# Fundamental Liberties in Disciplinary Inquiries

## – What Every Medical Practitioner Should Know

By Eric Tin and Jessica Soo

**Key points:**

1. The powers exercisable by Disciplinary Tribunals (DTs) are "tremendous powers, which may close a man's professional career and ruin him financially and socially". However, all power has legal limits, and the notion of a completely subjective or unfettered discretion is contrary to the rule of law.
2. A person accused of a disciplinary offence as defined under the Medical Registration Regulations (MRR) has the right to be heard before an impartial and unbiased tribunal. The punishments meted out by a DT must accord in letter and spirit with the sentencing framework laid down by Parliament in the Medical Registration Act (MRA).
3. The right to counsel and representation by counsel is fundamental to all criminal and quasi-criminal proceedings. Where a respondent doctor elects not to have a counsel represent him, it is not the DT's role to become his counsel.
4. No person shall be punished retrospectively. In disciplinary inquiries, the prosecution and DT should be mindful of the constantly evolving standards in the medical field and be wary of applying guidelines retrospectively.
5. The double jeopardy principle can only apply when a person is charged with the same offence, both in fact and in law. It is not double jeopardy if a respondent doctor faces a criminal charge on a set of facts, and is later dealt with by the DT for disciplinary action on the same set of facts.
6. Equality before the law and equal protection of the law require that like should be compared with like. Consistency in sentencing where appropriate in disciplinary inquiries is a facet of this equality principle.

### Functions and characteristics of disciplinary tribunals

DTs constituted under Section 50 of the MRA[1] determine whether a respondent doctor is guilty of an alleged wrongdoing, and if so, the punishment to be meted out. The wrongdoing, also known as a "disciplinary offence",[2] may relate to a practitioner's (a) criminal conviction involving fraud or dishonesty; (b) criminal conviction implying a defect in character which makes him unfit for the profession; (c) disreputable conduct; (d) professional misconduct, or (e) failure to provide professional services of the quality reasonably expected of him.[3]

Under the MRR as amended in 2010, prior to a DT hearing, the Medical Council is to send the respondent doctor a notice of inquiry enclosing the charge.[4] It is a fundamental principle that the charge must state clearly the precise nature of the offence, and also include sufficient particulars of the alleged offence so as to enable the respondent doctor to know the case to meet and prepare his defence adequately.[5]

DT proceedings are quasi-judicial in nature. Any person giving evidence before a DT shall be legally bound to tell the truth.[6] Witnesses enjoy the same privileges and immunities in relation to hearings before a DT as if such hearings are proceedings in a court of law.[7] A DT may administer oaths, and any party to the proceedings may apply for a subpoena for a witness to testify or produce documents.[8] DT proceedings are deemed "judicial proceedings" within the meaning of the Penal Code,[9] and those who give false evidence can be prosecuted for perjury or other offences against administration of justice.[10] A DT may regulate its own procedure[11] and is not bound to act in a formal manner.[12]

1. *Cap 174.*
2. *Regulation 2(1).*
3. *Section 53(1), Cap 174.*
4. *Regulation 27(2)(c).*
5. *[2013] 1 SLR 83 at [29].*
6. *Section 51(7), Cap 174.*
7. *Section 51(8), Cap 174.*
8. *Section 51(5), Cap 174.*
9. *Section 51(11), Cap 174.*
10. *Sections 191-193, Cap 224.*
11. *Section 51(1), Cap 174.*
12. *Section 51(4), Cap 174.*

It is also not bound by the provisions of the Evidence Act[13] or by any other law relating to evidence; it may inform itself on any matter in such manner as it thinks fit.[14] In practice however, DTs do try to follow well-established evidential rules and principles as advised by the legal assessor.[15]

The High Court has observed that "as disciplinary proceedings are quasi-criminal in nature, a disciplinary tribunal has to adopt procedures and practices which ordinarily prevail in criminal trials".[16] The conduct of disciplinary inquiries commencing with a notice of inquiry enclosing a charge[17] is akin to the summons procedure of criminal courts. The standard of proof beyond reasonable doubt in DT proceedings[18] is the same standard required in criminal proceedings. Many provisions in the MRR, which govern procedural aspects of disciplinary proceedings, mirror those in the Criminal Procedure Code.[19] This includes the summary trial process of a disciplinary inquiry,[20] powers of the DT to amend charges,[21] the right of a respondent doctor to make representations to the Medical Council to withdraw, amend, amalgamate or have charges taken into consideration for sentencing;[22] the joinder of charges and of respondents;[23] the concept of taking into consideration of charges,[24] and the process of pre-inquiry conferences.[25] The fairly coercive powers of the Medical Council appointed investigators also appear similar to those vested in law enforcement officers for investigation of criminal offences.[26]

If a practitioner is found guilty of a disciplinary offence as charged, the DT can impose punitive and deterrent sanctions not unlike a criminal court.[27] These sanctions have a direct practical effect upon the practitioner's finances, career and reputation, as well as an indirect effect on the public and the profession by shaping expectations and norms of professional conduct and standards. The legal requirement for the DT to hear mitigation[28] before exercising its discretionary powers to order sanctions is likewise analogous to the criminal justice process.[29] The statutory avenue of appeal against a DT's final decision to a superior court[30] can perhaps be reckoned as a further parallel between a DT and a first instance criminal trial court.

## Constitutionally entrenched fundamental liberties

As a High Court judge once put it, the powers exercisable by DTs are "*tremendous powers, which may close a man's professional career and ruin him financially and socially*".[31] These powers include removing a doctor's name from the appropriate register, ordering a suspension term of between three months and three years, and imposing fines of up to $100,000.[32]

However, all power has legal limits, and the notion of a completely subjective or unfettered discretion is contrary to the rule of law.[33] In this regard, the higher judiciary acts as a bulwark against arbitrary or capricious exercise of power by professional DTs, and corrects their findings where they are not grounded in evidence or law. For example, if a DT does not follow established principles, fails to act fairly in the discharge of its functions, does not exercise its powers or otherwise act within the law, or impinges on a respondent doctor's fundamental liberties, such as to occasion injustice to a respondent doctor, an appellate court will likely intervene and reverse a DT's decision.[34]

The High Court has also, in a case on appeal from a legal profession DT, held that where the prosecutorial power is abused (eg, exercised in bad faith for an extraneous purpose) or exercised unconstitutionally (eg, where a discriminatory prosecution which resulted in an accused being deprived of his right to equality under the law and the equal protection of the law), the exercise of the prosecutorial discretion can be subject to judicial review.[35] The High Court may declare a prosecution unconstitutional for breach of constitutional power or for infringement of constitutional rights and protections.[36] It is suggested that this observation applies with equal force to prosecutions before any professional DT.

Under the Singapore Constitution, which is the supreme law of the land, a person accused of an offence has, amongst others, the following fundamental liberties:

1. The right against unlawful or unjust punishment;
2. The right to counsel and representation by counsel;
3. The right against retrospective punishment;
4. The right against double jeopardy; and
5. The right to equal protection under the law.

## Right against unlawful or unjust punishment

Article 9(1) of the Constitution provides that no person shall be deprived of his life or personal liberty save in accordance with law. Our highest court of the land

13. *Cap 97.*
14. *Supra 12.*
15. *Regulation 67.*
16. *Supra 5 at [29].*
17. *Regulation 27(2)(a).*
18. *[2010] 2 SLR 926 at [75].*
19. *Cap 68.*
20. *Regulation 34.*
21. *Regulation 35.*
22. *Regulation 33.*
23. *Regulations 36 to 38.*
24. *Regulation 41.*
25. *Regulation 29.*
26. *Section 60A, Cap 174.*
27. *Section 53(2), Cap 174.*
28. *Regulation 40(2).*
29. *Section 228(3), Cap 68.*
30. *Section 55, Cap 174.*
31. *[1980-1981] SLR 48, at [7].*
32. *Supra 27.*
33. *[2005] 3 SLR 709 at [15].*
34. *[2006] 1 SLR 182.*
35. *[2008] 2 SLR 239 at [149].*
36. *Supra 35 at [150].*

has interpreted the word "law" in this Article to include fundamental rules of natural justice.[37] Natural justice has two basic tenets: the right to be heard, and the principle that no one shall be a judge in his own cause.

Put together, this means that a person accused of an offence has the right to be heard before an impartial and unbiased tribunal which has the corresponding duty to afford him the opportunity to defend himself and confront his accuser. The tribunal must be satisfied beyond reasonable doubt, based on relevant and reliable evidence, that all the elements of the charge have been made out. Only then can the tribunal proceed to assess the person's degree of culpability in the circumstances, having regard to his conduct and the consequences of his actions, so as to mete out the most appropriate type and quantum of punishment. Where at any point in the proceedings the DT determines that the evidence brought forward is insufficient or there is no evidence to substantiate any charge, the DT is obliged to discontinue further proceedings on the charge.[38]

A respondent doctor can legitimately expect a DT to act within the statutory framework in administering professional disciplinary justice. The MRA, which is enacted by Parliament, defines the constitution, jurisdiction and substantive powers of the DT. The MRR, which is promulgated by the Medical Council, prescribes the procedural rules governing the exercise of the DT's functions. Although a DT is a master of its own procedures, it is suggested that where statute expressly stipulates a certain process, unless the DT has good reasons to depart, it should ordinarily follow the statutory process.

A respondent doctor's right to an impartial and unbiased tribunal means that he may, before the commencement of the hearing, object to the DT's composition on the basis of bias.[39] There need not be actual bias; apparent bias will suffice. But it is not for the respondent doctor to allege bias based purely on his own supposition, subjective sensitivity, fears or suspicions. The objective legal test is whether there are circumstances which would give rise to a reasonable suspicion or apprehension in a fair-minded reasonable person with knowledge of the relevant facts, that the tribunal was biased.[40]

A respondent doctor may appear in person to present his own case before the DT.[41] He may also confront his accuser and the latter's witnesses by cross-examination.[42] Where breaches of the rules of natural justice are alleged, the key question lies in asking whether the individual concerned was given the opportunity to present his case and whether he suffered any prejudice as a result of any unfairness in the conduct of the proceedings.[43]

Likewise, the punishments meted out by a DT must accord in letter and spirit with the sentencing framework laid down by Parliament in the MRA. A DT should not impose punishments which are not in the MRA, or in excess of what the MRA envisages, as such punishments would be unlawful. A sanction that is wrong in law or in principle, based on wrong appreciation of facts, manifestly inadequate or manifestly excessive, is bound to invite appellate intervention and correction on appeal. For example, the High Court has allowed the appeal in a case where a disciplinary committee erroneously read the maximum fine in the MRA as applying to *each charge* rather than *each inquiry* (regardless of number of charges).[44]

Where orders of costs made against respondent doctors found guilty of professional misconduct are found to have exceeded the statutory ambit of the DT's conferred powers, the High Court has also reversed such orders.[45] In one case, the High Court rejected the Medical Council's argument that it had "unfettered discretion" to order costs, and held that the DT could only exercise the power to order costs where the respondent doctor was found guilty of professional misconduct or specified infractions for otherwise it would be "inconsistent with principle" and "contrary to the notion of fairness".[46]

In another case, the DT had ordered costs payable by the respondent doctor to include costs incurred at the Complaints Committee stage. The High Court on appeal held that as the earlier stages of the disciplinary proceedings were "disparate", the DT could not in the absence of express authorisation "recover by a side wind costs incurred" prior to the DT stage, under cover of the term "incidental".[47] To do so would be to commit an illegality in misconstruing the scope of statutory powers.[48]

## Right to counsel and representation by counsel

Article 9(3) of the Constitution provides, among others, that an arrested person shall be allowed to consult and be defended by a legal practitioner of his choice. The right to counsel and representation by counsel is fundamental to all criminal and quasi-criminal proceedings.

37. *[1980-1981] SLR 48 at [26].*
38. *Regulation 34(5).*
39. *Section 50(6), Cap 174.*
40. *[2011] 4 SLR 156 at [52].*
41. *Section 51(3), Cap 174.*
42. *Regulation 34(4)(e).*
43. *[2008] 2 SLR 780 at [13].*
44. *[2004] 3 SLR 151.*
45. *For example supra 33.*
46. *Supra 33 at [15].*
47. *Supra 34 at [29].*
48. *Supra 34 at [26].*

In practice, a respondent doctor can avail himself to legal counsel when he first receives the notice of complaint inviting him to furnish a written explanation to the Complaints Committee. In a disciplinary proceeding, the respondent doctor's livelihood is at stake, and an inquiry cannot be said to have been completed until and unless the doctor is notified of the nature of his complaint.[49] From that point until the conclusion of the disciplinary inquiry (should there be one), he may seek legal advice on any issues related to his case.

The right to be represented by counsel is however not an unqualified right. An accused is only entitled to counsel who is able and willing to represent him. If counsel fails to turn up or is unwilling or unable to act for the accused, this would not be a basis for claiming that Article 9(3) has been violated such as to nullify the proceedings. On the other hand, if a respondent doctor's conduct in discharging or constantly changing counsel last minute amounts to "hampering or attempting to hamper the progress of the Inquiry" in the DT's view, and he persists despite the DT's warning, the DT chairman shall make a written note of this and proceed with and complete the Inquiry in any manner which it thinks fit.[50]

Where a respondent doctor elects not to have a counsel represent him, it is not the DT's role to become his counsel, as a DT must maintain its independence and impartiality as a neutral arbiter in accordance with natural justice. The High Court's clarification on this point is unequivocal:

*What happens when an individual chooses to appear unrepresented before a tribunal such as the (Singapore Medical Council), as occurred in the case here? Would such proceedings be subject to a different standard of natural justice? For example, would the tribunal be expected to warn the individual of the legal implications if he fails to cross-examine witnesses? In a similar vein, would the tribunal have to ensure that the individual appreciates the importance of making a mitigation plea?*

*The answers to these questions are obvious. Additional duties are not foisted on a tribunal merely because the individual is unrepresented – advising a person who has been charged of his litigation strategies and options is the duty of an advocate and solicitor, not the adjudicator.*[51]

## Right against retrospective punishment

Article 11(1) of the Constitution provides that no person shall be punished for an act or omission which was not punishable by law when it was done or made, and no person shall suffer greater punishment for an offence than was prescribed by law at the time it was committed.

This enshrines the principle that penal law cannot be retrospectively enacted or applied. Laws must be known in order to be able to guide conduct in advance, especially through warning of sanctions. Allowing laws and sanctions to apply retrospectively would result in arbitrariness and a lack of certainty and predictability that can undermine the rule of law.

As recently noted by the High Court, it is a cardinal tenet of the rule of law that a person should only be punished for offending laws, regulations or *professional practices* that had been both known and clearly established at the time of offending, and that no person should be punished retrospectively.[52] In disciplinary inquiries, the prosecution and DT should be mindful of the constantly evolving standards in the medical field and be wary of applying guidelines retrospectively. Where a set of guidelines has been revised over time, care must be taken when drafting the charges to assess the conduct in question against the correct version of the guidelines applicable at the relevant time.

Those responsible for adjudicating, prosecuting or defending in disciplinary inquiries should also pay heed to the transitional provisions in the MRA and the MRR for cases that straddle between the repealed legislation and the amending legislation. Usually, an amending legislation will contain a transitional provision to guide the date when it will come into effect. As a general rule, complaints made on or after 1 December 2010 will come under the present MRA, while those made before this date would continue to be regulated by the repealed MRA. Applying the correct version of the law is important to ensure no retrospective application of penal law, especially when the amending legislation contains a higher statutory punishment. For example, the maximum fine is $100,000 under the present MRA, while the previous MRA provides for a maximum fine of $10,000. It will be unconstitutional to apply the present MRA (and hence a maximum fine of $100,000) to a complaint made before 1 December 2010, which should be regulated under the previous MRA (where the maximum fine was $10,000), as the present MRA was not in effect before 1 December 2010.

## Right against double jeopardy

Article 11(2) of the Constitution provides that a

49. *[2000] 2 SLR 274 at [34].*
50. *Regulation 34(6) and (7).*
51. *Supra 43 at [12]-[13].*
52. *Supra 5 at [42].*

person who has been convicted or acquitted of an offence shall not be tried again for the same offence except where the conviction or acquittal has been quashed and a retrial ordered by a court superior to that by which he was convicted or acquitted.

This enshrines the double jeopardy principle, which can only apply when a person is charged with the same offence, both in fact and in law. The test to determine whether the charge is the same offence is whether the evidence needed to find the person guilty of the second offence will also at the same time prove him guilty of the earlier offence.[53] The fact that two offences have been committed at the same time and are inextricably linked, or that two trials involve the same or similar witnesses, is not sufficient on its own to constitute double jeopardy.

It is also not double jeopardy if a respondent doctor faces a criminal charge on a set of facts, and is later dealt with by the DT for disciplinary action on the same set of facts, as the nature of criminal proceedings and disciplinary proceedings (which is only quasi-criminal) is different.[54] Under Section 51(a) and (b) of the MRA, a DT may deal with a respondent doctor who had been convicted in Singapore or elsewhere of any offence involving fraud or dishonesty, or any offence implying a defect in character which makes him unfit for his profession. Such a conviction shall be accepted by the DT as final and conclusive under Section 51(3) of the MRA. The converse is true, in that a respondent doctor who had been dealt with by a DT can likewise be later prosecuted in a criminal court for an offence that arose from the same facts for which he received a disciplinary punishment.

## Right to equal protection

Article 12(1) of the Constitution provides that all persons are equal before the law and entitled to the equal protection of the law.

Equality before the law and equal protection of the law require that like should be compared with like. What the Article assures an individual is the right to equal treatment with other individuals in similar circumstances. It prohibits laws which require some individuals within a single class to be treated differently than others of the same class. Therefore, discrimination in treatment between one class of individuals and another class where there is conceivable difference in their circumstances is permissible in law.[55]

Consistency in sentencing where appropriate is a facet of this equality principle. As a general rule, each case should be decided on its own facts; but like cases should broadly be treated similarly.[56] In this regard, parties before the DT both have a duty to draw to the DT's attention, all relevant material such as applicable precedent cases, regardless of whether such material supports their case.[57] Where the appellate court finds that a largely similar sentencing precedent was not drawn to the DT's attention, and there appears to be similarity in the factual scenarios of the case and the precedent, it would interfere with the punishment meted out by the DT. That said, consistency is not a paramount goal, and each case should still be primarily decided on its own facts.

## Conclusion

All parties with a role in disciplinary inquiries should be familiar with and avoid encroaching on the fundamental liberties of a respondent doctor. Protection of these liberties ensures substantive and procedural fairness in the disciplinary proceedings, giving practical meaning to the rule of law. Trust and confidence in the professional disciplinary justice system will be enhanced when those brought through it know that they can always expect due process regardless of the merits of their case. SMA


### *Acknowledgements*

*The authors wish to acknowledge Dr T Thirumoorthy for his encouragement to contribute this article, and Ms Jessica Foo, Practice Trainee at Donaldson & Burkinshaw, for her research and editorial assistance.*



*Eric is the Head of Litigation & Dispute Resolution Practice and Head of Medico-Legal Practice Group of Donaldson & Burkinshaw. He is a panel lawyer of the Medical Protection Society Ltd. He is concurrently an adjudicator of the Financial Industry Disputes Resolution Centre, a member of the Ministry of Home Affairs' Criminal Law Advisory Committee (Hearing), and a chairman of the Disciplinary Committees of the Council for Estate Agencies.*



*Jessica is a Partner with the Litigation & Dispute Resolution Practice and Medico-Legal Practice Group of Donaldson & Burkinshaw. She advises and represents MPS member doctors in Singapore Medical Council disciplinary proceedings, medical negligence claims and coroner's inquiries. Her work also includes general litigation and she is an appointed mediator with the Financial Industry Disputes Resolution Centre Ltd.*


53. *[1964] AC 1254 at [1309-1310] as followed in [1983-1984] SLR 274 at [23].*
54. *[1983-1984] SLR 274 at [22].*
55. *Tan YLK, Thio LA. Constitutional Law in Malaysia and Singapore. 2nd ed. Singapore: Butterworths Asia, 1997.*
56. *Supra 43 at [17].*
57. *Supra 43 at [17].*