has his work cut out for future editions. Whether the increase in professional regulation is a positive step forward remains to be seen. Regulation can promote fear, alienation, loss of standing and mental health issues. Those involved in regulation have a duty to ensure that the approach is measured and necessary and not a runaway train disgorging professionals at every bend in the track.

Ian Stern KC
2 Bedford Row

Hamer's Professional Conduct Casebook Fourth Edition
Foreword by Lord Burnett, Lord Chief Justice of England and Wales

"We have had to wait four years since the publication of the third edition of Kenneth Hamer's *Professional Conduct Casebook* for this significantly updated and expanded new edition. It is now ten years since the first edition was published. It filled a gap that needed filling in bringing together in a systematic and approachable manner summaries of the caselaw covering almost all aspects of the law relating to professional misconduct.

It is undeniably the case that rules governing conduct have become more elaborate across the whole range of professions. The very slim Code of Conduct I was given on becoming a barrister, for example, has been replaced by the substantial online Bar Standards Board Handbook incorporating a long Code of Conduct. Whether that has resulted in an improvement in the way professionals serve their clients and the public may no doubt be debated. But it has made professional conduct proceedings and the appeals and legal challenges that arise from them more complex. There has been a continuing rich flow of cases all of which have been digested in this new edition. The book continues with its accessible, alphabetical chapter approach but Mr Hamer has introduced a handful of new chapters which will provide further clarity.

Over the course of my own professional lifetime the public interest in holding professionals to account through their disciplinary bodies has increased. The consequences of an adverse finding are always serious. One result is that disciplinary panels and tribunals operate much more like courts than was once the case. A growing number of lawyers are engaged regularly in professional misconduct cases, whether prosecuting them on behalf of the professional body, defending the professional or acting as advisers to disciplinary panels. A steady flow of cases comes to the High Court. In whatever capacity someone may be engaged in cases of this sort, the casebook will be an invaluable aid, happily in a single volume."

The Rt Hon. The Lord Burnett of Maldon
Lord Chief Justice of England and Wales
Royal Courts of Justice
London
May 2023

Copies of the book are available to ARDL members with a 30% price discount. Order online at https://global.oup.com/academic/ with promotion code ALAUTHC4 to save 30% as shown on attached flyer. In the search bar of OUP type in the author's name Kenneth Hamer.

Legal Update

R (Humpherson) v. Police Appeals Tribunal and Chief Constable of West Midlands Police [2022] EWHC 2424 (Admin)

Appeal – police officer – appeal by chief constable to Police Appeals Tribunal – subsequent judicial review claim

The claimant police officer met a woman through a dating app. At the time of meeting her he was wearing his full police uniform and riding a police motorcycle, and later he engaged in sexualised WhatsApp messages with her while at work. Thus he was 'on duty' at the time of meeting the woman on the basis that he was in uniform. The chief constable found that the claimant's conduct amounted to gross misconduct by reason of a breach of police standards, and dismissed the claimant without notice. By his claim for judicial review, the claimant challenged the decision of the Police Appeals Tribunal (PAT) dismissing his appeal against the decision of the chief constable to dismiss him. Because the facts were not in dispute, the chief constable's decision was taken pursuant to the 'special procedure' hearing. The chief constable read the evidence, heard full submissions and issued a detailed judgment. The task of the PAT was to determine whether the chief constable's finding, or the disciplinary action imposed, were unreasonable. The PAT found the sanction not unreasonable or irrational.

In refusing judicial review, Henshaw J said, at [24]-[38], that the following principles applied to appeals to the PAT and judicial review of PAT decisions:

- On an appeal to the PAT under rule 4(4) of the Police Appeals Tribunal 2012 on the grounds that the finding or disciplinary action imposed by the panel was 'unreasonable', the test is not the Wednesbury test but something less: *R (Chief Constable of Wiltshire Police v. Police Appeals* [2012] EWHC 3288 (Admin*).*
- The PAT must consider whether the panel has applied the structured approach set out in the Guidance on Outcomes when assessing whether the misconduct constitutes gross misconduct and on sanction: *R (Chief Constable of Greater Manchester Police) v. Police Misconduct Panel* (High Court, 13.11.18) at [14, 16 and 18], and *R (Chief Constable of West Midlands Police) v. Panel Chair and Panel Misconduct Panel* [2020] EWHC 1400 (Admin) at [30].
- The PAT itself is required to adopt the same structured approach: *R (Chief Constable of Nottinghamshire Police v. PAT and Flint* [2021] EWHC 1248 (Admin) at [75].
- The High Court can set aside a decision of the PAT only if a public law error is established: *R*

(Chief Constable of Dorset) v. PAT and Salter [2011] EWHC 3366 (Admin).

- Public law errors are not confined to Wednesbury unreasonableness but include, in addition to procedural unfairness, cases where the decision-maker has taken into account or neglected to take into account matters which it ought to have taken into account: *R (DSD and NBV) v. The Parole Board* [2018] EWHC 694 (Admin).

- The need for deference to the PAT as an expert body is reduced where the issue is one of law (as opposed to fact or evaluation): *R (Wilby-Newton) v. PAT and Chief Constable of South Yorkshire Police* [2021] EWHC 550 (Admin) at [86]. The same will apply if the PAT's reasoning indicates fundamental misunderstandings of the facts and/or principles to be applied.

- Since the PAT decision, which the court is asked to review, itself relates to the chief constable's prior decision, the court naturally has to look at the chief constable's decision as well as that of the PAT: *R (Williams) v. Police Appeals Tribunal* [2016] EWHC 2708 at [28]. Where the original decision was 'plainly wrong', the court should be able more readily to quash the PAT's decision. Depending on what is meant by 'plainly wrong', the court has to consider the chief constable's decision, because it has to decide whether the PAT's approach to it involved any error of law. However, the decision which the court reviews is that of the PAT, applying the public law error standard.

Mariaddan v. Solicitors Regulation Authority Limited [2023] EWHC 207 (Admin)

Bankruptcy of appellant – whether appellant entitled to pursue appeal – appeal personal to the bankrupt

Following a hearing before the Solicitors Disciplinary Tribunal (SDT), the appellant was found guilty of misconduct and was struck off the roll of solicitors and an order for costs was made against him of approximately £31,000. The appellant appealed to the Administrative Court the findings of the SDT. Shortly before the hearing the appellant informed his counsel that he was an undischarged bankrupt. The question arose whether the appellant was entitled, nonetheless, to pursue his appeal. Foster J said that the effect of section 306(1) of the Insolvency Act 1986 is that the bankrupt's estate vests in the trustee upon the latter's appointment taking effect. Where the Official Receiver is involved, then the estate vests upon his becoming trustee. A bankrupt's estate comprehends 'all property belonging to or vested in the bankrupt at the commencement of the bankruptcy' (section 283(1)). The definition of 'property' in section 436 of the 1986 Act includes 'things in action'. In *Heath v. Tang* [1993] 1 WLR 1421, CA, Hoffmann LJ said that despite the breadth of the definition of property in section 436, there are certain causes of action personal to the bankrupt which do not vest in his trustee. These include damages for pain and suffering and actions for defamation and assault. Foster J said that the personal interest exception persists in the case law, and the judgment in *Addison v. London European Securities Limited* [2022] EWHC 1077 (Ch) of Jonathan Hilliard QC sitting as deputy judge of the High Court was of particular help. In that case the court said that some of the factors relied on in the cases to determine whether the matter should be regarded as personal to the bankrupt include whether the bankrupt's status was at issue, and what common sense and fairness dictates. In the instant case, the appellant had standing to pursue his appeal: [19]-[21]. The disciplinary jurisdiction of the professional bodies is exercised so as to police the personal and professional behaviour of the individuals who are within the purview of their authority. The regulatory function is carried out in the public interest and in respect of the actions and omissions of the professional acting in a professional, and sometimes a personal, capacity. The connection of the regulated person and the proceedings in respect of them to the individual is indissoluble. The

appellant's bankrupt status was not in issue in the appeal, further common sense and fairness dictates that he be allowed to appeal. It is not natural to regard any action by the SRA or a right of appeal arising from it as vesting in the appellant's trustee in bankruptcy and the judgment of the SDT was clearly not enforceable against his estate, that is to say, such conclusions as are reached other than as to costs. On the substantive merits of the appeal, the judge said that no grounds to interfere with the reasoning and conclusions of the SDT had been shown, and the appeal must fail.

Barnes v. Solicitors Regulation Authority Ltd **[2022] EWHC 677 (Admin)**

Costs – costs against solicitor – solicitor unlikely ever to be able to pay – order punitive and set aside

In July 2020, the appellant, Maxine Barnes, was struck off the roll of solicitors and ordered to pay the costs of and incidental to the application and enquiry fixed in the sum of £20,000, that figure representing 67% of the SRA's costs as claimed. The tribunal determined that while the SRA's costs of £31,281 were reasonable and proportionate, there should be a reduction in the amount of costs the appellant should pay to reflect her limited means. The tribunal had before it a financial statement which the appellant had lodged and signed with a statement of truth. At the time of the hearing, the appellant was an ex bankrupt, having been made bankrupt after the events in question that led to her being struck off, and had had her home repossessed. She had no assets and no ability to borrow money. At the time of the hearing she was employed by a firm of solicitors and the statement set out her income and that of her husband and their outgoings. On her figures, she had an average monthly surplus of £180 for the two of them. Following the tribunal's decision to strike her from the roll, she was summarily dismissed by her employers. By letter dated 2 December 2021, the SRA's Recovery Unit indicated that it would put recovery on hold for a year given that she was now unemployed, but that statutory interest at the rate of 8 per cent would continue to apply. On appeal, Cotter J said, at [10] and [41], that the evidence about the appellant's summary dismissal was not new evidence within *Ladd v. Marshall* but a change of circumstances post decision, and that whether there was an error within the exercise of discretion by the tribunal must be considered on the basis of the information before the tribunal. However, it would take a very significant period of time to pay off the debt if all of the £180 was paid towards the £20,000 costs, and if only half of the surplus was used the annual payment would not keep pace with the interest rate, so the debt could never be paid off. Allowing the appeal, and setting aside the costs order the judge said:

> 46. The courts have held for a long time that the guiding principle is that fines, costs and compensation should be capable of being paid off within a reasonable time if imposed in circumstances such as this (i.e. not in ordinary civil litigation). The decision of the tribunal on the reasonable assumption that she had an entitlement to half the monthly surplus would mean that the Appellant would never pay off the debt, on the then current level of remuneration at the time of the hearing (i.e. before she lost her job). I accept, as Mitting J set out [in *SRA v. Davis and McGlinchey* [2011] EWHC 232 (Admin)] that the Solicitors Regulation Authority does not have the aim of pursuing impecunious solicitors against whom orders have been made and cannot pay. However, I cannot see how the Authority or the profession is in any way better off leaving to the Enforcement Unit a debt that can never be paid, save in exceptional circumstances. The exceptional circumstances can be dealt with by what is known as 'a football pools' order. That description may not now be understood by a number of younger people. I believe 'a lottery order' would be more widely understood.
>
> 47. In my judgment, given the means which it appears it accepted the tribunal fell into clear error in making an order the effect of which

was that the Appellant could never in all likelihood pay off the debt. Even if she took all of the surplus income available to her and her husband, she would have to work for many years post retirement. If half the surplus were taken she would never be able to pay off the debt, no matter how long she lived.

48. No proper exercise of discretion under the Rules could produce an order for costs that will never be satisfied and will remain a burden on a party for life. I reject [the SRA's] submission to the contrary i.e. that it is a proper order open to the tribunal even given the exercise of its generous discretion. Nor, as I have stated, can it be correct to leave what is effectively an unrecoverable debt to the Recovery Unit in the hope that it will then take a reasonable view. The tribunal itself is the one with the regulatory requirement to consider means and the Unit should only be required to recover debts which the tribunal considered to be properly recoverable.

….

50. In my judgment, the tribunal fell into error by failing to properly assess the effect of what it took as the true means. An order that results in a payment of costs that cannot reasonably ever be paid off can only be considered, in my judgment, as punitive.

51. Unlike the position when considering the level of fine, which is a sanction which includes an element of punishment. I fail to see the relevance of the fact that there has been a finding of dishonesty on the issue of repayment of costs, as costs are not an additional punishment. So the nature of the matter should not be relevant, unless it is believed that the solicitor continues to be dishonest and the information as to means is not accepted, which is not something the tribunal found in this case. So, the tribunal should have been cautious not to impose an order for costs which was, in effect, an additional element of punishment. The tribunal did not state that was a relevant feature, i.e. the findings of dishonesty were relevant to the issue as to costs made, but if it were part of the judgment made then that itself would be an additional and separate error of law.

The judge went on to re-exercise discretion and stated that there was no reasonable prospect that at some time in the future the appellant would be able to pay any element of costs. Accordingly, the only proper order should be no order as to costs.

Re Z (Disclosure to Social Work England: Findings of Domestic Abuse) [2023] EWHC 447 (Fam)

Confidentiality – judgment in family proceedings – disclosure to regulator in public interest

In February 2022, His Honour Judge Ahmed (the judge) in private law proceedings conducted a fact-finding hearing to determine allegations of domestic abuse made by the mother against the father. The judge made findings of domestic abuse by the father towards the mother and children and, on 22 June 2022, Social Work England (SWE) applied for a transcript of the fact-finding judgment. The father was a senior social worker working with vulnerable adults and, as the regulatory body with responsibility for the fitness to practise of social workers in England, SWE believed that the fact finding judgment might be of relevance to its ongoing investigation into the father's fitness to practise. On 26 August 2022, the judge refused the application of SWE. Mrs Justice Knowles allowed the mother's appeal against the judge's decision saying at [4] that, in making his decision, the judge failed to have regard to the public interest in disclosing the fact-finding judgment to SWE in circumstances where it is highly desirable for the various agencies concerned for the welfare of children and vulnerable adults to co-operate with each other.

At [19]–[34] of her judgment, Knowles J extensively reviewed the law on disclosure in family

proceedings. The proceedings under the Children Act 1989 relating to Z were – like other family proceedings – heard in private. In those circumstances, the disclosure of information relating to those proceedings is liable to constitute a contempt of court. The court has power under the Family Procedure Rules 2010 to permit the disclosure of information in proceedings relating to children for certain specified purposes. The acknowledged and long-standing authority on the approach to be adopted by a court when determining an issue of disclosure is the decision of the Court of Appeal in *Re C (A Minor) (Care Proceedings: Disclosure)* [1997] Fam 76 (also reported as *Re EC (Disclosure of Material)* [1976] 2 FLR 725). In that case Swinton Thomas LJ (with whom Henry and Rose LJJ agreed) identified ten factors which were likely to be relevant when determining an application for disclosure to the police, including the welfare and interests of the child, the maintenance of confidentiality, the public interest in the administration of justice, the relevance of the evidence to any investigation, and the desirability of co-operation between agencies concerned with the welfare of children. The approach described by Swinton Thomas LJ was re-affirmed by the Court of Appeal in *Re M (Children)* [2019] EWCA Civ 1364, and *Re P (Children) (Disclosure)* [2022] EWCA Civ 495. Though *Re C* was concerned with disclosure of information from family proceedings to the police, its principles have also been held to be applicable to disclosure of information to professional regulatory bodies: see *Re R (Disclosure)* [1998] 1 FLR 433 (disclosure of psychiatric report to the father's employer, the Probation Service), *Re L (Care Proceedings: Disclosure to Third Party)* [2000] 1 FLR 913 (disclosure of judgment and expert medical reports to the UK Central Council for Nursing, Midwifery and Health Visiting), and *A Local Authority v. SK and HK* [2007] EWHC 1250 (Fam) (disclosure of judgment to the mother's employer, the local authority where the mother worked in a residential home for elderly people). All the above cases concerned public law proceedings relating to children. *Re D and M (Disclosure: Private Law)* [2002] EWHC 2820 (Fam) concerned private law proceedings for contact. In that case, the court, applying *Re C,* refused to allow disclosure to the police but permitted disclosure to the relevant local authority. Thus, disclosure in private law proceedings requires the evaluative exercise set out in *Re C* applied to the variable circumstances of the case in hand, recognizing that there is no presumption in favour of disclosure.

In the instant case, Knowles J said, at [48]-[50], that though the judge listed the *Re C* factors and applied those he considered were relevant, he did not explain why he regarded it as irrelevant, for example, to consider the public interest in disclosure or the desirability of co-operation between the various agencies concerned with the welfare of vulnerable people/children. The judge was fully aware of the father's occupation and knew that SWE was investigating the father and sought disclosure to assist it for that purpose. In those circumstance, the judge should have addressed the public interest and the desirability of co-operation but he did not do so. The judge also fell into error in not inviting submissions from SWE prior to making his decision. Those submissions would likely have included relevant case law relating to the disclosure of information from family proceedings to professional regulatory bodies, particularly those bodies such as SWE with a statutory duty to protect the public and ensure that social workers are fit to practise. Disclosure could have been ordered with anonymization of names. The appeal would be allowed.

Ranga v. General Medical Council [2022] EWHC 2595 (Admin)

Dishonesty – sanction - false documents – insight and remediation less relevant – erasure upheld

The appellant challenged the sanction of erasure. The particulars of misconduct were: (1) dishonesty in submitting two academic exercises for an MSc in Medical Leadership at De Montfort University in late 2017/early 2018 that were plagiarised and not her own work; (2) breach of patient confidentiality;

(3) dishonesty in communication with another doctor and a patient's solicitor; and (4) failure to keep proper records. While the appellant admitted plagiarism in April 2018 in respect of one essay, she continued to deny plagiarism for the other essay until August 2019. The second set of allegations concerned patient C. In February 2018, the appellant was contacted by patient C concerning facial treatment to her lips and eyes she had received from a doctor. The appellant contacted the doctor and a solicitor, without having sought or received any consent from patient C, and acted dishonestly in the course of these communications. She also failed to keep proper records of the consultation with patient C. Despite positive testimonials in relation to her progress, the tribunal had concerns about the extent of the appellant's insight into the implications of her misconduct. The tribunal concluded that the only appropriate sanction was erasure.

Dismissing the appellant's appeal on sanction, Foster J, at [51]-[55], said that the assumption underlying the first ground of appeal, namely that the tribunal did not find the appellant's conduct irremediable and implicitly accepted that she had some insight, appeared to be that erasure is only proportionate and appropriate in those cases where there is no chance of remediation at all. This was a false analysis: it is not the law that only where a practitioner has absolutely no insight at all, that erasure may be necessary. This is particularly so in a case involving dishonesty, such as the present case involving several occasions of dishonesty in different contexts. Even though steps had been taken by the appellant towards remediation, the tribunal found them to be inadequate to support a conclusion that the public interest could be protected by any lesser sanction than erasure. Remediation may be of less relevance in a non-clinical case where aspects of a practitioner's character are central to the allegations, such as in dishonesty cases. Dishonesty is difficult to remediate: see *Nkomo v. General Medical Council* [2019] EWHC 2625 (Admin) at [35]. *Bolton v. The Law Society* [1994] 1 WLR 512 was expressly applied to the medical profession in *Patel v. General Medical Council* [2003] UKPC 16. That authority indicates that the nature of professional regulation is such that ordinary mitigation of punishment has less effect upon the exercise of applying a sanction than in criminal courts. It also diminishes the relevance of a professional's ability to show they had learned their lesson and will not do it again. In the instant case, despite the tribunal's recognition that there was some insight by the appellant, erasure was appropriate. Given the multiple cases of dishonesty, the aim of imposing erasure here was maintenance of public confidence and of conduct and standards within the profession.

Hetherington and another v. Solicitors Regulation Authority Limited [2022] EWHC 2722 (Admin)

Evidence - findings in previous civil proceedings – admissibility before SDT – findings not binding on SDT

The appellant solicitors, partners in the firm of The Hetherington Partnership Ltd, appealed against the order of the SDT that they be struck off the roll, and pay costs in the sum of £98,000. The allegations made and found proved against the appellants arose out of the firm acting for large numbers of purchasers – either individual clients or providers of Self Invested Personal Pensions (SIPPs), dealing with individuals' personal pensions – who wished to invest in schemes operated by companies linked to an entity called Group First. Clients were referred to the firm by Group First and under the schemes individuals invested (personally or via the use of a SIPP) in a car parking space or a storage facility. The firm acted for the purchaser clients, carrying out the conveyancing work on transactions involving the acquisition of parking spaces or storage pods. There were over 6,000 transactions and over £100 million passed through the solicitors' client account in relation to the schemes. It comprised the major part of the firm's practice and income. The tribunal found that the appellants dishonestly failed to give clients adequate advice as to the proposed transactions. The appellants appealed on the

grounds, amongst others, that the tribunal's findings of fact were flawed in that it failed properly to apply rule 32 of the Solicitors (Disciplinary Proceedings) Rules 2019 to the findings of fact made by Her Honour Judge Robinson in a judgment given on 28 May 2020 in the Sheffield County Court in the case of *[JH] v. The Hetherington Partnership Ltd*. JH acquired a Group First product through his pension provider (Stadia) which instructed the firm. Stadia subsequently went out of business. He invested most of his pension fund (£97,500) into Group First and received a single payment of £7,800 by way of returns. Judge Robinson dismissed the claim, on the basis that Stadia was the firm's client, not JH. The judge, however, also made findings that included any advice given by the firm was correct advice; that there was no duty to give any further advice, in particular on the wisdom of the investment; and that the documentation sent by the firm for processing on behalf of Stadia was correctly processed by the firm.

Dismissing the appellants' appeal against the decision of the SDT, Lang J said that it was apparent that the tribunal accepted the SRA's submissions as to why Judge Robinson's findings ought not to be followed. Rule 32 of the 2019 Rules distinguishes between convictions and findings in prior civil proceedings. By rule 32(2), the findings of fact of a civil court or tribunal are admissible as proof but not conclusive proof of those facts. The findings were limited to the facts and circumstances of JH's case. Judge Robinson was only directed to a single 2017 Warning Notice on Fraud issued by the SRA; however warning notices had been issued to the profession as early as 2013. The danger that the rent term could be brought to an end early by Group First under a break clause was not evidently addressed at all in JH's case. The appellants had a duty to ensure the clients knew of the full extent of the risks involved. Judge Robinson's judgment did not dismiss these risks, simply concluding that, in that case, the duty to warn was adequately discharged. The effect of rule 32 was that the judgment was admissible but its findings were not binding on the tribunal. The burden of proof did not shift in this case; it rested on the SRA in respect of all issues, including the findings of Judge Robinson. Hence the tribunal addressed the findings of Judge Robinson in considerable detail. Clearly some of those findings were specific to JH. The tribunal was also correct to state that the bundle of evidence which was before Judge Robinson was not in evidence in these proceedings, and therefore it was not entirely clear which documents Judge Robinson was referring to. The tribunal had to make its assessment on the basis of the documentation in evidence before it.

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Request for Comments and Contributions

We would welcome any comments on the Quarterly Bulletin and would also appreciate any contributions for inclusion in future editions. Please contact either of the joint editors with your suggestions. The joint editors are:

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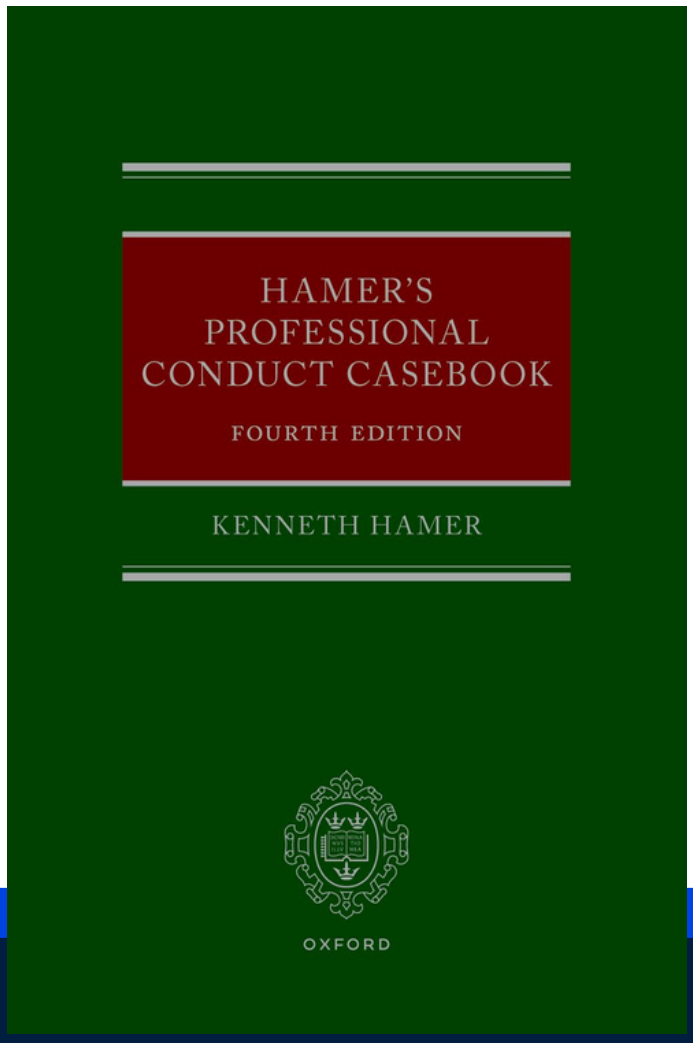

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