

**REVIEW OF THE DISCIPLINARY PANEL, LICENSING  
COMMITTEE AND APPEAL BOARD OF THE BRITISH  
HORSERACING AUTHORITY**

Christopher Quinlan QC  
September 2016

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## **1. FOREWORD**

On 23 March 2016 the British Horseracing Authority ('BHA') announced this Review. On 1 June 2016 I was asked to lead a Review Team to, *inter alia*, review the BHA's Disciplinary Panel, Licensing Committee and Appeal Board. Not an insignificant task, the exercise was completed in three months.

I wish to thank the Review Team who have given me unstinting, patient and invaluable assistance. I would not have been able to complete this work without them.

I would also like to express my gratitude to the following:

- The consultees who gave up their time to see me and/or the Team and who, without exception, cooperated constructively with the process.
- The Stewards, Clerks of the Course and Scales and the Judges at Bath and Goodwood racecourses who permitted me unrestricted access and allowed me to follow them as they performed their duties. They took time to explain their roles, duties and responsibilities and to answer my questions.
- Samuel Jones – a junior barrister seconded to the Team – for his research on the disciplinary structures in other sports.

It is the BHA's principal responsibility to regulate the sport of horseracing. An integral part of regulation is maintaining and administering discipline, ensuring the participants play by the rules; and if they do not, there is a fair system in place to deal with breaches. I have considered and reflected with care upon the contributions of those with whom we have consulted. I have adopted some of their contributions in my Recommendations.

It is for the BHA to regulate and to do so with confidence. While the sport's participants consent to be regulated, they cannot dictate the terms upon which they are. I have not prepared a treatise on the law. I have sought to make practical recommendations, rather than deal in the theoretical or esoteric. I have done so in the belief that a modern disciplinary process, transparent,

independent and impartial, will meet the BHA's regulatory responsibilities and deliver fair justice for its participants. If it does so, just one consequence will be enhanced confidence amongst those participants, stakeholders and the racing and betting public.

I hope in that modest way I have contributed to the wellbeing of a sport I enjoy and whose participants I respect.

I have used the personal pronouns 'I' and 'we'. I have done so to reflect the fact I drafted this Review but have done so with and following the considerable help of the Team. Solely for ease of reference, where I have needed to use a gender specific pronoun, I have used the masculine<sup>1</sup>.

A handwritten signature in black ink, appearing to read 'Chris Quinlan', written in a cursive style.

Christopher Quinlan QC  
Bristol  
September 2016

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<sup>1</sup> Unless the present occupant is female.

## **2. INTRODUCTION**

1. The central principles of good governance in sport are derived from different sources. Those include corporate and sporting codes, rules and regulations and jurisprudence, in part developed through challenges to existing governance and disciplinary structures.
2. The governing body of each sport is responsible for enforcing its own rules and regulations. They do so by adopting their own processes and procedures, including a system by which disputes arising in the sport are resolved. Thereby they exercise a disciplinary function over those they govern.
3. The BHA governs and regulates British horseracing. It came into existence in July 2007, created by the merger of the Horseracing Regulatory Authority ('HRA') and the British Horseracing Board ('BHB'). Until then the HRA was responsible for regulating and policing the conduct of horseracing. The BHB was the governing authority for horseracing in Britain, responsible for promoting the interests of racing. Prior to the creation of both, responsibility for regulation and discipline in horseracing rested with the Jockey Club. It no longer retains any regulatory function.
4. In her 2008 Review Dame Elizabeth Neville said the following of the BHA's Disciplinary system:

*"The Review Team considers that the judicial organs of the BHA, being the Disciplinary Panel and the Appeal Board, are appropriately independent of the other regulatory organs of the BHA. The processes in themselves are clearly fair. The Review Team also considers that the Disciplinary Panel and Appeal Board are appropriately staffed by people with breadth of experience of horseracing and by lawyers of the highest calibre. Therefore,*

*on a structural level, we have no recommendations to make about the composition of either panel.”*

5. On 24 June 2015, Adam Brickell, the then BHA Director of Integrity, Legal and Risk launched a Review of the BHA’s Integrity provision. It was the first major review of this area of the BHA’s business since 2008. The resulting *2016 Integrity Review* made six primary Recommendations, the third of which was:

*“The BHA, working closely with stakeholders, should review the structure, composition, and processes of the Disciplinary Panel, Licensing Committee, and Appeal Board as a matter of urgency, to identify and implement a practical and legally robust solution which generates greater confidence amongst the sport’s participants.”<sup>2</sup>*

6. The *2016 Integrity Review* Team’s Challenge Panel endorsed that recommendation and made a similar one of its own:

*“We entirely agree that a separate review of the structure, composition and processes of the Disciplinary Panel and Appeal Board needs to be carried out urgently, building on the information and views provided by those contributing to this Review.”<sup>3</sup>*

7. The Challenge Panel observed that such a review was “urgent”. The BHA management responded thus to that recommendation:

*“We will seek to ensure the review of the Disciplinary Panel and Appeal Board is based on broad terms of reference which do not artificially constrain that piece of work (although sensible parameters will be established to keep that review relevant and within budget). The Review*

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<sup>2</sup> *2016 Integrity Review R3*

<sup>3</sup> *2016 Integrity Review Appendix D (Challenge Panel Assurance Report)*

*Team will consider whether, and specifically what sort of, external expertise would enhance that review.”<sup>4</sup>*

8. In a decision dated 4 April 2016, the BHA's Disciplinary Panel (chaired by Matthew Lohn) found that Jim Best (a trainer) had breached the BHA's Rules of Racing by instructing a jockey to ride two horses (Echo Brava at Plumpton on 14 December 2015 and Missile Man at Towcester on 17 December 2015) other than on their merits<sup>5</sup>. He was disqualified for four years. On 7 April 2016 Mr Best secured a stay of the decision from the Appeal Board.
9. On 24 May 2016 the Appeal Board allowed the appeal and remitted the matter to the Disciplinary Panel. It did so on two grounds: (1) apparent bias of the Chairman which the BHA did not contest and (2) the reasons given were insufficient to support the decision. The Appeal Board promulgated its written reasons on 31 May 2016 ('the *Best* decision').
10. Following the Appeal Board's decision the BHA considered it appropriate to accelerate the review recommended by the *2016 Integrity Review*. It was a review the Professional Jockeys Association ('PJA') called for in February 2015<sup>6</sup>. In doing so, the BHA appointed me to lead it, supported by a Review Team of BHA employees.
11. The Terms of Reference for this Review are set out at Appendix A. The broad aims of the Review were to identify and implement improvements to the BHA's overall approach, building on the current system and updating it in line with current best practice in sports governance and regulation, in order to deliver the highest standards of fairness for participants.

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<sup>4</sup> *2016 Integrity Review* Appendix D (Challenge Panel Assurance Report)

<sup>5</sup> Rules (C)45 and (A)30

<sup>6</sup> Response to the BHA's 'Notes of the End of Flat Season Review Meeting', 19 February 2015

12. The *Best* decision accelerated this Review. That case is a relevant part of the background. However, the Appeal Board remitted the case to the Disciplinary Panel and those proceedings are, at the time of drafting, extant. For that reason alone it would not be appropriate for me to investigate that case, still less to pronounce on any part of it. Still further, it is not within my Terms of Reference to do so. Therefore, I have not sought to inquire into it or its facts. I express no view upon it.

### **3. EXECUTIVE SUMMARY**

1. The views of consultees have varied from one extreme to the other. At one end a consultee suggested that participants had no confidence in the BHA's disciplinary system. He suggested the only viable solution (for the BHA to avoid its Armageddon) was to start afresh. At the other end of the spectrum there was a view (also expressed from outside the BHA) that there "*was nothing wrong with the process*". It was suggested that my Review was an unnecessary "*knee-jerk reaction*" to a vocal and wrong minority.
2. It will come as no surprise to the informed that the concerns about the fairness of the disciplinary system came primarily from the PJA, 'defence advocates'<sup>7</sup> and from media representatives. That is not to diminish them or to suggest that they are in some way deserving of less consideration than views from other sources. It is to make the following points.
3. I have been alive to the Mandy Rice-Davies point. Put in a way she did not, the source of a statement, assertion, criticism or an argument may not be irrelevant when assessing its merits. There may be agendas at work, both for and against the BHA. Persons will or may have motives for the views they express. They may or may not be motivated by the best of intentions. Obviously, there is room for a misunderstanding, overstatement or exaggeration and the like. An expressed lack of confidence may be misplaced or erroneous.
4. I have done my best to assess the merits of the concerns expressed to us. I have looked through the sometimes hyperbolic criticism to see if beneath there lies substance. I have concluded that in some important respects there is. Such cannot properly be dismissed with the line, "well the defence would say that, wouldn't they".

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<sup>7</sup> By which I mean advocates who appear solely for participants.

5. I am confident the reason the BHA asked (someone like) me to lead this Review was to bring an 'outsider's' perspective and objectivity to the exercise. It is an approach it has used before.
6. The BHA has not argued any particular case to me. It has not sought to encourage or discourage any particular approach nor sought to 'defend' any of its bodies or its disciplinary structure. Instead it has facilitated the process by providing the Review Team and making available to me for interview any of its employees, officers and others I wished to interview. I spoke with a good number of them; they expressed their own views. I sense, if I may say so, an acceptance among the majority that the disciplinary system can be improved. I did not detect that the BHA, its employees or officials were defensive or resistant to sensible evolution when I discussed it with them.
7. I have concluded that the Disciplinary Panel is not - in a strict legal sense - independent at common law or for the purposes of Article 6(1)<sup>8</sup>. That is not the same as concluding that it is unfair. I have no doubt that it, and its members, act independently of the BHA. Further, in common with other sports governing bodies the BHA tests its disciplinary system, holistically, by asking whether it, when viewed in totality, is both independent and 'fair'. That is a perfectly sound legal approach.
8. Consistent with that holistic approach, the BHA places great store by the Appeal Board, both by reference to its composition and the role it plays in the structure. In doing so, it could point to the Appeal Board's decision in *Graham Bradley*, which concluded that the disciplinary process complied with common law and Article 6(1) and was fair. That decision has stood – without successful challenge – since 2003. It could also point, as some of the consultees have, to the conclusions (on this point) of the *Neville*

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<sup>8</sup> European Convention on Human Rights

*Review* and *2016 Integrity Review*. Both concluded that the disciplinary system was “*legally robust*”.

9. I have examined the substance of that view. I have looked to see whether I would reach the same conclusion about the BHA’s disciplinary process as a whole. In summary, I have concluded that the BHA’s disciplinary process, when viewed in totality, meets the BHA’s legal obligation to provide a fair disciplinary system.
10. I was not tempted to stop there and conclude accordingly that the BHA could or should proceed without change. Of course, it *could*. However, I do not believe it *should*. To do so would not address some important points which in my view the BHA now should grapple with.
11. First, as a responsible regulator the BHA would no doubt wish to ensure each stage of the process is legally independent. As I have already observed, the Disciplinary Panel is not structurally independent. A degree of technical independence could be achieved without significant overhaul of the system. That would go only so far.
12. Second, not all of the matters that come before the Disciplinary Panel are susceptible to appeal to the Appeal Board. For example, an appeal from the racecourse Stewards cannot be taken from the Disciplinary Panel to the Appeal Board. The Appeal Board, unlike the Ritz, is not open to all.
13. Third, the risk of an adverse costs order may deter otherwise meritorious appellants from pursuing their cases before the Appeal Board.
14. Fourth, confidence. My Terms of Reference require me to consider making recommendations to “*generate greater confidence*” in the disciplinary system. I have done so. I have not done so to pacify the unreasonable nor have I recommended change for the sake of it. Taken as

a package I hope my recommendations represent an opportunity for positive evolution. Some may say it is unnecessary revolution. I disagree.

15. To generate that greater confidence, I have recommended significant changes to the Disciplinary Panel, to its selection and appointment processes and its composition. I would remove the Disciplinary Panel from its present place in the BHA corporate structure and give it a new independence. I envisage and have recommended a more substantial role for the Chairman. He will oversee the Disciplinary Panel, Licensing Committee and Appeal Board, in a new role I have called the 'Judicial Panel Chairman'.
16. Before my Review commenced the BHA spent a good deal of time contemplating reform of the Licensing Committee. I have considered and adopted in large measure its work in that respect. The most significant recommendation is that it should be merged with the Disciplinary Panel. Within that merged Panel there should be a legally qualified person to lead on licensing matters and to assist the Judicial Panel Chairman on such matters. Its composition would broaden in line with the Disciplinary Panel.
17. The Appeal Board enjoys almost universal confidence amongst consultees. I have reflected that in recommending little change. It remains separate from the Disciplinary Panel and Licensing Committee. However, I have recommended that it should be given the power to hear cases *de novo* (*hearing a case afresh*), in exceptional circumstances.
18. I have recommended a procedural code applicable in complex cases, which would include specific guidelines on disclosure.
19. The BHA set the date for publication of this Review in June 2016. For good reasons the BHA was anxious that the exercise was completed as

expeditiously as possible. It is expected that in October 2016 UK Sport will publish its *Code for Sports Governance in the United Kingdom*<sup>9</sup>.

20. Discipline is not – as we understand it – one of the Code’s key elements<sup>10</sup>. On the topic of disciplinary structures and polices, it is likely to say no more than National Governing Bodies should comply with the law and best practice. To that extent it is not out of line with my recommendations. Further, I understand the BHA will examine my recommendations in light of the Code’s requirements. Therefore, I see no bar to publication of this Review as planned.
21. The Review has been conducted and completed in three months. Accordingly the recommendations are necessarily general. It simply has not been possible to carry out a detailed analysis of the Rules and identify all the necessary procedural and regulatory changes necessary to implement these recommendations. Such was not within my Terms of Reference. Instead I have taken an overview and mainly (but not exclusively) advised generally.
22. The BHA has commissioned a rewriting of the Rules (the ‘Rules rewrite’). That will be a substantial project and necessarily take time. Rule changes necessitated by implementation of my recommendations might conveniently be addressed as part of that process. However, it may be that the BHA resolves to implement my recommendations, if it does, in advance of, and separate from, that project. Naturally that is for it, not me.
23. Finally, though I have worked with, and been asked to the lead, the Team, the BHA was clear in my instructions that it wanted me to make the

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<sup>9</sup> The BHA will no doubt wish to comply with the Code, though since it does not receive public funding from UK Sport or Sport England, it is not strictly required to.

<sup>10</sup> Namely Transparency, Integrity, Financial Probity, Leadership and Decision Making, Membership, Independence of Thought, Diversity and Culture.

recommendations. The Review's recommendations were to come from outside rather than from within the organisation. I have accepted my 'brief' and acted according to my instructions.

24. Taken together, I believe my recommendations, if implemented, will develop and improve the present disciplinary process. They will help the BHA regulate the sport confidently and fairly. I hope that view is shared within the BHA and more widely in the sport.

#### **4. SUMMARY OF RECOMMENDATIONS**

**My recommendations, in the order in which they appear in this Report, are as follows:**

**R1: The Disciplinary Panel/Licensing Committee's Terms of Reference should be amended to remove the following term: The Chairman and Members of the Disciplinary Panel/Licensing Committee shall be guided by the Board.**

**R2: The Director of Raceday Operations and Regulation ('DROR') should no longer have responsibility for the Disciplinary Panel and Appeal Board. This role should be assumed by a newly appointed Judicial Panel Chairman, who shall also have responsibility for the Licensing Committee.**

**R3: In order to give effect to R2, the Judicial Panel Chairman should have an enhanced leadership role and responsibilities.**

**R4: The Secretary to the Disciplinary Panel and Appeal Board should no longer report to the DROR and instead report to an appropriate member of the Executive Team.**

**R5: The Terms of Appointment for the Disciplinary Panel, Licensing Committee and Appeal Board should be amended. All members should be appointed on terms which provide that a notice period is exercisable only in circumstances such as the following:**

- a. By the individual to whom it relates; or**
- b. By the BHA where the Chairman or member (as appropriate) has**
  - 1. Committed any serious or repeated breach or non-observance of their obligations to the BHA or of the Rules; or**

2. **Committed a criminal offence or acted in any manner which brings them or the BHA into disrepute.**

**R6: The procedure for appointment to the Disciplinary Panel and Licensing Committee should be formalised and set out in the Rules or operating procedures as appropriate.**

**R7: Application for appointment to the Disciplinary Panel and Licensing Committee should be through an open competition judged against published criteria.**

**R8: The appointment process for the Disciplinary Panel should be by way of a bespoke selection committee under the stewardship of the new Judicial Panel Chairman.**

**R9: Active Stewards should no longer sit as members of the Disciplinary Panel.**

**R10: The composition of the Disciplinary Panel and Licensing Committee should no longer be limited to Stewards and lawyers but should be broadened to include other suitably qualified people with sufficient knowledge of horseracing.**

**R11: A Disciplinary Panel enquiry should be chaired by a legally qualified person of sufficient qualification and experience. That should be subject to a clause permitting variation where the Judicial Panel Chairman directs or the parties agree.**

**R12: The number of lawyers on the Disciplinary Panel should be increased. There should be a modest increase in the size of the Disciplinary Panel such that it should not number fewer than 22 (when combined with the Licensing Committee).**

**R13: Schedule (A)6 §4.9 should be amended to include the BHA and a requirement to explain why Disciplinary Action has not been taken.**

**R14: The Rules should be amended to provide for Disciplinary Panel written reasons within the following timeframes:**

- a. An appeal from racecourse within 48 hours of the hearing;**
- b. Where it sits as a tribunal of first instance within 20 working days of the hearing.**

**Both timeframes should be subject to a caveat to provide for exceptional circumstances.**

**R15: The Rules should be amended to stipulate the principle to be applied when determining whether an appeal deposit should be forfeited and the Disciplinary Panel should address this matter in its written reasons where relevant. The principle should be that a deposit will be forfeited where the Disciplinary Panel concludes that the appeal was without any realistic prospect of success.**

**R16: The BHA should introduce the relevant stakeholders to Sport Resolutions with a view to those bodies establishing formal partnerships offering Racing's participants access to pro bono legal advice and representation in the event that they become subject to a BHA investigation or disciplinary proceedings and cannot afford representation themselves.**

**R17: The procedural rules or policies should address specifically the issue of disclosure. In particular I recommend that the procedural rules should:**

- a. Define the nature of the material to which they apply;**
- b. Include the test to be applied by the BHA and appropriate disciplinary body or its chairman in assessing whether material in the BHA's possession falls to be disclosed; and**

- c. **Make provision for any affected party to apply to the relevant disciplinary body or its chairman seized of the case for an order for disclosure.**

**R18: A formal procedure for alternative disposal of matters be established outside of the full Disciplinary Panel procedure, to include a fast track for minor or admitted offences, formal cautions, agreed sanctions and provision for matters to be resolved (where the parties consent) without an oral hearing.**

**R19: The present Licensing Committee should be merged with the Disciplinary Panel to form a single disciplinary group, under the leadership of the Judicial Panel Chairman.**

**R20: The Judicial Panel Chairman should appoint a legally qualified person to oversee the licensing duties of that committee, assuming the responsibilities of the present Chairman as amended to reflect the other recommendations herein.**

**R21: The categories of persons exempted from Appeal Board's Chairman's Panel (at Schedule (A)7 §2.3.1 and 2.3.3) should be extended to the non-Chairman's Panel.**

**R22: The Appeal Board's powers should be extended to permit it to conduct a *de novo* hearing in exceptional circumstances when considering an appeal against the decision of a Disciplinary Panel or the Licensing Committee.**

**R23: The nature, purpose and content of the Disciplinary Panel meetings held three times a year should be formalised in the Rules, procedural guidelines or policies.**

**R24: In relation to the Disciplinary Panel meetings:**

- a. The automatic attendees should comprise the Judicial Panel Chairman and members of the judiciary, as well as the Secretary.**
- b. If BHA employees are invited to any meeting, then such invitation should be extended only for appropriate and specifically minuted purposes. By way of example, certain BHA employees might properly attend such meetings to report on Rule changes and amendments. They would not be expressing any interpretative view, simply informing (as a fact) what the changes are. That is something I would expect them also to provide to (for example) the PJA.**

## 5. METHODOLOGY

### A. The Review Team

1. The original composition of the Review Team included Adam Brickell, the then Director of Integrity, Legal and Risk and Jamie Stier, Director of Raceday Operations and Regulation. It soon became clear to me that given the remit of this Review and in particular some of the structural issues I would have to address, that it was undesirable for them to remain on the Team. That is not a reflection upon them as individuals but instead the positions they occupy (or occupied) and my Terms of Reference. They readily stood down, having in reality played no part in my or the Team's work to that point.
2. Therefore, for the vast majority of the time I was leading a Team which comprised (in alphabetical order):
  - Catherine Beloff, BHA Head of Legal - Governance
  - Fiona Carlin, PA to the BHA Director of Integrity, Legal and Risk
  - George Coombs, BHA Compliance and Legal Assistant
  - Samuel Jones, Barrister
  - Paul Lifton, BHA Head of Business Change

### B. Evidence Gathering Process

3. In the PJA's response to the BHA's 'Notes of the End of Flat Season Review Meeting'<sup>11</sup> it called for a review of the disciplinary process. During the course thereof it suggested that the BHA should "*speak to advocates who have or continue to represent horsemen and racecourses so their concerns can be obtained*". I have done so.

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<sup>11</sup> 19 February 2015

4. Paragraph 4 of the Review's Terms of Reference provides:

*"In common with the Integrity Review, the methodology of the Review will focus extensively on consultation. This will include British Racing's principal stakeholders, participants and media, and other sports and regulators outside sport."*

5. The Review Team followed that method. Those interviewed by the Review Team are listed as consultees in Appendix C. The Review Team interviewed a total of 62 people, of whom I saw 35. The consultees consisted of the following:
  - a. Persons with direct knowledge and experience of the BHA's disciplinary, appeal and/or licensing processes, and/or
  - b. Persons with direct knowledge and experience of disciplinary and appeal procedures in other sports, and
  - c. Two representatives of the media who had demonstrated a particular interest in the subject.
6. In the first category the Review Team and/or I saw the Chairmen and members of the Disciplinary Panel and Appeal Boards; the Chairman of the Licensing Committee; advocates who represent the BHA and/or jockeys, trainers and other participants before the Disciplinary Panel, Licensing Committee and Appeal Board; BHA employees and officials; representatives from the PJA, the National Trainers Federation ('NTF') and other stakeholder bodies. In order to address the key topics, we drafted a series of questions organised under the following headings:
  - a. Composition of the Disciplinary Panel and Appeal Board
  - b. Disciplinary Panel and Appeal Board Terms of Reference
  - c. Conduct of Hearings before the Disciplinary Panel and Appeal Board
  - d. Disciplinary Panel and Appeal Board decisions and reasons
  - e. Appeal deposits
  - f. Comparison with other sports and regulators
  - g. Any other matters

7. Not all of those topics and questions were appropriate for all of our consultees. We amended and questioned as appropriate. We also drafted some additional specific questions for jockey/trainer representatives and chairmen and members of the respective disciplinary bodies, as well as for the Chairman of the Licensing Committee.
8. In the second category, Samuel Jones was seconded to the Team to analyse the disciplinary structures in a number of other sports. He participated with Team members in some of the interviews of this category. As part of that exercise, he looked at the disciplinary and appeal procedures and processes in the following sports: rugby union, rugby league, football, cricket, tennis, athletics, boxing and swimming. The governing bodies of each of those sports cooperated in, and assisted with, that process and to them we extend our gratitude, particularly those named in Appendix C. The product of that analysis informed our assessment of the BHA's structures and recommendations in relation thereto.
9. We did not 'cherry-pick' consultees, seeking only or mainly those favourable to the BHA. We took a decision to meet with a wide range of people, covering all aspects of the disciplinary system, including therefore those who have been and remain publically and privately critical of the BHA. I decided to meet personally those I identified to be the most vociferous of the BHA's critics. I am pleased to have done so. The PJA and defence advocates share my sense of fair play.
10. The consultations were recorded, audibly and/or in writing. The notes or recordings were provided to the consultees; where written notes were provided the content was agreed. Those records have been preserved but they are not appended to this Review. We have acceded to requests for or offered confidentiality (for example) in the sense of not attributing to consultees particular remarks, save where necessary and then by consent.

I have drawn on those notes and the interviews generally in formulating my recommendations and in drafting this Report. The information gained during those interviews was important in identifying areas where there was concern. It also revealed areas of the process where there was general or even higher levels of satisfaction, such as the Appeal Board.

11. The Review Team also considered a wide range of other materials. Those materials included previous BHA Reviews, the Rules, BHA internal and externally published documentation, and legal resources, exemplified in Appendix D. I also spent time with the Stewards, Clerk of the Scales and Judges at Bath (29 June) and Goodwood racecourses (28 July). I saw for myself their processes and procedures in operation and witnessed a number of Stewards' Enquiries. I also spent time observing BHA Disciplinary Panel hearings held on 9 June and attended a Disciplinary Review Group meeting.

## 6. THE BHA'S DISCIPLINARY STRUCTURE

### A. Introduction

1. The BHA is a company limited by guarantee. Under its Articles of Association its objects include:

*"3(1) To be the governing, administrative and regulatory authority for the sport and industry of horseracing in Great Britain and to govern, regulate, promote, administer and organise horseracing in Great Britain in every way in which the Company shall think necessary or desirable.*

*[...]*

*(3) To manage and administer the financing and funding of the governance, regulation, promotion, administration and organisation of horseracing in Great Britain.*

*[...]*

*(7) To be responsible for the regulatory matters in relation to the sport and industry of horseracing in Great Britain including taking all such steps regarding such regulatory matters as may be necessary or advisable:*

*(A) to seek to enhance public confidence in the integrity of the sport;*

*(B) to encourage policies and to take steps which improve the safety and welfare of participants;*

*(C) to encourage policies and to take steps to improve the safety and welfare of horses; and*

*(D) to encourage the improvement of industry standards through education, training and qualifications for licensed personnel through appropriate and effective training provision.*

*[...]*

*(11) To be responsible for the licensing and/or registration of any persons including but not limited to racehorse owners, agents (including jockey's agents), trainers, riders, valets and stable staff."*

*[...]*

*(14) To be responsible for disciplinary matters in relation to the governance, regulation, promotion, administration or organisation of the sport and industry of horseracing in Great Britain including taking all such steps as may be deemed to be necessary or advisable for preventing infringements of the Rules of Racing or other rules, regulations, advices and directions as the Company may make from time to time, or other improper methods or practices in the sport and industry of horseracing in Great Britain, and for protecting horseracing from abuse.*

*(15) To provide a process, by rules, regulations, advices and directions or otherwise and subject to the agreement of the parties to the process, for the decision and settlement of any differences, disagreements or disputes that may arise between individuals and/or bodies interested in the sport and industry of horseracing in Great Britain, or any persons who are members of or alleged to be members of or are employed or engaged by any such interested bodies, or any other persons in reference to due compliance with the Rules of Racing or otherwise, or in reference to agreements or arrangements, or to any other matter of difference, disagreement or dispute arising between interested individuals and/or bodies, or any of them, and whether the Company is concerned in such difference, disagreement or dispute or not, and to make such provisions for enforcing any award or decision as the Company shall deem proper.*

*[...]"*

2. The BHA is an independent body. It is responsible for governing and regulating horseracing. It has a mandate from the sport to do so.
3. The BHA has a number of key roles and responsibilities. Those include raceday operations and regulation, race planning, handicapping, compliance with the Rules of Racing ('the Rules'), and protecting the integrity of the sport on and off the racecourse. It does the latter through its Integrity Team. The Integrity Team is responsible for investigating alleged breaches of the Rules.

4. The BHA governs and regulates by Rules, General Instructions, Operating Procedures for Officials and Codes of Conduct. Rule (A)1.1 provides:

*“All functions relating to the governance and regulation of horseracing shall be exercisable by the [BHA]”*

5. Rule (A)2 defines those caught by and subject to the Rules. It includes all who have agreed to be bound by the Rules<sup>12</sup>; the owner and any person who is in any way legally interested in or plays an active part in managing a horse entered to run under the Rules<sup>13</sup>; and the riders and trainers of such a horse<sup>14</sup>.
6. The Rules are made up of seven Manuals (A)-(G), each of equal standing and each dealing with a specific area of the BHA’s responsibilities. The General Manual (A) contains the Rules relating to the Disciplinary Panel, the Appeal Board and the Licensing Committee.
7. Part 6 of General Manual (A) contains the BHA’s general power to take disciplinary action. Rule (A)52.1 provides that the BHA may deal with any matter relating to racing whether the matter arises in Great Britain or elsewhere. Rule (A)53 gives the BHA the power to take disciplinary action for a breach of the Rules. Rules (A)54-62 contain the disciplinary penalties available to the BHA, supplemented by the Guide to Procedures and Penalties 2016.
8. Disciplinary cases within the BHA fall essentially into two categories. The first are raceday incidents. In the main the Stewards deal with these by way of enquiries on the raceday. Those decisions may end up before a Disciplinary Panel, by way of an appeal. Alternatively, matters may be

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<sup>12</sup> Rule (A)2.1

<sup>13</sup> Rule (A)2.1.2

<sup>14</sup> Rule (A)2.1.3

referred from the racecourse to the Disciplinary Panel. The second broad category are those which result from investigations carried out by the Integrity Team. Sometimes there is overlap between the two.

9. The disciplinary functions of the BHA comprise three separate elements, namely investigations, prosecution, and the quasi-judicial. It is important that the investigative and prosecutorial functions on the one hand are kept separate from the judiciary on the other.
10. The *Neville Review* recommended that the investigative and intelligence handling role within the BHA be kept separate from the decision-making role in licensing and discipline. That meant a person independent of the investigatory team should take the charging decision. The result was the creation of the post of Disciplinary Officer. His precise duties and responsibilities are examined later (see Chapter 10).

#### **B. Racecourse Stewards**

11. No Person may act as a Steward unless approved and appointed by the BHA<sup>15</sup>. The principal duty of the racecourse Stewards is to ensure that racing is run in accordance with the Rules<sup>16</sup>. The Stewards are the sport's referees.
12. The Stewards' powers to take disciplinary action may be used only in relation to matters that arise in the course of, or concerning, the meeting for which they have been appointed<sup>17</sup>. I consider in Chapter 7 the appointment and duties of Stewards.

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<sup>15</sup> Rule (B)1.1 and 1.2

<sup>16</sup> Rule (B)4.1

<sup>17</sup> Rule (B)13.2

13. Breaches of the Rules, which happen on a racecourse on a raceday, are usually dealt with at a Stewards' Enquiry<sup>18</sup>. Such an enquiry is conducted on the course immediately after the race in which the breach is alleged to have occurred. Examples of the kinds of matters dealt with are numerous and varied but include interference, use of the whip and running and riding.
14. A Stewards' Enquiry must be conducted in accordance with the procedure laid down in the BHA Operating Procedures for Officials ('BHAOPs') No. 2.5 (3 October 2011), entitled 'Conduct of Enquiries & Hearing of Objections'. While those enquiries are outside the scope of this work, there is merit in understanding the process, not least to put into context appeals heard by the Disciplinary Panel.
15. In summary, three Stewards, one of whom is a Stipendiary Steward, will conduct the enquiry. A Stipendiary Steward is a 'professional' Steward, employed by the BHA. The remaining two are both Honorary Stewards, one of whom will act as the enquiry Chairman. Legal representation is prohibited. The Stewards will consider the relevant footage, hear the evidence from the appropriate witnesses, deliberate in private and announce their decision by simple majority. The Stipendiary Steward advises the other Stewards on process, penalty and also presents the evidence.
16. Penalties are imposed (if a Rule breach is admitted or proved) as appropriate in accordance with the BHAOP No. 2.6 (1 May 2011) and the BHA Guide to Procedures and Penalties 2016. The Stewards' powers are not unlimited: a fine must not exceed £15,000 and a riding suspension not more than 42 days.

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<sup>18</sup> I have adopted the spelling of Enquiry used in the Rules.

17. Participants wishing to challenge the Stewards' decision made following a racecourse enquiry may appeal to the Disciplinary Panel<sup>19</sup>. The right extends to any owner, trainer or rider of a horse in a race which is the subject of a Stewards' enquiry; a suspension following a contravention of a Rule in Part (B)4 or an objection under Rule (B)73.2; or any other person on whom any form of disciplinary penalty is imposed.
18. In addition, the BHA may investigate matters missed on the day, referring to the Disciplinary Panel if appropriate. Further, Stewards may decide that they cannot deal with a matter on the day. That may be for reasons of timing, complexity or because the possible sanction exceeds their powers, in which case they can also refer the matter<sup>20</sup>.
19. The BHA also has the power to correct a decision of the Stewards where they have failed accurately to apply any mandatory provision in the Rules<sup>21</sup>. A person affected by such a decision may, if he disagrees with it, apply for the matter to be referred to a Disciplinary Panel<sup>22</sup>. It has the further power, if it considers it appropriate, to cancel or reduce any decision of the Stewards<sup>23</sup>.

**C. BHA Disciplinary Bodies**

20. Paragraph 3.1.3 of my Terms of Reference requires consideration of changes to the structure, composition and processes of the BHA's Disciplinary Panel, Licensing Committee and Appeal Board to (in the first instance) ensure those functions "*remain legally robust and would withstand legal challenge*". That presupposes that they are legally robust and would presently withstand legal challenge (which I take to mean the

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<sup>19</sup> Rule (A)76

<sup>20</sup> Rule (B)16

<sup>21</sup> Rule (B)17.1

<sup>22</sup> Rule (B)17.2

<sup>23</sup> Rule (B)18

same thing). It is necessary first to consider that proposition. That requires some analysis of the relevant legal principles.

21. In subsequent chapters I look at the compositions and processes of the Disciplinary Panel (Chapter 7), Licensing Committee (Chapter 8) and Appeal Board (Chapter 9). At this stage it is useful to look at the BHA's disciplinary structure. This involves consideration of its component parts but not in the detail set out in subsequent Chapters.
22. I have included the Licensing Committee in this section because it is convenient to do so. I appreciate that licensing is not a disciplinary function.

(1) Disciplinary Panel

23. Article 47 of the BHA's Articles of Association provides that the BHA Board has a general power to delegate certain of their powers to a committee or committees consisting of one or more directors and/or to such other person or persons as it thinks fit. It delegates powers to, *inter alia*, its Disciplinary Panel, Appeal Board and Licensing Committee.
24. Rule (A)44.1 enables the BHA to "*make enquiry*" into any matter relating to racing, irrespective of whether it was considered by the Stewards and whether or not it was referred by the Stewards under Part (B)1, for the purpose of:
  - a. Establishing whether or not the Rules have been complied with;
  - b. Carrying out an investigation concerning a contravention of the Rules;
  - c. Determining any appeal made to it in accordance with Rules (A)76 to 82 and;
  - d. Otherwise discharging its functions<sup>24</sup>.

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<sup>24</sup> Rule (A)43

25. The BHA exercises this power by way of the Disciplinary Panel through the holding of enquiries. Schedule (A)6 contains the provisions about Disciplinary Panels which are convened to carry out such enquiries<sup>25</sup>. The Disciplinary Panel is a tribunal of both first instance and appeal.
26. An appeal from a Stewards' decision on the racecourse is initiated by service of a Notice of Appeal ('Notice') generally within seven days of the announcement of the decision, accompanied by a deposit of £110, £220, £250 or £500 as appropriate<sup>26</sup>. In limited circumstances the Notice must be served within 48 hours of the decision appealed against<sup>27</sup>. The Disciplinary Panel may confirm, reverse or otherwise vary the decision of the Stewards and exercise any of the BHA's powers under Part (A)6<sup>28</sup>. The matter is determined by way of a rehearing. Pending resolution of the appeal, any suspension imposed by the Stewards will not take effect<sup>29</sup>.
27. As I have observed, the Disciplinary Panel also conducts enquiries as a tribunal of first instance. Those may include referrals by Stewards or following investigations by the Integrity Team.
28. Proceedings before the Disciplinary Panel are conducted in accordance with Schedule (A)6<sup>30</sup>, subject to departure in special circumstances<sup>31</sup>. At the conclusion of an Enquiry and after deliberating, it will announce its decision. Where it is not convenient for summary reasons to accompany a decision, reasons should be provided within a reasonable time of the decision. The Rules state that they should be provided in writing if

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<sup>25</sup> Rule (A)44.3

<sup>26</sup> Rule (A)78.3

<sup>27</sup> Rule (A)78.1

<sup>28</sup> Rule (A)80.2

<sup>29</sup> Rule (A)81

<sup>30</sup> §4

<sup>31</sup> §6

requested by any person against whom disciplinary action is to be taken<sup>32</sup>.

29. In general, hearings are conducted in private. However, the BHA may decide that in relation to such types of matters as it may specify, an Enquiry may be conducted in the presence of representatives of the media<sup>33</sup>. The BHA has issued 'Press Guidelines for Open Enquiries', paragraph 2 of which states:

*"The enquiries and appeals which the press are able to attend relate to incidents which occur during the course of the race where the evidence is largely on camera, concerning such issues as interference, whip offences and improper riding, running and riding of horses, failure to obtain the best possible placing, including taking the wrong course, dropping hands, riding a finish a circuit too soon, mistaking the distance of the race etc. It is also likely to include hearings into issues relating to direction markers, bypassing, remounting and void races. Incidents which take place on the course before or after a race could also be included under the Rules above (e.g. improper riding on the way to the start)."*

30. Paragraph 3 of those Guidelines states that while there is a "presumption and expectation that the press will be admitted to all such enquiries", it is subject to the right of horses' connections, or others directly involved in the Enquiry, to submit written reasons in advance as to why they feel there are particular reasons for it to be a closed hearing.
31. In Chapter 7 I consider in more detail the convening and composition of the Disciplinary Panel and its Terms of Reference. I also make significant recommendations in relation to its future.

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<sup>32</sup> Schedule (A)6 §5.2

<sup>33</sup> Schedule (A)6 § 5.1

32. The presence of the press at enquiries – in the circumstances permitted by the Guidelines – was generally viewed positively by consultees. I have no recommendations to make concerning that aspect of the process.

(2) Licensing Committee

33. Licensing is at the heart of the BHA's regulatory function. The Licensing Team is directly responsible for licensing, permitting and registering those who participate in the sport. This includes owners, trainers (both licensed and permitted), jockeys, stable employees, amateur riders, jockeys' agents and valets.

34. The Rules set out the BHA's general powers as to licences, permits and registrations. The BHA may refuse or grant a licence, permit or registration unconditionally or subject to restrictions or conditions. It also has the power to withdraw, renew or refuse a licence, permit or registration, subject to referral to the Licensing Committee in certain circumstances<sup>34</sup>.

35. The current provisions in relation to the Licensing Committee are contained in Schedule (A)9 to the Rules. Matters come before the Licensing Committee in essentially two ways. First, the BHA may refer an application for a licence, permit or registration to the Licensing Committee. Under Schedule (A)9, Part 1, it must refer the application for a decision on its merits if it:

*"2.1.1 is minded to refuse the application or to attach conditions or restrictions to the licence, permit or registration on the ground that the applicant is not a suitable person,*

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<sup>34</sup> Rules (A)24 and (A)25

*2.1.2 is minded to refuse the application on the ground that such action is necessary in the interests of racing pending the outcome of an ongoing investigation or process (whether or not undertaken by the Authority), or 2.1.3 considers such a course to be otherwise appropriate.”*

36. Second, under Schedule (A)9 Part 2, an applicant whose application has been refused by the BHA (subject to exceptions) may submit their case for re-assessment by the Licensing Committee, subject to a screening requirement.
37. Schedule (A)9 also makes provision for the composition of the Licensing Committee. In considering and hearing applications it must consist of a minimum of three persons, one of whom shall, where appropriate, be a legally qualified person of a suitable standing. One must chair the hearing. That is subject to certain specified cases where it may act by a single person<sup>35</sup>.
38. The Terms of Reference for the Licensing Committee provide that the Committee members, including the Chairman, will be appointed by the Board<sup>36</sup>. They presently number six. Two of the Committee are lawyers and the remainder are Stewards.
39. The BHA may suspend or withdraw any licence or permit held by the “offender” (namely a person against whom the BHA is entitled to take disciplinary action for contravention of the Rules under Rule (A)53)<sup>37</sup>. Rule (A)63 empowers the BHA to suspend or withdraw any licence or permit granted to a person under the Rules if it considers that

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<sup>35</sup> Schedule (A)9 §25

<sup>36</sup> §2.1

<sup>37</sup> Rule (A)56

*“63.1.1 such action is necessary in the interests of racing, pending the outcome of an ongoing investigation or process (whether or not undertaken by the Authority), or*

*63.1.2 any other good cause is shown.”*

40. An appeal from a decision of the Licensing Committee is heard by the Appeal Board in the circumstances provided by Schedule (A)<sup>738</sup>. This provides that there shall be a right of appeal, so far as is relevant, from any decision:

*“12.2.1 to refuse or withdraw a licence or permit on the ground that a Person is not a suitable Person*

*12.2.1 to refuse a licence or permit on the ground that such action is necessary in the interest of racing, pending the outcome of an ongoing investigation or process (whether or not undertaken by the Authority)*

*12.2.2 to withdraw or suspend a licence or permit under Rule 63 or*

*12.2.3 to exercise the power of prohibition in Rule 65...”*

41. In Chapter 8 I consider in more detail its Terms of Reference, composition and make recommendations for its future.

(3) Appeal Board

42. The powers under Manual (A) Part 1 of the Rules, include the power to make provision for the BHA’s decisions to be reviewed by or appealed to the Appeal Board<sup>39</sup>. Appeal Boards are convened in accordance with Schedule (A)<sup>740</sup>.

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<sup>38</sup> §12

<sup>39</sup> Rule (A)83.1

<sup>40</sup> Rule (A)84

43. Decisions which are subject to appeal are set out in Schedule (A)<sup>741</sup>. Disciplinary Panel decisions on appeals from Stewards cannot be appealed to the Appeal Board<sup>42</sup>.

44. The grounds for bringing any appeal are:

*“14.1 that the reasons given are insufficient to support the decision,*

*14.2 that the hearing was conducted in a way that was substantially unfair and prejudicial to the appellant,*

*14.3 that there was insufficient material on the basis of which a reasonable decision maker could have made the decision in question,*

*14.4 that the decision maker*

*14.4.1 misconstrued,*

*14.4.2 failed to apply, or*

*14.4.3 wrongly applied,*

*these Rules, General Instructions or regulations which are relevant to the decision,*

*14.5 that any Disciplinary Penalty or award, order or other sanction is so disproportionate that no reasonable decision maker could have decided upon it, or*

*14.6 that there is evidence for the appeal which, had it been available at the original hearing, would have caused the decision maker to reach a materially different decision.”*

45. An appeal is initiated by service of a Notice of Appeal generally within seven days of the date of notification of the decision or written reasons,

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<sup>41</sup> §12.2, 12.3 and 12.5

<sup>42</sup> Schedule (A)7 §12.3.5

accompanied by a deposit of £800<sup>43</sup>. In limited circumstances the Notice must be served within 48 hours of the decision appealed against<sup>44</sup>.

46. Appeals are not conducted by way of a rehearing of the enquiry. Subject to one exception, an appeal is by way of a review of the decision on the documents, video evidence and submissions<sup>45</sup>. However, the exception is that the Appeal Board may receive new evidence in exceptional circumstances where:

*“22.3.1 it is satisfied with the reason given as to why it was not, or could not reasonably have been, obtained and presented at the original hearing, and 22.3.2 it is satisfied that the evidence is cogent and might reasonably have caused the decision maker to reach a different conclusion.”*<sup>46</sup>

47. As with Disciplinary Panel hearings, hearings before the Appeal Board are private subject to the presence of the media in circumstances identified in paragraphs 29 and 30 hereof. Subject to the Appeal Board deciding to the contrary, they are conducted in accordance with the procedure set out in Schedule (A)<sup>747</sup>.

48. Pursuant to Schedule (A)7 the Appeal Board “*should*” allow an appeal:

*“29.1 if satisfied that one or more of the grounds in Paragraph 14 have been made out and it would be unfair to allow the decision to stand, or 29.2 where new evidence has been presented on the appeal and the Appeal Board is satisfied in the light of that evidence that the decision was wrong.”*<sup>48</sup>

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<sup>43</sup> Schedule (A)7 §16

<sup>44</sup> Schedule (A)7 §16.1.2

<sup>45</sup> Schedule (A)7 §21.1

<sup>46</sup> Schedule (A)7 §22.3

<sup>47</sup> §26.4

<sup>48</sup> §29

49. The Appeal Board has extensive powers. In addition to allowing or dismissing an appeal, it may exercise any power which the original decision maker could have exercised (save for limited exceptions); remit the matter for re-hearing; order forfeiture or return of deposit; and/or increase or decrease a disciplinary penalty or award<sup>49</sup>. It may also make a costs order<sup>50</sup>.
50. The Rules provide for a written statement of the decision as soon as practicable after the hearing<sup>51</sup>. If requested by any party the Appeal Board shall give written reasons<sup>52</sup>.
51. In Chapter 9 I consider in more detail its Terms of Reference, convening and composition of the Appeal Board, its power to receive further evidence; the deposit; and its decisions. I also make recommendations in relation to its future.

**C. Legality of the Disciplinary Process**

52. The issue of the lawfulness of the BHA's disciplinary structure is not new. Previous Reviews have looked at the legality of its disciplinary process. The Appeal Board has examined it and there are relevant High Court and Court of Appeal decisions to be considered.

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<sup>49</sup> Schedule (A)7 §30

<sup>50</sup> Schedule (A)7 §33

<sup>51</sup> Schedule (A)7 §34.1

<sup>52</sup> Schedule (A)7 §35.1

(1) Previous Reviews

*The 2008 Neville Review*

53. In October 2007 Dame Elizabeth Neville QPM was commissioned by the BHA to conduct an “Independent Review” (‘the *Neville Review*’). The Terms of Reference of that Review were:

- a. To carry out a Post Implementation Review of the Recommendations of the 2003 Security Review with a view to assessing how such measures have protected the integrity of racing.
- b. Identify areas for development to improve the BHA’s role in protecting the integrity of racing.
- c. Review relevant Rules and penalties connected with integrity issues.
- d. Assess the role and procedures that racing and sports governing bodies should adopt when dealing with matters that may involve breaches of the criminal law as well as its own rules in relation to corruption connected with betting
- e. To consider all of the above in the light of the proceedings against Messrs Rodgers, Fallon, Williams and Lynch (*The City of London* proceedings).

54. The *Neville Review* looked at the BHA’s disciplinary process. That included consideration of the BHA’s “*judicial organs*”, which concluded thus:

*“The Review Team considers that the judicial organs of the BHA, being the Disciplinary Panel and the Appeal Board, are appropriately independent of the other regulatory organs of the BHA. The processes in themselves are clearly fair. The Review Team also considers that the Disciplinary Panel and Appeal Board are appropriately staffed by people with breadth of experience of horseracing and by lawyers of the highest calibre. Therefore, on a structural level, we have no recommendations to make about the composition of either panel.”*

55. Its “one concern” related to the Disciplinary Panel’s case management in the most complex cases. Its Recommendation 8 included a suggested amendment of the procedures in Appendix S of the Rules to reflect revised processes for case management. I too have recommendations to make in that respect.

*2016 Integrity Review*

56. The Integrity Review had this to say about the disciplinary process under the heading of “fairness”:

*“One of the main areas of focus in the responses to questions could be broadly described as the “fairness” of the overall investigative and disciplinary process. These views were wide-ranging, and referred to a number of different elements within those processes, and in some cases also touch on the licence application process. A handful of knowledgeable and influential respondents have suggested that there are significant deficiencies in the system. With respect to that point of view, the Review Team, reinforced by comments from a significant number of respondents, is of the opinion that the basic overall system is sound and withstands legal scrutiny (as recognised by the High Court), but issues regarding confidence and execution in certain cases have been legitimately raised and must be addressed.”<sup>53</sup> [emphasis added]*

57. As the Integrity Review team commented (see emphasis above) the basic overall system (which I take to mean the disciplinary structure) has withstood “legal scrutiny”. I have examined that assertion.

58. The *Neville Review* was published on 13 May 2008. Jurisprudence has moved on. It predates (for example) the decision in *R (on the application*

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<sup>53</sup> §3.1 Themes and Recommendations (Fairness)

*of Kaur) v Institute of Legal Executives Appeal Tribunal and another*<sup>54</sup>. Further, neither the *Neville Review* nor the *2016 Integrity Review* were directly concerned with carrying out a detailed analysis of the disciplinary structure and certainly not pronouncing a definitive view on its legality.

59. I have considered the structure afresh, in light of contemporary understanding and jurisprudence and reached my own conclusions.

(2) Jurisprudence

*Graham Bradley v The Jockey Club*

60. I start with The Jockey Club Appeal Board's decisions in *Graham Bradley v The Jockey Club* [2003] ISLR-SLR 71. In November 2002 The Jockey Club Disciplinary Committee found him to be in breach of several of its Rules and penalised him accordingly. At that time The Jockey Club exercised the disciplinary function. He appealed.

61. The Chairman of the Appeal Board was Sir Edward Cazalet, a retired High Court Judge. Each set of written reasons is (as one might expect) of the highest standard. The Appeal Board considered and applied domestic and European Court of Human Rights authorities on Article 6<sup>55</sup>. The reasons disclose argument of a similarly high quality. For present purposes, I need consider only the decision and reasons on the preliminary points.

62. At the first stage the Appeal Board was concerned solely with what it called the "*legality appeal*". It is unnecessary to go into the facts. Graham

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<sup>54</sup> [2012] 1 All ER 2435

<sup>55</sup> *Le Compte, Van Leuden and De Meyere v Belgium* (1981) 4 EHRR 1; *Stefan v United Kingdom* (1997) 25 EHRR CD 130; *Wickramsinghe v United Kingdom* (1988) EHRLR 338; *R (Alconbury Developments) v Secretary of State for the Environment* [2001] 2 WLR 1389; *Porter v Magill* [2001] UKHL 67; *R v Dorset County Council ex p Beeson* [2002] EWCA Civ 1812; and *Colgan v The Kennel Club* 26 October 2011, Cooke J

Bradley challenged, on two grounds, the legality of the disciplinary process through a lack of appearance of independence and impartiality as well as there being objectively a real possibility of bias on behalf of both the Disciplinary Committee (as it was then called) and the Appeal Board itself. He argued further that the proceedings against him by The Jockey Club failed to comply with Article 6(1) of the European Convention on Human Rights ('the Convention'). The Jockey Club accepted that Article 6(1) of the Convention applied to the disciplinary process.

63. One of his complaints was that the members of the Disciplinary Committee and the Appeal Board were too closely connected with The Jockey Club. At that time the Disciplinary Committee consisted only of Stewards, who were also members of The Jockey Club. That is somewhat removed from the present day composition, where external lawyers are able to chair. The Appeal Board comprised Stewards but was chaired by an external lawyer.
64. *Graham Bradley* failed on each of his preliminary points. The Appeal Board recognised the separation of the functions of the members of the disciplinary bodies from The Jockey Club's executive functions. The Jockey Club conceded that applying the observer test, there was a lack of an appearance of independence of the Disciplinary Committee within the meaning of Article 6(1), which states:

*"In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice."*

65. However, the Appeal Board concluded – for the detailed reasons it gave – that to the independent observer the Disciplinary Committee would have a sufficient appearance of impartiality. It further concluded that the Appeal Board would – to the independent observer – have a sufficient appearance of independence and impartiality. It also dismissed a possibility of bias (at common law) argument and also the complaint of actual bias. In reaching its conclusions the Appeal Board reviewed all of the relevant authorities. Notwithstanding The Jockey Club’s concession in respect of the Disciplinary Committee, the Appeal Board found that the overall process was Article 6(1) compliant and fair.
66. Graham Bradley was similarly unsuccessful in his substantive appeal. His appeal against penalty was allowed to the extent that his disqualification was reduced from eight years to five years.
67. He appealed to the High Court and thereafter the Court of Appeal. Those decisions were two of a number I considered involving The Jockey Club and the successor regulatory bodies. On this specific topic, and for the sake of completeness, they were:
- a. *Graham Bradley v The Jockey Club* [2004] EWHC 2164 QB; upheld on appeal [2004] EWCA Civ 1056
  - b. *William Mullins v The Appeal Board of The Jockey Club and The Jockey Club*, [2005] EWHC 2197 (Admin)
  - c. *William Mullins v (1) Nigel McFarlane (2) The Jockey Club*, [2006] EWHC 986 (QB)
  - d. *Kieren Fallon v Horseracing Regulatory Authority* [2006] EWHC 2030 (QB)
  - e. *McKeown v British Horseracing Authority* [2010] EWHC 508 (QB)
68. Before the High Court and the Court of Appeal Graham Bradley did not challenge the legality of The Jockey Club’s disciplinary process. In those proceedings he challenged the imposition of the penalty contending that it was disproportionate and unlawful.

69. William Mullins did not challenge the legality of the disciplinary process, but took a procedural point and then sought a declaration that the disqualification of the winning horse was wrong.
70. In the High Court Kieren Fallon challenged the HRA Disciplinary Panel's decision, upheld by its Appeal Board, to prohibit him from riding under Rules in Great Britain until the conclusion of criminal proceedings for conspiracy to defraud. It was the collapse of the criminal prosecution of him (and others) that led to the additional aspects of the *Neville Review*. There was no challenge to the legality or fairness of the HRA's disciplinary process *per se*.
71. Dean McKeown criticised and challenged in the High Court the findings of fact and conclusions of the HRA's Disciplinary Panel and Appeal Board. He did not challenge the legality or fairness of the HRA's disciplinary process. He did run an argument of actual or apparent bias but it was based (it seems) on the alleged perversity of the facts found and then upheld rather than the composition of the disciplinary bodies and/or the process. Of note, the High Court (Stadlen J) ruled that the Appeal Board should have remitted the matter to the Disciplinary Panel in light of the agreed fact that the Panel had proceeded on an incorrect factual basis.
72. I have not had brought to my attention nor have I found any decision of the High Court or above where the legality of the disciplinary process has been challenged. Its decisions have been subjected to "*legal scrutiny*" by the High Court and above. One might say that by implication so have its procedures. However, in my view that is different from there having been a direct challenge to, or scrutiny of, the legality of the disciplinary process.

## D. Legal Principles

### (1) Introduction

73. This is not the place for a treatise on the law. At this stage I have sought to express general principles I anticipate are not controversial.
74. The BHA is not a public body for the purposes of judicial review. The same applies to the Disciplinary Panel and Appeal Board and also the Licensing Committee. It and their decisions are not susceptible to that form of relief. Its control over the sport means that the BHA's regulatory actions (including those of its disciplinary bodies and the Licensing Committee) are subject to the supervisory jurisdiction of the High Court.
75. The Appeal Board was part of The Jockey Club's response to the coming into force of the Human Rights Act 1998. In *Mullins* the High Court (Burnton J) concluded that The Jockey Club and its Appeal Board were not "public authorities". That does not matter for the purposes of this Review. The Jockey Club accepted in *Bradley* that Article 6(1) of the Convention applied to its disciplinary process. Further, courts are "*public authorities*" and so are obliged to ensure Article 6 is complied with<sup>56</sup>. Article 6(1) principles will be the standard against which the BHA's procedures and decisions are judged.
76. A sports governing body, in this instance the BHA, must act according to law. In carrying out its regulatory tasks, including the disciplinary functions, it (and its disciplinary bodies) must act lawfully. They must exercise their functions lawfully. That means
- a. They must act in accordance with the sport's own rules and regulations.

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<sup>56</sup> *Stretford v The FA* [2006] EWHC 479 Ch 17, §33

- b. They must act fairly, in a procedural sense and in accordance with the rules of natural justice.
  - c. They must act non-arbitrarily.
  - d. They must not act unreasonably, irrationally or perversely.
77. In the context of disciplinary bodies, the requirement to act with procedural fairness and according to the rules of natural justice, has given rise to much debate. Sports governing bodies and their disciplinary tribunals are obliged to have a fair disciplinary process<sup>57</sup>.
78. What do these laudable propositions mean? Once more, general principles. The participant must have an appropriate opportunity to be heard. Any burden and standard of proof placed upon the participants must be fair. The governing body and its disciplinary bodies must act in good faith. The tribunal must make an objective determination of the issues without partiality or prejudice in favour of or against any party<sup>58</sup>.
79. The tribunal must not have the appearance of bias. In any case the question is whether a *“fair minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased”*<sup>59</sup>.
80. The test for apparent bias involves a two-stage process. First, the tribunal must ascertain all the circumstances that might have a bearing on the suggestion that the tribunal is (or was) biased. The relevant circumstances are those apparent on investigation; they are not restricted to the circumstances available to the hypothetical observer at the original hearing<sup>60</sup>.

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<sup>57</sup> See for example *Bradley; Colgan v Kennel Club*, 26 October 2001 Cooke J; *Modahl v BAF* [2001] EWCA Civ 1447, [2002] 1 WLR 1992

<sup>58</sup> *Re Medicaments and Related Classes Goods (No 2)* [2001] 1 WLR 700

<sup>59</sup> *Porter v Magill* [2001] UKHL 67, [2002] AC 357

<sup>60</sup> *Modahl v BAF* [2002] 1 WLR 1192

81. In the context of sport, the relevant circumstances include:
- a. The fact that a sports disciplinary body is or may be exercising a domestic contractually based jurisdiction (and not a court of law);
  - b. It owes obligations to all its participants;
  - c. It is conducting an inquisitorial process; and
  - d. That the decision-makers are expert in the sport<sup>61</sup>.
82. Second, the tribunal must ask itself whether those circumstances would lead a fair minded and informed observer to conclude that there was a real possibility that the tribunal was biased. Bias means a predisposition or prejudice against one party's case or an issue for reasons unconnected with the merits of the issue.
83. At this stage it will suffice to note that the "*fair minded and informed observer*" takes a balanced approach, understanding the context and weighing the arguments of both sides. Article 6(1) requires that a tribunal determining civil rights and obligations must be independent. That is closely linked to but different from impartiality:

*"Impartiality is the tribunal's approach to deciding the cases before it. Independence is the structural or institutional framework which secures this impartiality, not only in the minds of the tribunal members but also in the perception of the public."*<sup>62</sup>

84. In the context of the BHA, the Disciplinary Panel and the Appeal Board are the 'structure' of the BHA's disciplinary process. It is in this context that one looks at the composition of a tribunal. That is especially relevant to this Review.

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<sup>61</sup> Lewis and Taylor Sport: Law and Practice, Third Edition (2014): D2.79 - Footnote (1)

<sup>62</sup> *Gillies v Secretary of State for Work and Pensions* [2006] UKHL 2

(2) The BHA's Disciplinary Structure

85. It is the fairness of the procedure as a whole that must be assessed<sup>63</sup>. If one identified any particular issue at an individual stage of the BHA's structure, one must then step back and evaluate the process as a whole.
86. The Terms of Reference require me to consider each disciplinary body on an individual basis. In doing so I am bound to consider its 'legality'. Further, if each is compliant then the whole is sound. If there is or may be an issue or issues with any aspect of the individual bodies then I shall need to consider what effect (if any) that has on the fairness of the process as whole. Therefore, I have not expressed a view as to the legality of the process at this stage. I do so in Chapter 9, Appeal Board.

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<sup>63</sup> See for example *Calvin v Carr & Others* [1980] AC 574; *Modahl v BAF* [2001] EWCA Civ 1447, [2002] 1 WLR (1992)

## **7. DISCIPLINARY PANEL**

### **A. Introduction**

#### **(1) Summary**

1. This is the area of the disciplinary structure about which most concern was expressed by consultees. That concern was not universal but it is undoubtedly the case that the low level of confidence in the disciplinary structure expressed by a few consultees derives from the workings of the Disciplinary Panel. This is not new nor should it necessarily come as a surprise. The *2016 Integrity Review* commented:

*“One of the most significant concerns for one particular section of the sport relates to the Disciplinary Panel, and specifically its composition and its approach. Respondents stopped short of suggesting any actual unfairness in the process but expressed a strong belief that there is a perception of unfairness and bias towards the BHA, along with concerns about the composition and approach of Disciplinary Panels. This has led to a lack of confidence in the disciplinary process in some quarters. The Review Team notes that this criticism is not universal, and it has certainly not identified any evidence of actual unfairness or prejudice occurring, and is satisfied that the Disciplinary Panel, its structure, and the way it operates, stands up to legal scrutiny.”<sup>64</sup>*

2. A few of my consultees were clear in their expressed view that the Disciplinary Panel was not perceived as being independent of the BHA. That perception emanates mainly, they suggest, from its composition; the conduct of some hearings; its decisions and written reasons; and its refusal (as it was put) to criticise the BHA, its employees, officers or others affiliated to it where such is objectively merited. There are also

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<sup>64</sup> §3.7

issues relating to some of the processes of the Disciplinary Panel such as case management and with disclosure.

3. In the preceding Chapter I touched on the *2016 Integrity Review's* conclusion that it was “...satisfied that the Disciplinary Panel, its structure, and the way it operates, stands up to legal scrutiny”<sup>65</sup>. It is right to see that in proper context. In the very next paragraph it noted “how important it is that the industry has confidence in all aspects of the disciplinary process”<sup>66</sup> and then made the recommendation that accelerated this Review. So it might be summarised thus: the Disciplinary Panel is legally sound but it needs to be reviewed urgently in light of industry confidence.

(2) Present arrangements

4. At the time the Review commenced the BHA Disciplinary Panel comprised 11 members. Of those 11, nine were racecourse Stewards and two external lawyers. Following and in light of the Appeal Board’s decision in *Best* the BHA announced publically (on 1 June 2016) that certain procedural matters in respect of the Disciplinary Panel would change in a number of material respects. Those new arrangements would remain in place thereafter until the BHA had considered the recommendations in this Review.
5. In this Review I have considered the arrangements as they were before Appeal Board’s decision in *Best* and so all references to the present arguments should be read accordingly.

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<sup>65</sup> §3.7, emphasis added

<sup>66</sup> §3.8

**B. The Disciplinary Panel's Terms of Reference**

6. I have summarised in the preceding Chapter some of the work of the Disciplinary Panel. Its Terms of Reference state its "Purpose" to be:

1.1 *To hold Disciplinary Enquiries under the 'Rules of Racing' and, where appropriate, to impose penalties as provided for in the 'Rules of Racing'.*

1.2 *To hear appeals to the Authority from Stewards' decisions.*

1.3 *To consider applications that a suspension imposed by a Recognised Racing Authority should not have an effect under these Rules.*

1.4 *To consider applications that decisions taken by an employee of the Authority or the Authority should not take effect under the Rules of Racing.*

1.5 *To consider applications where the Authority has corrected a decision of the Stewards because the Stewards have failed to accurately apply any mandatory provision of the Rules.*

1.6 *To consider applications by disqualified persons to be employed in a racing stable.*

1.7 *To follow the provisions for Disciplinary Enquiries set out in Schedule (A)6 to the Rules.*

7. There is an issue. The Terms of Reference state:

*"The Chairman and Members of the Disciplinary Panel shall be guided by the Board."<sup>67</sup>*

8. The Appeal Board is not so constrained. That expression is not defined. I do not know what it means or why it is there. It appears to permit the Board unfettered right or power to guide the Panel on policy, approach generally or even in relation to a specific case or cases or decision.

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<sup>67</sup> §7.1

9. I spoke to all but one of the present Disciplinary Panel. I accept that they regard themselves as independent of the BHA. They would and did point to a number of their decisions, some high profile, where they have found against the BHA. Not one of them said the Board had or had even tried to guide them on any matter. Since 2011 the Disciplinary Panel has upheld 48 of 103 appeals from racecourse decisions (either in whole or in part).
10. I am equally confident that they *act* independently of the BHA. By “act” I mean that they think, and decide cases, for themselves, on their individual merits, objectively.
11. However, in a strict legal sense, in my opinion this Term means the Disciplinary Panel is unlikely to be considered technically independent at common law and for the purposes of Article 6. I say that because of its potential for use rather than its actual use. Consistent with my expressed conclusion that the Disciplinary Panel should be structurally independent of the BHA, I recommend that the said Term should be removed.
12. **R1: The Disciplinary Panel/Licensing Committee’s<sup>68</sup> Terms of Reference should be amended to remove the following term: The Chairman and Members of the Disciplinary Panel/Licensing Committee shall be guided by the Board.**

**C. The Disciplinary Panel’s Position in the BHA Corporate Structure**

(1) The Executive Management Team

13. In the BHA’s corporate structure the Disciplinary Panel is a committee which sits under the Board. The Appeal Board and Licensing Committee are separate committees, also under the Board. The Disciplinary Panel

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<sup>68</sup> See Chapter 8. The same issue arises in respect of the Licensing Committee’s Terms of Reference.

and the Appeal Board share a Secretary. She reports to the Director of Raceday Operations and Regulation ('DROR').

14. The DROR is one of the team of BHA Directors accountable to the Chief Executive. He provides strategic leadership on all raceday operations and raceday regulatory matters. His responsibilities are wide and include responsibility for the Rules, stewarding, equine health and welfare, racecourse licensing and standards, medical, and raceday teams. He is a member of the Executive Team.
15. One of his core responsibilities is the Disciplinary Panel and Appeal Board. It is his responsibility to
  - a. Ensure that systems and procedures are in place and carried out to ensure the fairness of hearings by Disciplinary Panels and Appeal Boards. As such he is responsible for recommending the appointment of suitably qualified individuals to Panels and Appeal Boards, and the effective separation of functions within the BHA.
  - b. Further, he must oversee the support to Disciplinary Panels and Appeal Boards as required.
16. It is also relevant to mention in this context the Stewarding and Disciplinary Policy Committee. According to its Terms of Reference its purpose is:

*"To consider and report to the Board on all policies and procedures pertaining to Stewarding and Disciplinary matters under the Rules and where appropriate to make recommendations to the Board."*
17. The Terms of Reference state that membership of the Committee shall include a Chairman appointed by the Board, the DROR, the Head of Stewarding, and other individuals as may be appointed by the Board. Therefore the present members of the Committee include the DROR. So it is that he has an input into disciplinary matters in that context also. There

is the added complication of his presence at the Disciplinary Panel meetings, examined in Chapter 10 (with additional recommendations in that regard).

(2) The Disciplinary Panel

18. Schedule (A)6 provides:

*“The members of any Disciplinary Panel empanelled to conduct an enquiry will in normal circumstances be selected by the Director of Raceday Operations and Regulation in consultation with the Chairman, or in his absence, the Deputy Chairman of the panel.”<sup>69</sup>*

19. Therefore pursuant to the Rules the DROR is:

- a. Ultimately responsible for the appointment of Stewards.
- b. Responsible for recommending the appointment of Stewards to the Disciplinary Panel.
- c. Responsible for selecting and appointing a Disciplinary Panel to conduct an enquiry.

20. Therefore Stewards who form part of the Disciplinary Panel and Appeal Board<sup>70</sup> fall under the control of the Head of Stewarding who in turn is answerable to the DROR. There is an obvious tension so far as the Disciplinary Panel is concerned. He leads the Stewards who referee the sport. Their decisions have the potential to, and many do, come before a body (the Disciplinary Panel) for which he is also responsible.

21. There is a further issue. Under the Rules the DROR is also responsible for appointing the individual Disciplinary Panels<sup>71</sup>. The DROR and the Secretary both told me that this responsibility has been delegated to the

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<sup>69</sup> §2.1

<sup>70</sup> There are Active Stewards on the Appeal Board.

<sup>71</sup> Schedule (A)6 §2.1

Secretary. She prepares the roster and appoints members to conduct enquiries. She also decides which enquiries require a legal chairman and appoints accordingly. A great deal of responsibility is vested in her.

22. However, whatever the day-to-day reality the Rules – as drafted - provide a further legal issue so far as structural independence is concerned. The overarching role of the DROR is a structural issue which I have concluded needs to be addressed. Severing it is important in creating the structural independence I think is desirable. I want to emphasise that none of this is a comment on the present DROR. These issues and my recommendations relate solely to the role, not the individual.
23. The role of the DROR in relation to the Disciplinary Panel should change. He should no longer have any role in the selection process. So far as his other duties are concerned we need to look at the role of the Disciplinary Panel Chairman, as presently drawn and going forward.

(3) The Chairman of the Disciplinary Panel

24. Schedule (A)6 paragraph 3 provides:

*“Role of the Chairman*

*3.1 Each Disciplinary Panel shall have a Chairman who shall be selected in such manner as the Authority may from time to time decide.*

*3.2 Where the notification of charges includes a statement to the effect that the Authority considers the matter suitable for a preliminary hearing*

*3.2.1 such a hearing will be held unless the Chairman decides otherwise, and*

*3.2.2 it will normally be held on the first Thursday after the expiry of 28 days from notification of the charges.*

*3.3 The Chairman shall give such directions as he considers appropriate for the purpose of ensuring a fair and expeditious conduct of the proceedings.”*

25. That provision addresses the role of an enquiry chairman. It does not purport to address the role of the Panel Chairman. There are no Rules which deal with that larger role. That is to be compared with the Appeal Board Chairman, who enjoys autonomy not available to the Disciplinary Panel Chairman. By way of example once an appeal notice is received, it is the Chairman's responsibility to convene the Appeal Board<sup>72</sup>.

(4) Discussion

26. It is useful to look at the disciplinary structures in other sports. By way of example:

- a. The Rugby Football Union ('RFU') has a structurally independent judicial panel under its Independent Head of Judiciary.
- b. The Rugby Football League ('RFL') appoints independent members to an Operational Rules Tribunal Panel, from which Panel Members are selected by an Operations Director. The selection process is kept entirely separate from the apparatus of the Governing Body.
- c. The Football Association ('The FA') delegates its judicial powers to its Judicial Panel, which appoints a Chairman from its members. The Chairman of the Judicial Panel with the Football Regulatory Authority (a division of The FA which performs the regulatory, disciplinary and rule-making functions in relation to the game) appoints the members of the Judicial Panel.
- d. The England and Wales Cricket ('ECB') delegates its judicial powers to the Cricket Discipline Commission ('CDC'). The CDC members (stakeholder representatives, including umpires, Professional Cricketers' Association ('PCA') and the MCC) select a Chairman. CDC members are appointed through approval by existing members.
- e. British Swimming delegates responsibility for the management of its judicial system to the Judicial Commissioner assisted by the Officer of Judicial Administration. If there is a disciplinary hearing, then it is

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<sup>72</sup> Schedule (A)7 §17

heard by the Disciplinary Committee. The Committee comprises three people selected from the 12 Disciplinary Panel members.

27. In the new structure I envisage, the role of the Disciplinary Panel Chairman would need to be recast. I would recommend an enhanced role for that Chairman. He becomes what I have called 'the Judicial Panel Chairman'. So far as the Disciplinary Panel is concerned, it should be a role that includes the following responsibilities:
  - a. Chairing enquiries, if the need arises;
  - b. Selecting chairmen and panel members to conduct enquiries; and
  - c. Chairing the Appointments Committee.
  
28. He would also have responsibility for overseeing training as and when necessary or appropriate. I have kept separate the panels from which Disciplinary Panel and Appeal Board members are drawn.
  
29. My recommendation of an enhanced Chairman's role drew a positive reaction from many of our consultees. No one, including the present Disciplinary Panel Chairman thought it undesirable. As for the necessary skills and experience for a person in that role I would suggest they might include:
  - a. An in-depth knowledge and appreciation of horseracing and of its disciplinary procedures.
  - b. A distinguished senior legal practitioner of at least 15 years' qualification, with judicial experience, or a serving or retired judge.
  - c. An ability to demonstrate leadership.
  
30. He should also be someone independent of the BHA. For example, the provisions stipulated in respect of the present Appeal Board Chairman's Panel would apply also to him. He must:
  - a. Not have been the holder of a licence or permit granted by the BHA (whether as rider or trainer) within the previous 5 years;
  - b. Not be a Steward;

- c. Not be a director of, or employed by, the BHA<sup>73</sup>.
31. As with the members, I see no reason why the Judicial Panel Chairman could not be remunerated. He would not be an employee. I do not see it as a full-time role. His point of contact within the BHA would be the Chief Executive.
32. Once more, I emphasise that none of this is a criticism of the present incumbent. Rather I see this as a transformed role going forward necessitating legal qualification to complement the deep knowledge of racing and other skills and qualities the present Chairman has.
33. The effect will be to remove the Disciplinary Panel responsibilities from the DROR. For example, he will no longer have a role in selecting those who sit in judgment on appeals from the Stewards whose appointment he oversees and for whom he has ultimate responsibility.
34. At Appendix E I have formulated a diagrammatic representation of how the structure might look.
35. It would have this consequence for the present Secretary. In my suggested system she would no longer report to the DROR. That further severs the link between the DROR and the Disciplinary Panel. In my diagram she supports and assists the Judicial Panel Chairman and the Disciplinary Panel, Licensing Committee and Appeal Board. She reports to an appropriate member of the BHA Executive Team.
36. I have concluded this is a desirable step to improve confidence in the overall disciplinary process. It is part of the package of recommendations introducing structural independence at this stage to complement that at Appeal Board level.

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<sup>73</sup> Schedule (A)7 §2.3

37. As will be apparent, the Judicial Panel Chairman is the head of the new independent 'horseracing judiciary'. He becomes responsible for the entire 'judicial team'. He can perform the same appointment, training and selection duties in respect thereof. It provides that body with a proper and identifiable leader, and is the link into the BHA. Plainly he will not select an Appeal Board where he has chaired the Disciplinary Panel hearing from which the appeal comes. In such circumstances, he would delegate this role to the Deputy Judicial Panel Chairman<sup>74</sup>.
38. The Appeal Board remains separate, though under the leadership of the Judicial Panel Chairman. On balance there is merit in maintaining its separation from the Disciplinary Panel. Save for the Judicial Panel Chairman there should be a clearly delineated Appeal Board: as presently, its members will not sit on the Disciplinary Panel. This ensures the composition of each is not interchangeable.

(5) Recommendations

39. I recommend as follows:

**R2: The DROR should no longer have responsibility for the Disciplinary Panel and Appeal Board. This role should be assumed by a newly appointed Judicial Panel Chairman, who shall also have responsibility for the Licensing Committee.**

**R3: In order to give effect to R2, the Judicial Panel Chairman should have an enhanced leadership role and responsibilities.**

**R4: The Secretary to the Disciplinary Panel and Appeal Board should no longer report to the DROR and instead report to an appropriate member of the Executive Team.**

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<sup>74</sup> See Chapter 9

**D. Appointment and Terms**

(1) Method of Appointment to the Panel

*Process*

40. In this context I am referring to the 11 person Disciplinary Panel and not individual Panels convened for hearings. For ease of reference, I shall call it the 'Panel'.
41. The BHA Board appoints members to the Panel<sup>75</sup>. One of the first matters I asked of the BHA was the process by which members were appointed to the pool. That gap in my knowledge was shared by many of my consultees, some of whom I might have expected to know. That reflects the reality that it is not widely known. Insofar as there is a procedure, it is not set down in the Rules or elsewhere. That is why (I suspect) it is not widely known. Plainly it is not transparent. There is no competition as such for membership nor is there a formal (in the sense of being committed to writing) application procedure.
42. I did not discern any set appointment procedure for the initial appointment of the two lawyers external to the BHA: Matthew Lohn and Timothy Charlton QC<sup>76</sup>. Each has been a Chairman since being appointed by the Board in 2004. They have been approved by the Board to chair 'Disciplinary Enquiries'.
43. Both of the lawyers were approached by the regulator and invited to become members. They were no doubt approached because of their professional and other qualities, relevant knowledge and experience.

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<sup>75</sup> §2.3 Terms of Reference

<sup>76</sup> A third member is a Steward but also a retired Circuit and Deputy High Court Judge.

They have remained on the Panel without interruption ever since, reappointed upon the expiry of their successive three-year Terms.

44. The nine other members are all Stewards. For them there is an appointment process, but not one committed to writing. Each is a racecourse Steward as well as a member of the Panel. They are all Honorary Stewards, also known as Local Stewards. They are appointed by the BHA to steward on racecourses. Only Honorary Stewards sit on the Disciplinary Panel. Stipendiary Stewards, employed by the BHA, do not.
45. I was told that each Steward on the Panel was approached by the BHA and invited to become a member of the Panel. They are approached when there is a vacancy on the Panel; the Terms of Reference require there to be at least 11 members<sup>77</sup>. The approach comes following consultation between the Chairman of the Disciplinary Panel and the DROR. The latter is involved because he (ultimately) is responsible for Stewards, including Honorary Stewards. He has input because the Stewards are selected (I was told) on merit, based on their performance as a racecourse Steward and other relevant qualities. Each is an experienced racecourse Steward, though in practice there is no required minimum period of service in such capacity. Input is also sought and received from the Stewarding and Disciplinary Policy Committee.
46. Thereafter a recommendation is made to the Board, which is free to act upon it or otherwise. I was told that it is not an exercise in 'rubber-stamping'. On occasions the Board has not approved such recommendations.
47. Each is appointed for a three-year term. I was told that reappointment of the lawyers (and indeed the Stewards) follows a similar process.

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<sup>77</sup> §2.3

### *Discussion*

48. Discipline is an integral part of the BHA's role as the regulator. A part of that is appointing the members of the Disciplinary Panel and Appeal Board. However it is the process which has exercised me. At present it is opaque and not formalised; it might be said to be organic.
49. It is of course not uncommon for sports governing bodies to appoint their disciplinary members. They are often best placed to do it, knowing the qualities, skills, experience and knowledge they seek and require. They will also be well placed to assess the merits of candidates from within the sport. There is no legal bar to doing so.
50. However, other governing bodies delegate it or a part of it, to individuals, bodies or committees either within or without the sport, dedicated to that task.
  - a. The RFU Rules provide for the appointment of an Independent Head of Judiciary (presently a High Court Judge) who then invites (through an open competition) applications to join its National (judiciary) Panel<sup>78</sup>. Thereafter the Head of Judiciary appoints to that Panel.
  - b. British Swimming appoints members of its Disciplinary Panel through a Judicial Appointments Committee. An independent Judicial Commissioner with the assistance of the Chairman of the Disciplinary Panel then appoints Panel members to sit on Disciplinary Committees.
  - c. The FA delegates its judicial powers to its Judicial Panel which appoints a Chairman from its members. The Chairman of the Judicial Panel together with the Football Regulatory Authority appoints the members of the Judicial Panel. There are specific arrangements for appeals.

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<sup>78</sup> RFU Regulation 19.1.16 and 19.2.4

- d. The ECB delegates its judicial powers to the CDC. The CDC members (stakeholder representatives such as umpires, PCA and the MCC) select a Chairman. CDC members are appointed through approval by existing members.
51. There are good reasons for doing so. It clearly separates that part of the process from the other regulatory responsibilities of the governing body, particularly investigatory and prosecutorial functions. It also provides for clearly understood lines of responsibility and transparency of procedure and of process.
52. If my recommendations are substantially implemented then the BHA will need to consider the process for selection and appointment of the Panel. Going forward I would commend an open transparent competition. The virtues of doing so are obvious.
53. That is not to say that the process adopted hitherto has resulted in people being appointed who ought not to have been. Nor does it mean that more suitable and able people could or would have been appointed. What an open competition brings is transparency: participants can see how and why individuals have been appointed. It creates competition. It enables those meritorious candidates who would not otherwise be considered, to apply. It is the process used in many disciplinary systems, for example for the appointment of Recorders, Queen's Counsel and Judges.
54. Naturally, I have considered the disadvantages of such an approach. I recognise that there will be resource implications, in terms of people, cost and time. I suspect people neither qualified nor suitable will apply. They can be sifted out. It will take time. The criteria for candidates will have to be drawn up. That should not be too onerous a task. As a starting point the BHA will know the qualities, qualifications and experience it has been applying in the selection of members hitherto.

55. As for the process, my observations in this regard need to be seen in the context of my recommendations overall, especially for the enhanced Chairman's role.

(2) Terms of Appointment

56. I have seen a copy of a member's letter of appointment to the Disciplinary Panel. I understand it is the standard terms upon which a person is appointed or reappointed (as the case may be) to the Panel.

57. From that letter and generally I understand Panel members are appointed and then reappointed on three-year fixed terms. However, that is subject to a three-month notice period. The relevant clause simply states:

*"Notice Period: Three months"*

58. That is not qualified as to the circumstances in which it might be exercised. It appears it is exercisable by either the member or the BHA.

59. This creates further a legal issue so far as independence is concerned. In short, it might be argued that they have insufficient security of tenure. The matter is not addressed elsewhere, for example in the Rules (as it is with the Appeal Board). The BHA's apparent ability to terminate membership, unfettered as it appears to be, could be said to be inconsistent with legal independence.

60. I am not suggesting that the BHA would, for example, remove a member simply because it disagreed with a decision to which he had been party. There may (of course) be good reason why it would wish to remove a member. For example, misconduct or the commission of a criminal offence or following a Review of this kind. However, the clause is not so qualified. The member himself might wish to resign. In order to ensure

legal independence, I have recommended that this provision should be amended.

(3) Recommendations

61. Accordingly, I make the following recommendations:

**R5: The Terms of Appointment for the Disciplinary Panel (and Licensing Committee<sup>79</sup> and Appeal Board<sup>80</sup>) should be amended. All members should be appointed on terms which provide that a notice period is exercisable only in circumstances such as the following:**

- a. By the individual to whom it relates; or
- b. By the BHA where the Chairman or member (as appropriate) has
  1. Committed any serious or repeated breach or non-observance of their obligations to the BHA or of the Rules;  
or
  2. Committed a criminal offence or acted in any manner which brings them or the BHA into disrepute.

**R6: The procedure for appointment to the Disciplinary Panel and Licensing Committee<sup>81</sup> should be formalised and set out in the Rules or operating procedures as appropriate.**

**R7: Application for appointment to the Disciplinary Panel and Licensing Committee<sup>82</sup> should be through an open competition judged against published criteria.**

62. The advantages of a structurally and legally independent Disciplinary Panel, include the following:

- a. Implementation of the recommendations will result in a common law and Article 6 compliant, namely an independent, Disciplinary Panel.

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<sup>79</sup> See Chapter 8

<sup>80</sup> See Chapter 9

<sup>81</sup> See Chapter 8

<sup>82</sup> See Chapter 8

- b. This will address the present risk inherent in having to defend the disciplinary system a la *Bradley*.
  - c. The changes will improve not only the Disciplinary Panel but also the disciplinary system as a whole.
  - d. This will enhance confidence in the system both before the Disciplinary Panel and also in the disciplinary system as a whole.
63. These recommendations should be seen in the context of my overall recommendations for the Disciplinary Panel. The composition broadens; there is an enhanced role for the Chairman; and it becomes structurally independent. It is in that context that I believe the natural approach is to adopt a competition of the kind I have recommended.
64. As to the future selection process, I appreciate this, like the other recommendations will require some amendment of the Rules. It will be a matter for the BHA as to the process it adopts. My thoughts on this topic are as follows.
65. The BHA is entrusted by the sport to regulate the sport. An integral part of that is discipline. It is responsible for and should retain responsibility for the disciplinary process and its structures. For that reason I would recommend that the selection process could be arranged and administered by the BHA itself, so long as it ensures proper levels of independence.
66. I would recommend a bespoke Appointments Committee for that purpose, similar to many other sports. I would expect that committee to be chaired by the Judicial Panel Chairman. He would be independent of the BHA. It might well include his deputy<sup>83</sup> and the Secretary to the Panel. It might include a member of the Board. It would not include any person from the BHA's Integrity, Legal and Risk Department (including its

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<sup>83</sup> As to which see Chapter 9

Director), the DROR or anyone under his chain of command. That is not a comment on any of those as individuals or the way they carry out their duties, but instead it is a view expressed to ensure the proper levels of independence I spoke of in the preceding paragraph.

67. Accordingly, I have a further recommendation:

**R8: The appointment process for the Disciplinary Panel should be by way of a bespoke selection committee under the stewardship of the new Judicial Panel Chairman.**

(4) Miscellaneous

68. On the topic of the Terms of Reference, two further points. First remuneration. None of our consultees, who expressed a view on this topic (about which they were asked) took issue with reasonable payment to members for their services. No one suggested it should not happen. I agree, subject to this. The fact that members are paid should be a matter of public record.

69. Second, views amongst consultees were mixed about whether there should be a maximum fixed period of service on the Panel. Some suggested a five-year maximum, others that there should be no more than two terms of (say) three years. I see something in the arguments that to do so would guard against 'staleness' and 'panel jaundice'. On the other hand, I am not persuaded that it necessary or desirable to require able and experienced people to stand down. On balance I am not persuaded that there is necessity for that or even that it is desirable for there to be some arbitrary point beyond which a person cannot continue to serve. Renewable three-year periods together with the supervision of the Judicial Panel Chairman are, in my view, sufficient.

**E. Composition and Size of the Disciplinary Panel**

70. There are three related but different issues. The first is the presence of 'Active Stewards'. The second concerns the composition of the pool more generally. The third is the size of the pool.

(1) Role of Active Stewards on the Disciplinary Panel

*Meaning*

71. The term 'Active Steward' is mine and I have used to mean an Honorary Steward who is engaged on the racecourse contemporaneously with being a member of the Disciplinary Panel. Presently they number nine and have all served as racecourse Stewards for many years. They each have substantial experience of and expertise in the sport and especially in race-reading, an important skill for a panel 'winger' (in a panel of three persons the Chairman is flanked by two members known as 'wingers'). These qualities make them ideal members of a panel charged with the task of adjudicating upon horseracing disciplinary matters.

*Appointment and role of Honorary Stewards*

72. There are two types of Steward. Honorary or Local Stewards and Stipendiary Stewards. The former are not BHA employees and receive expenses related to the carrying out of their duties. They number 114. Hereafter I refer to them simply as Stewards. The latter (who number 17) are professional; the BHA employs them. The latter do not sit – and the BHA did not and would not suggest they should – on the Disciplinary Panel.

73. The selection, training, approval and appointment of Stewards is set out in BHA General Instructions 6.1. In short the BHA through its Stewarding Committee appoints Stewards. The selection criteria state that they

*“should” inter alia* have (1) an enthusiasm of, and knowledge of racing and (2) have practical racing or equestrian experience. It is it be noted that it also states that any person will not normally be considered suitable who is or their spouse is (for example) a trainer, jockey, bookmaker or an official appointed by the BHA.

74. BHAOP 2.1 states that the BHA regards Stewards and Stipendiary Stewards as its representatives on the racecourse. Their general responsibilities and duties are to be found in BHAOP 2.1<sup>84</sup>. Their principal duty is to ensure that racing is run in accordance with the Rules. The prime function of a Stipendiary Steward is to help and advise the Stewards. It is part of a Stipendiary Steward’s task to inform Stewards of any recent BHA policy decisions<sup>85</sup> and to sit on enquiries as a decision-making member of the Panel<sup>86</sup>.
75. The raceday team usually consists of two Stipendiary Stewards and two Stewards though that may be varied as circumstances require. On course enquiries comprise three Stewards, of whom one is the Stipendiary Steward and another the Chairman. Each is a voting member.
76. In general terms Stewards are stewarding for approximately thirty days of the year. Those who also sit on the Disciplinary Panel sit about ten times a year. Stipendiary Stewards officiate between 190 and 200 days a year. Stewards officiate on a small number of racecourses generally allocated on a geographic basis (‘allocated courses’). In addition to their allocated courses they may, where there is a need, officiate on other racecourses. Those are known as ‘chalk days’.

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<sup>84</sup> 1 October 2010

<sup>85</sup> BHAOP2.1 §16

<sup>86</sup> BHAOP2.1 §1

### *Historical Position*

77. I have tried to establish from documentation in the BHA's possession and from consultees when Active Stewards were first admitted to the Disciplinary Panel, and why. That has not been entirely straightforward; the BHA has inherited documents from its predecessors. The best it and I have been able to achieve is summarised as follows.
78. In 1993 The Jockey Club commissioned a Review of its "Disciplinary Functions" chaired by Anthony Mildmay-White. At that time the Disciplinary Committee comprised a small number of members of The Jockey Club. It had three primary functions, (1) sitting in judgment on appeals and referrals from racecourse, (2) formulating the Rules and (3) overseeing the system of racecourse stewarding.
79. That Review recommended, amongst other things, that the Disciplinary Committee should be reconstituted. It is to be noted that it recognised that the Committee was more than a "*sporting tribunal*" and had acquired an important role in "*promoting the quality of local stewarding*". It recommended the addition of three new members who would not participate in its tribunal functions and would not "*necessarily be precluded from continuing to act as Local Stewards*". They were Local Stewards. The inference to be drawn is that they were being added to help with that important role but not to act in a judicial capacity.
80. Next, a document dated 14 July 2003 entitled "*Expansion of the Disciplinary Panel*". The document describes the background as a two-phased expansion of the Panel. The first phase is to recruit Panel Chairmen, "*be they Jockey Club or non-Jockey Club*". The second phase is to invite, persons from the industry "*to join the Panel thus demonstrating independence from the Jockey Club, transparency and accountability*". The second phase was to be delayed until "*the uncertainties surrounding the formation of the HRA are resolved*".

The document lists the *'Proposed Shape of the Disciplinary Panel'* for 2004. They numbered 11 and each was a Steward.

81. Two further things of note from that document:
  - a. It records that *"Disciplinary Panel Members, other than the Chairman and Deputy Chairman, could continue to chair Local Steward's Panels in order to achieve the 'best' Panel possible"*.
  - b. However, *"[t]o avoid criticism of that practice, Patrick Russell [now the Disciplinary Officer] has advised that the appeal should not contain any person who is a Steward at the racecourse where the offence took place"*. That practice continues to this day, and was commented upon in the decision of *Wilson Renwick*<sup>87</sup>.

I understand those sentences to mean that by 2003 a very limited number of Stewards were sitting in a judicial capacity on the Disciplinary Panel as well as acting on the racecourse.

82. In 2004 in advance of, and in readiness for The Jockey Club delegating its regulatory function to the HRA in 2005, there was a review of the disciplinary structure. In a document I have seen<sup>88</sup> it is noted that of recent developments, *"the most significant is the incorporation of non-Jockey Club members from amongst the best local Stewards"*. By 2004 the Committee had become a Panel, and had also relinquished its Rule-making function. It was recorded that it had been *"agreed that all members of the Disciplinary Panel can now act as Local Stewards on the racecourse"*.
83. I have not seen any document which explains at what point, and why, Local Stewards were granted a judicial role on the Disciplinary Panel. It may be that the thinking was that Active Stewards would possess the best

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<sup>87</sup> 29 January 2015; decision 2 February 2015

<sup>88</sup> Evolution of the Disciplinary Process 1994-2004, with a manuscript date "1/1/2004" (I do not know when that was added.)

race-reading skills and it was desirable to have them on the Disciplinary Panel.

84. That document also records that the decision had been taken to add two lawyers to the Panel. Those lawyers – who were Timothy Charlton QC and Matthew Lohn – would act initially as wingers and thereafter chair enquiries based *“around points of law specifically”*. From a further document I have been shown dated 11 October 2004 that decision appears to have been made at the end of 2004.

*The issue*

85. In the PJA response to the BHA’s ‘Notes of the End of the Flat Season Review Meeting’ dated 19 February 2015 the PJA expressed its concerns on this topic. It was concerned that Active Stewards were sitting in judgment on their “active peers”, sometimes adjudicating on the decisions of friends, colleagues or associates. The Active Stewards sit in judgment on decisions to which Stipendiary Stewards – who otherwise guide them on the racecourse – are party.
86. It continued by asking the BHA to *“restrict those who are on the Disciplinary Panel rota from sitting as stewards on the racecourse in order to put visible distance between those two bodies”*. It also observed that *“serious consideration”* should be given to widening the pool of those who sit on the Disciplinary Panel.
87. The BHA responded by letter dated 14 April 2015. It did not accept there was *“evidence of any bias perceived or real”*. It expressed itself to be *“comfortable that the current composition of the Disciplinary Panel passes the [Porter v Magill] test”* for apparent bias and that the *“overall disciplinary process is one that provides a fair process”*. It then asserted that it was *“sure”* the PJA and its *“advisors”* were *“aware that a fair process does not necessarily require independence, in a strict legal sense, at every*

*stage*". It reminded the PJA of the obligation on any person provisionally selected for a Panel to declare any interest<sup>89</sup> and that it was (and is) open to the PJA and/or its members to make submissions in respect of any person to whom an objection was taken.

88. Commenting on that response, it is entirely in keeping with what I have concluded is the BHA's approach to its disciplinary process. It stresses that the Disciplinary Panel members *behave* independently. None of the members has been shown to be actually biased or to behave partially in favour of the BHA. Further, that approach was upheld in *Graham Bradley* and it has not been shown in the High Court or above to be flawed. Further, I have independently reached the same conclusion.
89. The PJA repeated those concerns during the consultation process. The advocates who represent jockeys, with whom we also consulted, share them. As in its correspondence with the BHA, the PJA emphasised to me that it was not accusing any individual Steward of actual bias.
90. I obviously put this issue squarely to the Disciplinary Panel members, including the legal chairmen. The (eight) Active Stewards I saw expressed to me very firmly that they acted independently of the BHA. They emphasised the very fair point that stewarding forms a small part of their lives. They see no conflict in acting both as a Steward on the racecourse and then sitting in judgment upon the decisions of their peers, including persons they know. They all made the point that they would have no hesitation in overturning a decision they believed to be wrong, regardless of who made it.
91. The point only arises where decisions of other Stewards are in issue. In such circumstances the Panel is required to adjudicate upon the correctness or otherwise of a decision made by Stewards and/or a

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<sup>89</sup> Schedule (A)6 §2.2

Stipendiary Steward who is known to all or some of them or with whom they have officiated.

*Present position*

92. The issue of conflict of interest or apparent bias is not new to Stewards. Schedule (A)<sup>690</sup> provides:

*“The Director of Raceday Operations and Regulation shall provide to any Person provisionally selected sufficient details of the matter in question and the individuals concerned so as to enable any Person provisionally selected to declare any interest and to disqualify himself or to seek any waivers of objection as appropriate prior to final selection. “*

93. BHAOP No. 2.5<sup>91</sup> (under the heading “Conflicts of Interest”) requires a Steward (on the racecourse) to satisfy himself before involving himself on any pre-enquiry deliberations or sitting on an enquiry that he can discharge his stewarding duties entirely objectively and impartially<sup>92</sup>. He must stand down if not so satisfied. It provides examples of the circumstances in which a Steward should stand down.

94. If he considers a conflict of interest may be perceived but is satisfied it is appropriate he should continue to act, he is required to disclose that to the Chairman who then decides whether that should be declared at the start of the enquiry.<sup>93</sup>

95. In relation to the Disciplinary Panel, Stewards do not sit on appeals from their allocated racecourses. They might sit on appeals from racecourses on which they steward on chalk days.

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<sup>90</sup> §2.2

<sup>91</sup> 3 October 2011

<sup>92</sup> §11

<sup>93</sup> §12

96. The Disciplinary Panel addressed this issue in the *Renwick* enquiry<sup>94</sup>. Wilson Renwick, the rider of the winner Nefyn Bay, was referred following an alleged breach of Schedule (B)6 Part 2 of the Rules by his use of the whip in a race at Doncaster on 23 January 2015. It was referred (following an enquiry) because it was his fifth misuse of the whip offence in the preceding six months.
97. Rory Mac Neice, a consultee in this Review, represented the jockey. Before the hearing he raised questions about the composition of the Panel that was due to hear this referral. The Chairman of the Doncaster Stewards had for many years sat on the Disciplinary Panel and was known to at least one member of the Panel convened to hear that case. In advance of the hearing he sought disclosure of the extent of any friendship or relationship, which might give rise to an appearance of bias. He was careful to say that he was not suggesting actual bias – that is, a predisposition to follow a decision to which the Chairman of the Stewards had been party.
98. The members of the Panel considered their respective positions and declined to stand down. The matter was not argued, which is not intended to pass judgment on the merits but simply to explain why the Panel (in its written reasons) described the below as “*an indication of the reasoning*”:

*“4. The legal test to be applied is this – would a fair-minded and informed observer conclude that there was a real possibility that the tribunal was biased? This is sometimes called, for shorthand, the apparent bias test.*

*5. Quite simply, this Panel did not feel that Disciplinary Panel members who also work as Stewards at racecourse meetings could ever reasonably be suspected of bias either for or against the views of their fellow Stewards expressed on other occasions, unless there is some additional and specific basis for such a concern. Of course, no Steward who took part in reaching a*

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<sup>94</sup> 29 January 2015; decision 2 February 2015

*decision on the racecourse will ever sit on a Disciplinary Panel which is hearing a challenge to that decision. But that is a completely different question than that raised by Mr Mac Neice. He relied upon the BHA's long-standing practice to exclude a Disciplinary Panel member from sitting on an appeal from a racecourse where that member sometimes stewards. He suggested, logically enough, that that was no different in principle to his current objection, and that it did not matter where individuals may have stewarded together. That practice, however, may be unnecessary in this Panel's view."*

99. It is right for me to record that the occasions when either Stewards on the Panel and the Chairman on the racecourse had officiated together seemed, on the basis of the available records (which were checked) to be "*few and far between*".
100. In June 2016 the BHA issued further Directions entitled "*Challenges to Disciplinary Panel Members*". These set out the procedure to be adopted where any party wishes to challenge any provisionally selected Disciplinary Panel member.
101. Since that time every provisionally selected Disciplinary Panel member has been required to make (and as I understand it, has made) a written declaration. They have done so by completing an "*Acceptance and Declaration*" pro forma that they are, *inter alia*, impartial and independent of the parties. I have seen the form and the Guidance issued to the members.

*Arguments in favour of the retention of Active Stewards*

102. The arguments in favour Active Stewards remaining on the Disciplinary Panel include:
- a. There are sufficient safeguards in place properly to guard against the risk of any conflict of interest or the perception thereof.
  - b. Active Stewards are alive to the issues and in any event the parties can object to any provisional member of the Panel, which objection will be adjudicated on its merits.
  - c. They have great experience of race-reading which – given the nature of the majority of the Disciplinary Panel’s work – is important for a Panel winger.
  - d. A point they emphasised to me in consultation is that being an Active Steward frequently adjudicating on the racecourse, gives them essential knowledge when it comes to both reading races and applying the Rules.
  - e. That leads to the related but different point, that by regularly stewarding on the racecourse, they are ‘match fit’ when it comes to adjudicating as part of the Disciplinary Panel.
  - f. Removing them from the racecourse but keeping them on the Disciplinary Panel would not address any complaint that they know one or more of the decision makers whose decisions they are judging.
  - g. If the composition of the Disciplinary Panel is broadened then the point loses force for their number is reduced, and so the concern is diluted.

*Conclusions*

103. I have found it helpful to start with the law and so approached it in three stages. First, does the mere fact that they act as a racecourse Steward mean that that they are thereby debarred – in law – from sitting on a Disciplinary Panel? If it does not, then is a more nuanced approach necessary, whereby the issue must be approached on a case-by-case, fact specific basis? Third, is a change desirable?

104. I would answer the first question in the negative. Fairness in the context of a regulatory body was considered in *R (Kaur) v (1) Institute of Legal Executives Appeal Tribunal and (2) The Institute of Legal Executives*<sup>95</sup>. The case concerned disciplinary proceedings brought against a member of the Institute of Legal Executives (ILEX). The ILEX disciplinary tribunal included an ILEX council member (who was also a director of the company). That was compounded by the fact that the ILEX Appeal Tribunal (IAT) had included the ILEX council's vice-president.
105. The Court of Appeal held that the vice-president of ILEX was disqualified from sitting on a disciplinary or appeal tribunal by virtue of her leading role in ILEX and her inevitable interest in ILEX's policy of disciplinary regulation. Rix LJ put it in this way: "*I have really no doubt that the fair-minded and informed observer ought to have and would have concluded that there was here a real possibility of bias*"<sup>96</sup>.
106. Before the Appeal Board in *Bradley*, Mr Warby QC (as he then was)<sup>97</sup> pointed out that virtually every disciplinary body in the United Kingdom will have members sitting on it who are involved in their organisation's disciplinary process. That is because they have specialised knowledge and experience in that organisation's field of expertise. There was, the Appeal Board noted "*clear authority*" that a disciplinary body that comprises members of the same club or association as the person subjected to the disciplinary process does not by that fact alone give an appearance of a lack of independence<sup>98</sup>. The Jockey Club (rightly) pointed to the absence of any improper overlap between the membership of the Disciplinary Committee (as it then was) and the executive functions of The Jockey Club. However, The Jockey Club did concede that applying the observer test, there was a

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<sup>95</sup> [2011] EWCA Civ 1168

<sup>96</sup> §[46]

<sup>97</sup> now Warby J

<sup>98</sup> §12.3; *H v Belgium* (1988) 10 EHRR 339; *Stefan v UK* (1998) UK 25 EHRR CD

lack of appearance of independence within the meaning of Article 6(1)<sup>99</sup>. The Appeal Board found that the observer would not find there had been a lack of appearance of impartiality<sup>100</sup>.

107. In *Stretford v The FA*<sup>101</sup> that the fact that two of the members of the Regulatory Commission were members of the FA Council did not give rise to an appearance of bias. The FA Council was a large body distinct from the prosecuting authority within The FA. Its interest was in seeing the proper application of the regulatory rules rather than securing convictions.

108. That is akin to the factual position in the BHA. The Compliance team sits under the Director of Integrity, Legal and Risk, and separate from the Disciplinary Officer and indeed from the Stewards who sit under the Head of Stewarding answerable to the DROR. I have also noted that the Secretary to the Disciplinary Panel and Appeal Board reports to the DROR and I have recommended that this changes.

109. In *Flaherty v National Greyhound Racing Club*<sup>102</sup>, a decision finding a greyhound owner guilty of administering a drug to the greyhound was set aside at first instance on the basis (amongst others) that the decision was affected by apparent bias and was undermined by the fact that the Chief Executive of the NGRC (the regulator) had retired with the stewards (the tribunal) during their deliberations. The Court of Appeal observed that sporting bodies should be given as free a hand as possible, consistent with the fundamental requirements of fairness, to run their own disciplinary processes without the interference of the courts. It is of note the Court found that there was no apparent bias where a member of the decision-

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<sup>99</sup> §12.4

<sup>100</sup> §12.5

<sup>101</sup> FA Regulatory Commission, 31 March 2008, which predates *Kaur*

<sup>102</sup> [2005] EWCA Civ 1117, also before *Kaur*

making body had been a (veterinary) steward (Mr Crittall) of the association who had been appointed for his expertise<sup>103</sup> Indeed it said:

*“The starting point thereafter for consideration of apparent bias seems to me to be that the integrity of Mr Crittall is to be presumed. I can see nothing in his relationship with WGS that takes the present case out of the ordinary run in which it is entirely appropriate for an individual with expertise to sit on a specialist tribunal. Stewards should not be divorced from greyhound racing; they are part of it. They are the regulators.”<sup>104</sup>*

110. It is not uncommon for first instance sporting disciplinary tribunals to be populated by persons from the sport in question. That is not, in my view, objectionable so long as (1) there is and remains a separation of functions or powers and (2) they do not offend the *Kaur* principle. By way of example, in recent times the RFU has stopped using its Council members on disciplinary and appeal panels.
111. Stewards are not involved in the governance of the BHA. They are not employed by it. I am not persuaded that the mere fact of being an Active Steward is of itself (i.e. without more) an absolute bar in law to being a member of the Panel. I do not believe that *mere fact* means they are not independent in the legal sense or incapable of acting impartially. I am not persuaded that the mere fact of being an Active Steward gives rise to an appearance of bias on the part of that individual.
112. The second question I would answer in the positive, namely that a more nuanced, fact specific approach is necessary. The Court of Appeal in *Kaur* expressed the (*obiter*) opinion that whilst its conclusion as to apparent bias would apply to all ILEX council members and directors, it would not necessarily apply to all members (of ILEX). As the Court observed

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<sup>103</sup> §38-41

<sup>104</sup> §41

*“authorities suggest that in this area of the law careful judgments may have to be made which depend on a given tribunal member's particular status and history”*<sup>105</sup>. In other words, the issue is fact or person specific. This is where issues of friendships or relationships become relevant.

113. Views amongst our consultees were mixed. Advocates who represent jockeys were strongly in favour of it stopping. The PJA’s approach was more nuanced, reflecting the fact-specific approach: a Steward should not sit if they are *“too close personally”*. Some within the BHA could see the merit of the perception argument and were not against this changing.
114. There is substance in the argument that being active on the racecourse is very useful for a Steward, though I wonder whether that is answered by the following:
- a. They will not lose their knowledge and experience if they step away from the racecourse.
  - b. Any necessary evidence could be placed before them by the parties.
  - c. They are (in any event) free to visit the racecourse, watch races and footage thereof, when not sitting.
115. I also recognise the logic of the point made by Mr Mac Neice in *Renwick*: if a Disciplinary Panel member is excluded from sitting on an appeal from a racecourse where that member sometimes stewards, then why not when he knows or has stewarded with them before? As he suggested (and Timothy Charlton QC recognised) there is logically no difference.
116. Ultimately the decision is finely balanced. The third (and final) stage of my approach was to consider whether change is desirable. That derives from my Terms of Reference which require me to consider changes in the composition of the Disciplinary Panel to generate greater confidence in the disciplinary process.

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<sup>105</sup> §47

117. I recommend that Active Stewards no longer serve on the racecourse and sit on the Disciplinary Panel simultaneously. To remove them would enhance confidence in the disciplinary process. It would do so by addressing the concern – which I do not regard as fanciful – that Active Stewards adjudicating upon the decisions of Stewards with whom they have officiated is unfair. That concern arises from the fact that in referrals and appeals one set of Active Stewards is assessing and passing judgment on the decisions of fellow Stewards. It may be more acute where there are friendships or they officiated frequently together. But, it also arises where there are no such ‘relationships’.
118. The concern is, if anything, more acute where the Active Stewards have officiated with the decision making Stipendiary Steward. If that person has advised and/or guided them on the racecourse there is a justifiable concern that they may (even subconsciously) afford his view greater weight than it properly deserves.
119. In respect of both Stewards and Stipendiary Stewards, the concern is exacerbated by the continuing and on-going ‘professional relationship’ between them. They may steward with them again in the future. I note that no one suggests that current jockeys or trainers could or should serve on the Disciplinary Panel.
120. I do think this situation is materially different from the law where a judge may sit on appeal from the decision of another judge whom he knows or where a barrister/solicitor appears before a judge known to him. They are different by virtue of their training and professions.
121. I see no reason why Stewards must make a ‘once-and-for-all’ decision. For example a Steward deemed suitable for membership of the Disciplinary Panel – who wished to do so – might step down for a fixed period, say 3 or 5 years. During that period they could sit as a member of the Disciplinary Panel but would not be active on the racecourse. Once their time on the

Panel came to an end, they might – if they wish and all other things are equal – return to racecourse stewarding. I appreciate that they will not forget – while on the Panel – their knowledge of other Stewards (and Stipendiary Stewards). However this solution will – I believe – mean the acquaintance is not so immediate or continuing in a professional sense.

### *Going Forward*

122. It follows from what I have said that I see no legal bar to the present system continuing while the BHA considers my recommendations. My recommendation on Active Stewards is one designed to improve confidence. Objections will be dealt with, as presently, by reference to the facts and having regard to the Guidance.

123. Having seen the Guidance I would recommend:

- a. It is made available to the racing public. There is something to be said for it being printed on the rear of each ‘Acceptance and Declaration’ form.
- b. The present ‘Acceptance and Declaration’ should be amended to state that the Panel member has had regard to the content of that Guidance.

### (2) Composition of the Disciplinary Panel

124. The issue is shortly stated: it is insufficiently representative of the sport. It was a view expressed strongly by the PJA and ‘defence advocates’ but also more broadly across the sport by our consultees.

125. Casting an eye across other sports and regulatory bodies one finds panels more representative of the sport or of the profession in question. RFU first instance panels of three often comprise a lawyer (in the chair), a former player and a former referee or rugby administrator. In football at first instance, provision is made for a legal chair where appropriate or requested and also a football panel member. In cricket, if the ‘accused’ is a

player it is usual (but not mandatory) for the CDC to include one member nominated by the PCA. In boxing, three-member disciplinary panels comprise a lawyer in the chair and at least one is independent of the governing body but has experience in coaching, officiating or administration in a different sport.

126. The Medical Practitioners Tribunal Service appoints General Medical Council tribunal members through an open competition against agreed competencies. The pool of tribunal members is large (almost 300) but tribunals considering individual cases normally comprise three tribunal members. In addition to the chairman, who may be medical or non-medical, there must be at least one medical and one non-medical tribunal member on each tribunal.
127. An Employment Tribunal consists of an Employment Judge, who can sit alone for some hearings, or with two lay members. The lay members are drawn from a panel after consultation with employer and employee organisations: the Confederation of British Industry and the Trades Union Congress. Lay members will normally have experience in employment matters.
128. At present the Panel is made up of lawyers and Stewards. Other stakeholders and participants, such as trainers and jockeys are not represented. The knowledge and experience of the present Panel no doubt runs deep but with respect I wonder how broad it is.
129. Broadening its composition would, in my judgment enhance the process. It would add to the knowledge and experience of the Panel. It would also generate greater confidence in the Panel and so the process. The point often made simply but with no less force, is that the credibility of a sporting tribunal is enhanced when populated by a representative selection of its constituency. But it goes further for a more diverse membership, drawn

from different sections of horseracing will bring more relevant experiences and thereby add to the balance of the tribunal.

130. As to the nature of expansion (by selection) an obvious constituency to explore are former jockeys and trainers. They are the obvious candidates because the bulk of the work done by the Disciplinary Panel involves race analysis. I say former as no one has suggested it would be appropriate for current trainers and jockeys to sit on the Panel. I agree that it would not be.

131. There may be practical difficulties. Some have questioned whether sufficient former jockeys or trainers with the necessary skills would wish to sit or are even available. That is not a good reason not to try. Naturally sufficient 'clear water' would need to pass between the weighing room and the tribunal room. That would depend on the circumstances and the individual.

132. I considered the suggestion made by a number of consultees that the Disciplinary Panel might or should contain specialists such as a betting expert or medics/veterinary surgeons (for anti-doping cases). So far as the former is concerned, I am not persuaded that such a step is necessary or desirable. I anticipate that in many betting enquiries the real issues concern interpretation of the betting evidence. Where there is a need for expertise, then no doubt evidence can be called on it, rather than depend upon the specialist knowledge of a Panel member.

133. The presence of veterinary surgeons in the pool specifically for anti-doping cases was an interesting suggestion. In human anti-doping cases, the tribunals convened by, for example, the RFU, the National Anti-Doping Panel and World Rugby do include at least one doctor. I have not adopted that suggestion because I have not had sufficient evidence which satisfies me there is a need. Where there is a need for such expertise the issues ought to be addressed by expert evidence.

134. Of course, I have recommended that the composition of the Panel should be broadened. If the BHA implements that recommendation it may be that the Appointments Committee concludes that it would benefit from the services of such a person, who has the relevant horseracing experience. That will be matter for the new committee but I do not specifically recommend it.

(3) Chair of Individual Disciplinary Panels

135. There was some support within the BHA for each enquiry to be chaired by a lawyer<sup>106</sup>. The PJA and defence advocates did not support such an idea.

136. It is a feature not uncommon in other sporting tribunals. Lawyers chair many of the RFU first instance panels. The FA provides for a lawyer in the chair if a party requests it. ECB first instance panels normally have a legally qualified chair.

137. There are a number of obvious advantages in having an external lawyer on the panel. He should be the chair. Ordinarily, a lawyer in the chair brings with him an element of independence. Further, a lawyer with judicial experience would bring other skills. He might reasonably be expected to help on procedure and any issues in respect thereof. He could be reasonably expected to deal with any legal points which arise unexpectedly. Increasingly jockeys, trainers and owners are represented by lawyers, sometimes Queen's Counsel, even in the most straightforward of cases. The Panel has no external legal advisor and in some circumstances would benefit from an experienced legal chair.

138. I appreciate many enquiries involve appeals or referrals from the racecourse. The particular skills and knowledge necessary to deal with those, where the race-reading will be to the fore, may not be such that they ordinarily call for a lawyer. However, to have them chaired by a lawyer or

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<sup>106</sup> By which I mean a person who is legally qualified.

former lawyer (or Judge) with a good knowledge of horseracing would be ideal. I know the BHA is fortunate to have the services of more than one such person at present.

139. Once more, this is finely balanced. I have considered leaving it to the judgment of the Judicial Panel Chairman. However that puts too great an onus on him and also does not cater for the unexpected.

140. I have therefore concluded that whilst not a necessity, it would be desirable for every enquiry to be chaired by a legally qualified person, with relevant post-qualification experience (at least seven years) and also with judicial or quasi-judicial experience. That person would also need to have sufficient knowledge of horseracing.

141. This requirement could sensibly be subject to a clause permitting variation where the Judicial Panel Chairman directs or the parties consent. That might be invoked in the most straightforward of cases, which I envisage would or could be dealt with on paper, without a hearing.

142. There is a related point that can conveniently be addressed at this stage. I considered a point made by more than one of the consultees, namely whether there should be a 'twin track' system. On one track are the appeals or referrals from the racecourse Stewards. A less 'formal' system might be suitable for that, without the need for formal (or over formal) procedural and disclosure rules. Such enquiries would not need to be chaired by a lawyer.

143. On the other track would be enquiries which originate before the Disciplinary Panel. These might (shortly) be described as integrity enquiries, concerned with, for example, allegations of corruption. A legally qualified person would always chair such enquiries. The proceedings would be controlled by reference to a formal case management timetable, reflected in procedural rules. There would be a framed disclosure regime.

144. I am not persuaded that an automatic 'twin track' system is the way forward. It is unnecessarily inflexible. Racecourse appeals can throw up difficult points, for example the interpretation or meaning of a particular Rule. Such enquiries may make a legally qualified chair desirable or even necessary.

145. Further, it would add an unnecessary and undesirable level of bureaucracy. It would not address the issues of structural independence I have identified. Such would prove unnecessary if the recommendations I have suggested are adopted, especially concerning the Judicial Panel Chairman. Therefore I am not recommending that there be an automatic 'twin track' approach. Later in this Chapter, however, I do make recommendations concerning procedural rules related to this issue.

(4) Size of the Disciplinary Panel

146. I recognise that the Disciplinary Panel should not be unwieldy or so large that its members are not sitting sufficiently frequently. At present the Panel tends to sit three Thursdays in four. Even if it were to sit every Thursday that would number only 52 days a year. It often hears more than one enquiry a day. A small number of enquiries can last longer than a day.

147. Views amongst the consultees were divided as to the size of the Disciplinary Panel. No one suggested it should be reduced; there was no clear majority that it should be increased. However, a not insignificant number within the BHA and who represent the BHA, suggested a modest increase would be desirable. At present the Rules provide for no fewer than 11. There is scope for expansion and I would recommend a small increase, not least to incorporate my other recommendations. By way of example, two lawyers is not sufficient, especially if my recommendation in respect of the chair is implemented.

(5) Recommendations

148. Therefore I recommend as follows:

**R9: Active Stewards should no longer sit as members of the Disciplinary Panel.**

**R10: The composition of the Disciplinary Panel (and Licensing Committee<sup>107</sup>) should no longer be limited to Stewards and lawyers but should be broadened to include other suitably qualified people with sufficient knowledge of horseracing.**

**R11: A Disciplinary Panel enquiry should be chaired by a legally qualified person of sufficient qualification and experience. That should be subject to a clause permitting variation where the Judicial Panel Chairman directs or the parties agree.**

**R12: The number of lawyers on the Disciplinary Panel should be increased. There should be a modest increase in the size of the Disciplinary Panel such that it should not number fewer than 22 (when combined with the Licensing Committee<sup>108</sup>).**

**F. Written Decisions**

149. The Rules require:

*“5.2 Where it is not convenient for summary reasons to accompany a decision, reasons should be provided*

*5.2.1 within a reasonable time of the decision, and*

*5.2.2 in writing if so requested by any Person against whom Disciplinary Action is to be taken”.*<sup>109</sup>

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<sup>107</sup> See Chapter 8

<sup>108</sup> See Chapter 8

<sup>109</sup> Schedule (A)6 §5.1

150. Schedule (A)6<sup>110</sup> provides that :
- “No reasons are required in any case where any Disciplinary Action taken for a contravention of a particular Rule or Rules falls within such range as is set out in any guidelines from time to time issued by the Authority”*
151. Schedule (A)6 permits a Chairman to depart from those (and other procedural) requirements because of *“special circumstances”*<sup>111</sup>. It is the task of the Chairman of each Disciplinary Panel to draft the written reasons.
152. Our consultations have revealed two issues in this respect. First, the content of the written reasons and second the time taken for some of them to be issued. The views are not universal but were widely held.

(1) Content

153. The complaint is that the reasons sometimes lack sufficient detail. It was a point made in the PJA’s Response to the BHA’s ‘Notes of the End of Flat Season Review Meeting’<sup>112</sup>. The complaint is not limited to one particular type of case. It was a complaint made in respect of reasons following both appeals and first instance decisions. The PJA Response made the point that an absence of reasons may give rise to an appearance (or perhaps more accurately lead to an inference being drawn) that the Disciplinary Panel lacks confidence in its decision and/or there are insufficient reasons to explain the decision.
154. Schedule (A)6 provides:
- “subject to Paragraphs 5.2 and 5.3, summary reasons are provided for decisions sufficient to enable any Person against whom Disciplinary Action*

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<sup>110</sup> §5.3

<sup>111</sup> §6.1

<sup>112</sup> Dated 19 February 2015, though it does appear to exempt those written by Timothy Charlton QC.

*has been taken to understand what material facts have been found by the Disciplinary Panel and why any particular Disciplinary Action is to be taken...”*

It does not require those reasons to be sufficient to explain to the BHA why, for example, it decided not to take disciplinary action.

155. I appreciate that non-lawyers often write the reasons. It is fair to expect lawyers to have more experience of and aptitude for drafting such documents, though that is not to say they alone possess such skills. Another advantage of having a lawyer chair enquiries may be an expected improvement in the quality of written reasons.
156. It is fair to note that the Disciplinary Panel members I saw, appreciated this was a legitimate concern. They acknowledged that not all written reasons given were sufficient and it was something that they were addressing. To that end a reasonable number of our consultees noted a recent improvement in the quality of written reasons.
157. It would not be especially helpful to recommend that the quality of the written reasons should generally improve. What I have done is record that the concerns remain and I am confident the new Judicial Panel Chairman, if appointed, would consider it a priority.
158. **R13: Schedule (A)6 §4.9 should be amended to include the BHA and a requirement to explain why Disciplinary Action has not been taken.**

(2) Timing

159. So far as timing is concerned, as I understand it, the vast majority of Disciplinary Panel written reasons from racecourse appeals are produced quickly, often the same day the decision is announced. For the more complex cases heard by the Disciplinary Panel at first instance, that is not

so. They are often the more difficult cases, taking place over days, with a deal of conflicting and/or complicated evidence.

160. However, I was told of enquiries where it had taken an unacceptably long time for the written reasons to be handed down. I recognise that there may occasionally be good reasons (such as illness) for delay.

161. This is not a new concern. Supplementing its Recommendation 3 the *2016 Integrity Review* advised:

*“...that, as a priority, the BHA engages with the Chair of the Disciplinary Panel with a view to establishing a set of guidelines as to the acceptable timeframe within which a Disciplinary Panel would be expected to produce a decision and reasons following an Inquiry, and for such guidelines to be published.”*

162. I agree with the observation that delay in promulgating written reasons causes obvious frustrations for the parties and to the racing public at large. It also means the parties cannot consider expeditiously the merits of an appeal.

163. I would go further than the *2016 Integrity Review* in my recommendations. It is not unusual for procedural disciplinary rules in other sports to provide for decisions within a set period. For example the *2015 Rules of the National Anti-Doping Panel Rules* state that (subject to the President’s permission) the written decision shall be provided to the parties within fifteen working days<sup>113</sup>.

164. **R14: The Rules should be amended to provide for Disciplinary Panel written reasons within the following timeframes:**

a. **An appeal from racecourse within 48 hours of the hearing;**

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<sup>113</sup> Rule 11.1

- b. **Where it sits as a tribunal of first instance within 20 working days of the hearing.**

**Both timeframes should be subject to a caveat to provide for exceptional circumstances<sup>114</sup>.**

(3) Criticism

165. One final matter and it is convenient to deal with it at this stage. The PJA and defence advocates raised with me their concern that the Disciplinary Panel does not criticise in its reasons the BHA and/or its employees and/or officials where such is merited. In the PJA's Response to the BHA's 'Notes of the End of Flat Season Review Meeting'<sup>115</sup> the PJA made this same complaint and compared the Panel unfavourably to the Appeal Board which does "*criticise the BHA, albeit respectfully*".
166. I was given examples. I do not consider it profitable or even possible or appropriate for me now to revisit those instances and seek to assess what was said, and suppose what might or should have been said, if anything. As the contributors appreciate and I understand, the Disciplinary Panel has jurisdiction only over those who are subject to the Rules. By way of example, raceday officials are not. No doubt any Panel would be careful about expressing a view upon an individual who has had no opportunity to explain their conduct.
167. I would make the (obvious) point that a disciplinary tribunal would not wish to be perceived as partial. Making proper comment, including criticising a party or person or procedure where such is appropriate, helps to prevent any incorrect perception.

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<sup>114</sup> For example illness or a case of exceptional complexity.

<sup>115</sup> Dated 19 February 2015

**G. Appeal Deposits**

(1) The issue

168. I was asked to consider this as a discrete topic. In February 2015 the PJA raised this issue in correspondence with the BHA. It did so in the context of a particular appeal where the deposit had been forfeited. It did not complain about the decision in that case. Instead it took issue with the apparent test. The PJA was concerned to understand with precision what the relevant test was. In that email correspondence it referred to what it described as the historical position, namely deposits were not forfeited when there were "*good or reasonable grounds for an appeal*".

169. The PJA repeated those concerns to me. It complained that it does not know what test is being applied. It made the point that when it acts for its members, it assesses the merits of all appeals. It believes that 'frivolous' appeals are (to use its phrase) "*a thing of the past*". It also points out (not unreasonably) that many jockeys earn "*relatively modest earnings*" and an appeal entails for them the cost of a trip to London and costs both in terms of time and missed rides.

170. This issue also arises in connection with appeals from the Disciplinary Panel to the Appeal Board.

(2) Rules and present approach

171. An appeal from a Stewards' decision is usually initiated by service of a Notice of Appeal within seven days of the date of notification of the decision, accompanied by a deposit of £110, £220, £250 or £500 as

appropriate<sup>116</sup>. In limited circumstances it must be initiated within 48 hours of the decision appealed against<sup>117</sup>.

172. The powers of the Disciplinary Panel in this respect are unlimited. The deposit may be *“forfeited or returned as the Authority considers appropriate”*<sup>118</sup>.

173. The Rules do not state the purpose of the deposit. It is a common feature in disciplinary systems in other sports. For example the ECB system requires the deposit of a fixed fee for an appeal – returnable at the Appeal Panel’s discretion<sup>119</sup>. The position is similar with the RFU though the deposit is forfeited – subject to the Appeal Panel’s discretion – if the appeal is dismissed. The position is similar with FA appeals.

174. As for the purpose of the deposit, the Rules are silent. In a recent case the Appeal Board stated:

*“We perceive that there is uncertainty as to the practice in this respect, with no common understanding as between (i) the BHA, (ii) those who commonly represent Appellants in this type of case and (iii) the Appeal Board itself. [BHA’s Counsel] states, as if it is a given proposition, that ‘... deposits stands independent of any costs, as some contribution to the administrative expenses of convening the Appeal Board and towards the costs of transcription of the hearing before the Disciplinary Panel. ... They should be forfeited and used for the administrative costs of the Appeals.’ That is one possible interpretation, but not one which, so far as we are aware, is documented whether in any previous decision of the Appeal Board or in the applicable Rules. An alternative perception, which enjoys a degree of*

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<sup>116</sup> Rule (A)78.3

<sup>117</sup> Rule (A)78.1

<sup>118</sup> Rule (A)78

<sup>119</sup> Interestingly – in the context of the discussion in Chapter 9, the ECB rules make provision for it to be set off against costs.

*support from some previous decisions of the Board, is that the deposit is basically designed to discourage frivolous appeals the pursuance of which will result in its forfeiture.”*

175. I am inclined to agree with the view expressed in the final sentence of that paragraph: the deposit is to discourage frivolous appeals. That would chime with the test I understand the Disciplinary Panel applies when deciding whether a deposit will be forfeited or returned.

176. The Rules give the Disciplinary Panel a wide discretion in this regard stating only:

*“The deposit may be forfeited or returned as the Authority considers appropriate.”<sup>120</sup>*

177. Through my research and consultation I learned that the Disciplinary Panel does in practice apply a test or criterion in this respect. It is (loosely) formulated thus: the deposit is forfeited where the appeal was frivolous or without merit. In all other circumstances it is returned.

178. None of our consultees suggested the requirement of an appeal deposit was unfair. None suggested it should not, in certain circumstances be forfeited. No one disagreed with the proposition that if there is a formulated test that is being applied, it should be made public. I agree. I also agree with the present test though I would express it thus: an appeal deposit will be forfeited where – in the opinion of the Disciplinary Panel – the appeal was without any realistic prospect of success<sup>121</sup>.

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<sup>120</sup> Rule (A)78.4

<sup>121</sup> Which I gratefully adopt from George Bartlett QC.

(3) Recommendation

179. I recommend:

**R15: The Rules should be amended to stipulate the principle to be applied when determining whether an appeal deposit should be forfeited and the matter should be dealt with in the Disciplinary Panel's written reasons where relevant. The principle should be that a deposit will be forfeited where the Disciplinary Panel concludes that the appeal was without any realistic prospect of success.**

180. There is a remaining related issue, which has arisen during the course of our Review. It concerns the relationship between the deposit and an order for costs. Although the Disciplinary Panel does have the power to make a costs order in specific circumstances, it is unusual for it to be exercised<sup>122</sup>. Therefore I address the issue in Chapter 9, which deals with the Appeal Board.

**H. "Inequality of Arms"**

181. This was a matter of particular concern for the PJA and those who represent jockeys. The PJA offers an insurance scheme, which provides a level of legal advice and representation for its members. The insurance scheme covers legal fees to a maximum of £4,500. That will not – we were told – meet the legal costs in an enquiry of any length. The issue is particularly acute in corruption or integrity cases. It is exacerbated by their inability under the Rules to recover costs when acquitted. The Disciplinary Panel does not have the power (under the Rules) to make a costs order against the BHA.

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<sup>122</sup> Rule (A)46.2; see also Schedule (A)6 §7.4.2

182. To increase that sum involves raising the premium and their members are not prepared to pay it. The complaint is that some jockeys either cannot afford legal representation or feel their legal representation does not always match that of the BHA's. The expression "inequality of arms" is a shorthand way of expressing that problem.

183. The *2016 Integrity Review* addressed this issue and made this supplementary recommendation:

*"R4(a). It is recommended that recent discussions between the BHA and Sport Resolutions be continued, and that the BHA introduces the relevant stakeholder representative bodies to Sport Resolutions with a view to establishing formal partnerships offering Racing's participants access to pro-bono legal advice and representation in the event that they become subject to a BHA investigation or disciplinary proceedings and cannot afford representation themselves."*

184. The BHA has progressed that recommendation and continued the said discussions. Therefore I recommend that the BHA introduces the relevant stakeholders to Sport Resolutions with a view to those bodies taking it forward. To underline that I adopt with appropriate amendments that recommendation:

**R16: The BHA should introduce the relevant stakeholders to Sport Resolutions with a view to those bodies establishing formal partnerships offering Racing's participants access to pro bono legal advice and representation in the event that they become subject to a BHA investigation or disciplinary proceedings and cannot afford representation themselves.**

## I. Procedure

185. There is no compendious set of procedural rules, dealing with case management, including disclosure. A number of consultees suggested that such would be desirable. It was suggested such rules would be of particular use in the context of disclosure (as to which see below) and enquiries that start in the Disciplinary Panel.

186. I agree. The *2016 Integrity Review* made this Recommendation (R4(b)):

*R4(b). It is recommended that the BHA produce a formal code of conduct for case management and disciplinary inquiries for all parties to comply with during an Inquiry. This code could cover a number of areas such as case management, directions hearings, and evidence, and should include a policy on disclosure, which from the BHA's perspective should deliver a commitment to ensure that those persons facing charges have sufficient material at the point of charge to prepare a response, namely: the charges; the evidence upon which the BHA relies; and relevant disclosure at the time.*

187. I would make provision for such by way of a formal procedural code. I appreciate that for many cases this will be neither necessary nor even appropriate. For example, an appeal from the Stewards' decision in an interference or whip offence is highly unlikely to engage such a process. It is not for those cases I have it in mind. It is really only an issue, as I perceive it, with some of the cases which start before the Disciplinary Panel. To that extent I do see room for and merit in a procedural twin track approach.

188. As for disclosure (in this context) I mean the provision by the BHA of material in its possession upon which it does not rely, but which is or may be relevant to any issue/s in an enquiry. It is conveniently called 'unused material' (in the sense it is not used by the BHA). This is a topic which generated concern among a number of consultees.

189. I am conscious that I am dealing with the exercise of quasi-judicial functions in a sporting context. The Disciplinary Panel is not the Crown Court or the High Court. However, it deals not only with pure sporting matters which result in short temporary suspensions measured in days or even weeks. It deals with grave matters, potentially ruinous of reputations and livelihoods. In those types of cases, I do consider a degree of formality around disclosure both proportionate and warranted.
190. The present Rules do not contain a disclosure test to be applied by the BHA in the first instance or by the Disciplinary Panel (or Appeal Board thereafter). I have read an order made by Timothy Charlton QC, on a disclosure application. He agreed that the: *“proper principle for disclosure”* to be applied was that the BHA must *“disclose anything which it relies upon or anything which undermines its case”*.
191. The provision of formalised test known to all would bring both clarity and certainty. A formal procedure for determination of applications would bring a degree of certainty, both in terms of timetabling, case management and also in formulation of applications and determination of the same.
192. I have already recommended the provision of a set of procedural rules. That is the natural place for such rules on disclosure to go.
193. **R17: I recommend that the procedural rules should address specifically the issue of disclosure. In particular I recommend that the procedural rules should:**
- a. **Define the nature of the material to which they apply;**
  - b. **Include the test to be applied by the BHA and appropriate disciplinary body or its Chairman in assessing whether material in the BHA’s possession falls to be disclosed; and**

- c. **Make provision for any affected party to apply to the relevant disciplinary body or its Chairman seized of the case for an order for disclosure.**

194. The BHA will no doubt seek advice on the terms of the disclosure test. In my experience the test currently applied in criminal proceedings in England and Wales has much to commend it. In such criminal proceedings it is the continuing obligation of the Crown to disclose to an accused any 'prosecution material' which has not previously been disclosed to the accused and which might reasonably be considered capable of undermining the prosecution case against the accused or of assisting his case<sup>123</sup>.

195. Further, the *2016 Integrity Review* recommended:

*"R4(d). It is recommended that a formal procedure for alternative disposal of matters be established outside of the full Disciplinary Panel procedure, to include a fast track for minor or admitted offences, formal cautions, and agreed sanctions. Further, the penalty guidelines should be reviewed with a particular focus on the lower level fines for minor rule breaches, and consideration given to an alternative approach."*

196. The fast tracking of minor or admitted offences, formal cautions, and agreed sanctions was a theme that emerged during my consultation. I saw two hearings that seemed to me (and to the Disciplinary Panel) to be unnecessary. Each was a gelding case. In both cases, the subjects admitted the breach in advance, and submitted to a minor penalty. Neither attended, yet there was an oral hearing, with the BHA's case being presented. I adopt the above recommendation and would commend procedural rules which provide for the resolution of matters without the necessity of a hearing where the parties consent.

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<sup>123</sup> s3(1) Criminal Procedure and Investigations Act 1996

197. Such procedures are already in place in a number of other sporting disciplines. For example, the LTA has a Summary Procedure through which fast track minor or admitted offences are dealt with. Similarly the RFL has an Early Guilty Plea Scheme through which straightforward admitted matters are processed (subject to certain criteria being satisfied).
198. I would therefore adopt but amend slightly that recommendation such that it reads:

**R18: A formal procedure for alternative disposal of matters be established outside of the full Disciplinary Panel procedure, to include a fast track for minor or admitted offences, formal cautions, agreed sanctions and provision for matters to be resolved (where the parties consent) without an oral hearing.**

## **8. LICENSING COMMITTEE**

### **A. Introduction**

1. In advance of this Review the BHA had spent a good deal of time considering and taking advice upon substantial changes to the structure, composition and processes of the Licensing Committee (the 'Committee'). I have seen and naturally considered the material generated in relation thereto, since it covers much of the ground I have been asked to review. Having done so, in very large measure I endorse and gratefully adopt those recommendations.

### **B. Licensing Committee**

2. The BHA's licensing function serves to safeguard the integrity and reputation of the sport of horseracing by licensing those who perform specific functions within it. Those who are licensed must meet particular criteria, which include assessment of their competence and capability and general suitability.
3. Licensing is primarily an executive function, carried out by the BHA's Licensing Team. In certain specific circumstances it is carried out by way of referral to the Committee. It is to be compared with the discipline function, exercised by the Disciplinary Panel.
4. I have summarised in Chapter 6 the work of the Committee and its place in the structure. Its Terms of Reference state its "*Purpose*" to be:

*"1.1. The Licensing Committee has been established to exercise the licensing function of the British Horseracing Authority for all persons who are required by the "Rules of Racing" to hold a licence or a permit.*

....

1.2. In addition, the Licensing Committee will, as required, determine whether a “relevant person” (as defined in the British Horseracing Authority’s “Racecourse Licensing Suitability Policy”) meets the applicable criteria under that policy, and where appropriate make recommendations to the Racecourse Department as to how to proceed with regard to that person and the relevant racecourse in the light of such a decision.”<sup>124</sup>

5. According to its Terms of Reference its duties are:

*“6.1 To exercise the licensing function of the British Horseracing Authority in respect of all persons who are required by the Rules of Racing to hold a licence or permit.*

*6.2 To recognise from time to time modifications to the British Horseracing Authority*

*Guidelines for the issue of Permits or Licences.*

*6.3 In particular and without limiting the wide scope of paragraph 1, to exercise the following powers under the Rules of Racing from time to time:*

- To grant, or refuse to grant, licences or permits;*
- To renew, or refuse to renew, licences or permits;*
- To grant, or refuse to grant, or withdraw temporary licences or permits;*
- To issue formal warnings to licensed or permitted persons;*
- To determine whether persons are ‘Suitable’ to hold a licence or permit;*
- To determine whether a “relevant person” (as defined in the British Horseracing Authority’s “Racecourse Licensing Suitability Policy”) meets the applicable criteria under that policy, and where appropriate make recommendations to the Racecourse Department as to how to proceed with regard to that person and the relevant racecourse in the light of such decision;*
- To accept, or refuse to accept, or cancel any registration under the Rules of Racing;*

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<sup>124</sup> §1

- *To allow, or refuse to allow, a person to act or continue to act as an Authorised Agent;*
  - *To withdraw or suspend a licence or permit;*
  - *To grant, or refuse to grant, approvals for Equine Swimming Pools”*
6. However, there are only two routes by which an application for a licence, permit or registration might reach the Committee. The first is Schedule (A)9 Part 1, where the BHA:
- a. Is minded to refuse the application or to attach conditions or restrictions to the licence, permit or registration on the ground that the applicant is not a suitable person; or
  - b. Is minded to refuse the application on the grounds that such action is necessary in the interests of racing pending the outcome of an ongoing investigation or process (whether or not undertaken by the BHA); or
  - c. Considers such a course to be otherwise appropriate<sup>125</sup>.
7. The second route is Schedule (A)9 Part 2. This provides that a person whose application has been refused by the BHA may in limited circumstances submit their case for re-assessment by the Committee.
8. The Terms of Reference provide that the Committee will meet “*at least once per month to avoid unnecessary delays in consideration of applications*”<sup>126</sup>. Further, the members’ “*approximate workload*” is put at “*12 days per year*”<sup>127</sup>. The Terms of Reference refer, I suspect, to a time when the Committee was expected to consider all applications.
9. The Committee no longer undertakes the bulk of the licencing work. In fact the opposite is true: it is responsible for a modest amount of it. That chimes with our consultees who expressed the view that in recent times

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<sup>125</sup> Schedule (A)9 §2.1

<sup>126</sup> §4.1

<sup>127</sup> §6.4

the Committee has become “*marginalised*”<sup>128</sup>. To illustrate the point we were provided with figures which show the number of cases heard over the last three years. They are both modest and falling:

- a. 2013 - 14 cases
- b. 2014 - six cases
- c. 2015 - two cases

In 2016 to date, this trend continues.

10. The Terms of Reference also provide that “*The Chairman and Members of the Licensing Committee shall be guided by the Board*”<sup>129</sup>. As with the Disciplinary Panel that expression is not defined. I do not know what it means. It appears to permit the BHA Board an unfettered right or power to guide the Committee on policy, approach generally or even in relation to a specific case or cases. No doubt the members of that Committee would regard themselves as independent of the BHA. I spoke with the Chairman who regarded himself as robustly independent of the BHA. I am confident that he and his Committee perform their responsibilities independently of the BHA.
11. For the reasons set out in respect of the Disciplinary Panel this provision should be removed.
12. **I repeat R1: The (Disciplinary Panel and) Licensing Committee’s Terms of Reference should be amended to remove the following term: The Chairman and Members of the (Disciplinary Panel and) Licensing Committee shall be guided by the Board.**

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<sup>128</sup> As they put it.

<sup>129</sup> §8.1

**C. The BHA Review**

13. At the BHA's Board meeting in September 2014, a formal review of the Licensing Committee structure and processes was initiated, led by Andrew Merriam. This review commenced in October 2014. The aim of that review was to determine the best and most effective way of dealing with and streamlining applications that were then being considered by the Committee either remotely, or by way of hearing. That included:
- a. Re-assessment of applications that have been refused by the BHA;
  - b. Applications that the BHA is minded to refuse for reasons of 'Suitability';
  - c. The withdrawal or suspension of a licence or permit;
  - d. The cancellation or removal of any person from the register of Owners; and
  - e. Other matters as deemed appropriate by the BHA concerning a licence, permit or registration.
14. The background was that since 2011, the BHA Executive had had responsibility for making the majority of licensing decisions, with only certain applications (including those where "suitability" concerns existed) and licensed individuals of on-going concern being referred to the Committee. In reviewing those matters, the following areas were considered:
- a. Requirement for a Committee;
  - b. Committee constitution and membership;
  - c. Committee role and objectives;
  - d. Education and training of Committee members; and
  - e. The Rules relevant to the Committee, specifically:
    - i. The decision making processes delegated to the Committee; and
    - ii. The current procedure for referring matters to the Committee.

15. Following that review, which involved extensive consultation with the current Committee Chairman and members, members of the BHA Executive, the BHA Disciplinary Officer, the Independent Regulatory Non-Executive Director, and a legal adviser, that review team recommended the following two core proposals. I look at each in turn and express my own views. Before doing so it is right to record that the BHA canvassed the proposals amongst the following stakeholders including the NTF, Permit Trainers Association, Racehorse Owners Association, PJA, Amateur Jockeys Association, National Association of Stable Staff (which expressed no comment), the Racecourse Association, and the Committee and Disciplinary Panel Members.

16. The responses I have seen were largely supportive, raising a small number of issues of detail rather than any of substance. The PJA expressed no concerns about the Committee but wanted more time to consider the proposals. In any event it made the (reasonable) point that any changes proposed and the consultation surrounding them should be placed on hold pending the conclusion of the *2016 Integrity Review*. The widespread support for the proposals has informed but not dictated my approach.

(1) Merger of the Disciplinary Panel and the Licensing Committee

17. First, the review group proposed that the Disciplinary Panel and the Committee members should be merged into a new combined pool of people, with the same administrative support, training and review meeting structure.

18. The proposed merger has much to commend it, not least given the reduced volume of work. It will streamline the process. Presently only one person is a member of both the Disciplinary Panel and the Committee. I also agree with that review team that dependent upon experience and qualifications, members would sit on either or both types of hearing. It

(correctly) recognised that under such a system there would need to be appropriate 'Chinese Walls' between any on-going simultaneous licensing and disciplinary cases in respect of a particular individual. It would also be necessary to ensure no person sat on a Committee hearing if they had inappropriate knowledge (from a disciplinary matter) of the individual in question. Naturally, members of the merged group would also be expected to declare any conflicts of interest that might or did arise on a case-by-case basis.

19. The proposed merger would have other advantages. It should provide more opportunities for individuals to act in licensing and/or disciplinary matters on a more frequent basis. It would ensure a more consistent approach in general, and in relation to administration, training and review meetings.
20. That review team opined that such a move would reflect the approach taken in other regulatory environments, and has been approved from a "*legal and fairness perspective*". As to the latter I have already commented upon the issues of independence in relation to the terms of appointment and its Terms of Reference.
21. On balance, I agree with the proposed merger. The licensing function is integral to what the BHA does and why it exists. It is at the very heart of the BHA's role to safeguard the integrity and reputation of the sport of horseracing as well as the wellbeing of the horses and people who participate in it. It is different from discipline.
22. When the review group proposed the merger, it did not do so against a background of an independent judicial panel of the kind I recommend. Therefore the issue arises as to whether that aspect of the BHA's work should be ceded to persons independent of the BHA.

23. On that issue, I am satisfied that the merger would not be an inappropriate derogation of the BHA's licensing function. I have reached that conclusion because of the second recommendation of that review group, namely that the BHA Executive would determine all applications in the first instance. Therefore, licensing remains primarily the function and responsibility of the regulator with provision for consideration by an independent panel in limited and appropriate circumstances.
24. I have recommended significant changes to the Disciplinary Panel. I would not envisage a merger with the Committee diluting any of those.
25. I make the following recommendation:

**R19: The present Licensing Committee should be merged with the Disciplinary Panel to form a single disciplinary group, under the leadership of the Judicial Panel Chairman.**

(2) Determination of Applications

26. The Committee review team concluded that the BHA Executive would determine all applications in the first instance. Provided all mandatory information had been provided during the application process, applicants would be provided with an optional review (rehearing) by the Committee, drawn from the combined pool. A subsequent appeal to the Appeal Board would be available.
27. They opined that this would allow the process for applications to be consistent and determined more swiftly. It would also offer applicants the right of a rehearing.

(3) Composition

28. The Committee presently comprises six members, of whom two are lawyers and the remainder are Active Stewards
29. In light of the extensive discussion of the issues in this regard in the preceding Chapter, I take this shortly. No issues were raised in relation to Active Stewards in this part of the process. No doubt that is because they are not involved in reviewing decisions of other Stewards. Given their knowledge of horseracing, I see no particular need or desirability to debar them. The effect is that R9 acts only as a bar to Active Stewards sitting on Disciplinary Panel matters. They may continue to sit on and determine licensing matters
30. However, I do see that the advantages of broadening the composition of the Disciplinary Panel apply equally to licensing matters. The composition of those who hear licensing matters should no longer be limited to Stewards and lawyers but broadened to include other suitably qualified people with sufficient knowledge of horseracing. I also believe that the virtues of openness so far as application and appointment to the Disciplinary Panel is concerned, apply equally to those engaged in licensing. For those reasons, I would suggest that appointment to the merged group should follow the same procedure as I have recommended for the Disciplinary Panel.
31. **Therefore I repeat R10 namely: The composition of the Disciplinary Panel and Licensing Committee should no longer be limited to Stewards and lawyers but should be broadened to include other suitably qualified people with sufficient knowledge of horseracing.**

(4) Chairman

32. I need to address the role of the Committee Chairman. The Committee's Terms of Reference state that in addition to his duties as a member he has the following as the Chairman:

*"6.5.1 To chair all licensing meetings.*

*6.5.2 To report to the Chairman of the Board.*

*6.5.3 To liaise with the Director of Integrity, Legal & Risk, or the Head of Racecourse (in respect of decisions referred under 1.2 above) as appropriate.*

*6.5.4 To liaise with the Secretary of the Licensing Committee on a regular basis.*

*6.5.5 To sit whenever practical when a panel is convened to determine whether a person is 'Suitable' to hold a licence or permit, or remain registered, or to determine whether a "relevant person" is "Suitable" in accordance with 1.2 above.*

*6.5.6 To sit on the 'Medical Appeals Panel' as a member.*

*6.5.7 To carry out inspection visits of licensed premises, to include the racing schools and trainers' yards as required.*

*6.5.8 To assist the British Horseracing Authority executive on licensing issues as required, to include sitting on/chairing ad hoc committees."*

33. The review team envisaged that there would be nominated chairs of the Disciplinary Panel and of the Committee. I see the merit in that, but have questioned whether it would be necessary or desirable if a Judicial Panel Chairman of the kind I have recommended was appointed.

34. I have concluded that the way forward would be for the Judicial Panel Chairman to appoint a person from amongst the licensing members to oversee and lead on the licensing aspects of the group's work. That person would assume some of the duties of the present Committee Chairman and answer to the Judicial Panel Chairman. That person would

obviously need to have an in-depth knowledge of licensing. For the same reasons as applied in respect of Disciplinary Panel Chairmen, I have also concluded that he should also be legally qualified. Once more this is no reflection on abilities of the current Chairman.

35. That assumption of responsibilities would be subject to necessary amendment of the present Terms of Reference consistent with the structural independence I have recommended. In this respect attention would have to be given to:
  - a. Paragraph 6.5.2 - (they should report to the Judicial Panel Chairman)
  - b. Paragraph 6.5.3 - as to the nature of the liaison with the Director of Integrity, Legal and Risk
  - c. Paragraph 6.5.4 - the Secretary would be shared with the Disciplinary Panel
  - d. Paragraph 6.5.8 - to maintain independence, the nature of the committees on which this person would sit would have to be carefully considered. It may be better that they attend as an invitee, for purposes not inconsistent with their independence.
  
36. Therefore I envisage a combined or merged Disciplinary Panel and Licensing Committee structurally independent from the BHA. Its members would be appointed by way of open application, act under the stewardship of the enhanced Judicial Panel Chairman and its Terms of Reference would reflect that new found independence.
  
37. I make the following recommendation:

**R20: The Judicial Panel Chairman should appoint a legally qualified person to oversee the licensing duties of that committee, assuming the responsibilities of the present Chairman as amended to reflect the other recommendations herein.**

(5) Terms of Appointment

38. The BHA has provided me with a copy of a member's letter of appointment to the Committee. I am told it is the standard terms upon which a person is appointed or reappointed (as the case may be) to the Committee.

39. The Committee members are both appointed and reappointed on a three-year fixed term. However, that is subject to a same three-month notice period which appears in the Disciplinary Panel members' appointment letters. I have already addressed this issue in relation to the Disciplinary Panel and need not repeat it or my reasoning here. My conclusions are identical, for the same reasons.

40. **I repeat R5, namely the Terms of Appointment for the (Disciplinary Panel,) Licensing Committee (and Appeal Board<sup>130</sup>) should be amended. All members should be appointed on terms which provide that a notice period is exercisable only in circumstances such as the following:**

- a. **By the individual to whom it relates; or**
- b. **By the BHA where the Chairman or member (as appropriate) has**
  - i. **Committed any serious or repeated breach or non-observance of their obligations to the BHA or of the Rules;**
  - or
  - ii. **Committed a criminal offence or acted in any manner which brings them or the BHA into disrepute.**

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<sup>130</sup> See Chapter 9

(6) Miscellaneous

41. Two miscellaneous matters identified to the BHA during its review which preceded mine:
- a. The Rules provide for a power to withdraw or suspend any licence or permit the BHA has granted<sup>131</sup>. However, those powers have not been delegated to the Licensing Committee under Schedule (A)9. It is engaged with decisions made in respect of “applications” and applicants. The review team’s proposals similarly refer only to applications.
  - b. Second, there is a right of appeal from a decision to suspend or withdraw a licence or permit under Rule (A)63 (on grounds other than Rule contravention), but no appeal from a suspension or withdrawal of a permit under Rule (A)56 is permitted.
42. These matters need to be regularised. They might naturally fall within the Rules rewrite.

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<sup>131</sup> Rules (A)24.2.1-24.2.2, (A)56 and (A)63

## **9. APPEAL BOARD**

### **A. Introduction**

1. My Terms of Reference required me to consider changes to the structure, composition and processes of the Appeal Board to ensure it remains legally robust. I am content that it is. Further, I have concluded that the BHA's disciplinary system, when viewed in totality, is fair. In my view it meets the BHA's legal obligation to provide a disciplinary system which is fair.
2. Further, I am required to consider changes to generate greater confidence in the appeal function amongst the sport's participants and stakeholders. My consultations revealed widespread satisfaction with the Appeal Board. In many ways it seemed to me – with one or two finesses – to be a model of a modern *independent* disciplinary tribunal.
3. The BHB introduced the Appeal Board on 1 March 2001 as part of its response to the Human Rights Act 1998 ('HRA 1998'). It replaced the Disciplinary Review Committee. From inception it was announced that its Chairman would be (and was) legally qualified and independent. He was to be "*supported*" by two Members of The Jockey Club. Sir Edward Cazalet, then a recently retired High Court Judge, and three Queen's Counsel (external to the BHB) formed the separate panel from which the independent Chairman would be drawn for any particular appeal. Immediately it had demonstrable and actual independence at its core.

4. As part of its public statement in advance of the launch, Christopher Foster, Executive Director of The Jockey Club, said:

*“We are delighted that four such well-qualified men, having fully reviewed our intended procedures, have agreed to make themselves available to chair an Appeal Board.*

*The Jockey Club intends to exercise its disciplinary and licensing functions fairly, rationally and proportionately, although access to the High Court for aggrieved parties ultimately provides compliance with Article 6 of the Human Rights Act when it is required. However, we hope that people will not feel it necessary to resort to that. The measures we have taken to make our procedures more transparent, together with the new Appeal Board, should minimise those occasions where aggrieved persons are exposed to the expense and delays of taking action in the Courts.*

*Other sporting bodies have also had to consider the implications of the Human Rights Act and the changes introduced by the Jockey Club are similar to those recently brought in by the Football Association.”*

5. The four members of the panel of independent Chairmen (in addition to Sir Edward Cazalet) included Bruce Blair QC and Jeremy Gompertz QC. The former is now the Appeal Board Chairman and the latter a member of the Disciplinary Review Group.

**B. Independence**

(1) Terms of Reference

6. The Terms of Reference describe its purpose thus:

*“Appeal Boards are convened to hear appeals from some decisions made under the ‘Rules of Racing’ to the extent permitted by the Rules for appeals to an Appeal Board, contained in Schedule (A)7 of the Rules. The Appeal*

*Board derives its authority from these Rules which are determined by the Board of the British Horseracing Authority.”<sup>132</sup>*

7. Its duties are defined in Schedule (A)7 of the Rules.

(2) Membership

*The Chairman’s Panel*

8. Appeal Boards are made up of representatives from two panels. The Chairman is appointed from ‘the Chairman’s Panel’, which consists of persons who satisfy this criteria: he is a member or former member of the judiciary, a Queen’s Counsel or a junior barrister or solicitor of more than 10 years post call or admission<sup>133</sup>. He must:

- a. Not have been the holder of a licence or permit granted by the BHA (whether as Rider or Trainer) within the previous 5 years,
- b. Not be a Steward,
- c. Not be a director of, or employed by, the BHA<sup>134</sup>.

9. Schedule (A)7 provides:

*“Members shall serve for an initial term of 3 years unless they resign earlier.”<sup>135</sup>*

10. Therefore their initial term is fixed at three years. That is subject to the following Rule:

*“A member may be required to resign at the request of a majority of the members, including the Chairman.”<sup>136</sup>*

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<sup>132</sup> §1.1

<sup>133</sup> §2.3

<sup>134</sup> §2.3

<sup>135</sup> §4.2

11. It is not entirely clear whether “members” means only members of the Chairman’s Panel or includes all members of the Appeal Board. It seems also to require the Chairman to be part of the majority. The precise meaning may not – for now – be important though it would benefit from clarification. What is important is that the Rules do not permit the BHA to require a member to resign or to enable it to unilaterally remove him. That is important for it provides the security of tenure necessary for independence.
12. The Chairmen also receive letters of appointment, which they are required to sign. I have seen one dated 26 June 2013 for an appointment to the Appeal Board ending on 25 June 2016. I understand it to be standard terms upon which Chairman *were* appointed or reappointed (as the case may be) to the Panel. It does not contain the three-month or any notice clause.
13. I have also seen the appointment letters for the three Chairmen. They are dated 1 January 2016, 20 April 2016 and 26 June 2016 respectively. Each contains the following clause:

*“Notice Period: Three months”*

14. It says no more or less than that. It is the same clause that appears in the Disciplinary Panel and Licensing Committee members’ appointment letters.
15. The Appeal Board derives its authority to hear appeals from the Rules. Rule (A)84.1 provides:

*“Appeal Boards shall be convened in accordance with Schedule 7 to hear appeals from decisions of the Authority”.*

16. Rule 84.2 specifically addresses membership:

*“Schedule 7 contains provision about*

*[...]*

*84.2.3 the membership of an Appeal Board*

*[...]”*

17. Read together, Rule 84.2 and Schedule (A)<sup>7137</sup> provide sufficient security of tenure for the members of the Chairman’s Panel. The tenure “*shall*” be three years unless the other members require him to resign. The Rules do not allow the BHA to remove a chairman.
18. Read with the Rules, the notice clause would not – in my view – enable the BHA to remove the member. If that is correct, it must therefore provide for resignation – on notice – by the Chairman himself. On that basis that clause does not undermine their security of tenure.
19. Decisions of the Appeal Board are determined by a majority of two, one of which must be the Chairman<sup>138</sup>. The effect is the Chairman cannot be outvoted. For me that is a further demonstration of its intended and actual independence of the BHA.

*The Non-Chairman’s Panel*

20. The Non-Chairman’s Panel shall consist of not less than five and not more than eight<sup>139</sup>. It presently numbers five. Two are Active Stewards and the remaining three are retired Stewards. A person is eligible for membership

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<sup>137</sup> §4.2 and §4.3

<sup>138</sup> §31.1

<sup>139</sup> §6.1

of that Panel only if he has previously served on the Disciplinary Panel or the Licensing Committee<sup>140</sup>.

21. As with the Chairman's Panel the Rules provide:

*"Members shall serve for an initial term of 3 years unless they resign earlier."*<sup>141</sup>

22. The Rules continue thus:

*"A member may be required to resign at the request of the majority of members including the Chairman."*<sup>142</sup>

23. The same comments apply to these provisions as made above in respect of the Chairman's Panel.

24. I have also seen the appointment letters for the five members. Two take effect on 1 January 2016 and each of those contains the following clause:

*"Notice Period: Three months"*

25. Those clauses are not present in the appointment letters of the other three members. For the reasons set out in respect of the Chairman's Panel, I have reached the same conclusion about their security of tenure.

26. **Therefore, I repeat R5, namely the Terms of Appointment for the (Disciplinary Panel, Licensing Committee and) Appeal Board should be amended. All members should be appointed on terms which provide that a notice period is exercisable only in circumstances such as the following:**

- a. By the individual to whom it relates; or**

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<sup>140</sup> §6.2

<sup>141</sup> Schedule (A)7 §9.1

<sup>142</sup> §9.2

- b. By the BHA where the Chairman or member (as appropriate) has:**
  - i. Committed any serious or repeated breach or non-observance of their obligations to the BHA or of the Rules; or**
  - ii. Committed a criminal offence or acted in any manner which brings them or the BHA into disrepute.**

(3) An Independent and Impartial Body

27. I have examined elsewhere the Appeal Board's decision in the case of *Graham Bradley*. The Appeal Board concluded that it was an independent and impartial body and had the appearance thereof.
28. My own views are that given the other provisions summarised above and below, I am satisfied that the Appeal Board - as presently constituted - is an independent and impartial body and has the appearance thereof:
- a. The security of tenure: the members are appointed for a fixed period; the BHA has no power to dismiss them at will, for example if it disagreed with a particular decision
  - b. The Chairman cannot, in effect, be outvoted
  - c. No current member of the Disciplinary Panel is permitted to sit on the Appeal Board
  - d. It is completely separate from the Integrity, Legal and Risk and the Raceday Operations and Regulation Departments of the BHA.
29. The Terms of Reference provide for the payment of fees and expenses<sup>143</sup>. No sensible independent observer would regard that as material to the question of independence or impartiality.
30. I note that the exclusion which applies to the Chairman's Panel - namely they are not eligible if (1) they have been the holder of a licence/permit within the previous 5 years, (2) they are a Steward, or (3) they are a director of, or employed by, the BHA - does not apply to the non-

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<sup>143</sup> §9.1 - §9.3

Chairman's Panel. That means (for example) a BHA director could in theory be appointed to the Appeal Board. *Prima facie* that would offend the *ratio* of the Court of Appeal decision in *Kaur*.

31. In light of the factors I have identified, I do not consider the matter identified undermines its independence. The reality is that at present no Director is nor has ever been on the Appeal Board. The BHA would not appoint one. Nor would it put in place any person who would fall foul of *Kaur*. The present incumbents are all former or Active Stewards. None would be able to outvote the Chairman. Nor could any person on an Appeal Board whatever his position vis-a-vis the BHA do so. As presently constituted, I consider the Board is and appears to be legally independent of the BHA. I have seen, heard or read nothing which suggests it is anything other than impartial and appears so.

**C. The Fairness of the Disciplinary Process**

32. I have already expressed the view that both the Disciplinary Panel and Licensing Committee are not technically independent. Therefore as identified in Chapter 6 the critical issue is whether the disciplinary process as a whole is fair.

(1) The Law

33. This issue was considered in *Calvin v Carr*<sup>144</sup>, a case which started with a decision of the Australian Jockey Club stewards at an Enquiry following the running of the Eastlakes Handicap race at Randwick Racecourse on 13 March 1976.

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<sup>144</sup> [1979] 2 All ER 440

The case ended before the Privy Council which in dismissing the appeal ruled there was:

*“no absolute rule that defect in natural justice could or could not be cured by appeal proceedings and that, where a person had joined an organisation or body and was deemed on the rules of that organisation in the context in which he joined to have agreed to accept what in the end was a fair decision notwithstanding some initial defect, the task of the courts was to decide whether in the end there had been a fair result matched by fair methods”*<sup>145</sup>.

34. In *Modahl v British Athletic Federation Ltd*<sup>146</sup> the Court of Appeal followed the Privy Council. This was a case where the first instance disciplinary panel was tainted by the appearance of bias arising out of a comment made by one of its members before - but unrelated to - the hearing. The appeal was dismissed. Latham LJ said:

*“It seems to me that in cases such as this, where an apparently sensible appeal structure has been put in place, the court is entitled to approach the matter on the basis that the parties should have been taken have agreed to accept what in the end is a fair decision. As Lord Wilberforce said, this does not mean that the fact that there has been an appeal will necessarily have produced a just result. The test which is appropriate is to ask whether, having regard to the course of the proceedings, there has been a fair result.”*<sup>147</sup>

[...]

*But it does not seem to me to be appropriate to apply this test after the event to the determination of the question of whether or not there has been a breach of contract giving rise to a claim for damages. One returns at that*

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<sup>145</sup> p440

<sup>146</sup> [2001] EWCA Civ 1447, [2002] 1 WLR 1192

<sup>147</sup> §61

*stage to ask the question posed in Calvin v Carr [1980] AC 574. The court's task is to determine whether or not, on the evidence, there has been a fair result.*"<sup>148</sup>

35. The Court of Appeal in *Flaherty v NGRC* took a similar approach<sup>149</sup>. In delivering the judgment of the Court of Appeal Scott Baker J said:

*"77. In my judgment it is important to stand back and ask the question posed by Lord Wilberforce in Calvin v Carr at p.593C whether, having regard to the course of the proceedings, there has been a fair result (".....those who have joined in an organisation or contract, should be taken to have agreed to accept what in the end is a fair decision, notwithstanding some initial defect").*

*78. In Modahl Latham LJ, having cited Lord Wilberforce in Calvin v Carr said: "61.....the test which is appropriate to ask is whether, having regard to the course of proceedings there has been a fair result. As Lord Wilberforce indicated, there may be circumstances in which by reason of corruption or bias or some other deficiency the end result cannot be described as fair. The question in every case is the extent to which the deficiency alleged has produced overall unfairness."*

*79. I have earlier in this judgment cited the words of Mance LJ at para 115 in the same case. It is in my judgment of paramount importance that sporting bodies should be given as free a hand as possible, consistent with the fundamental requirements of fairness, to run their own disciplinary processes without the interference of the courts."*

36. There is no absolute rule that appeal proceedings will or will not cure a defect in natural justice. Naturally these decisions are fact sensitive. It will

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<sup>148</sup> §67

<sup>149</sup> [2005] EWCA Civ 1117

in part depend on the nature of the breach. Further, one must consider the nature of the appeal process to see whether it cures any breach, so as to produce a decision that is fair overall. The appellate body must have the ability to conduct a fair and full inquiry.

37. As to what a fair and full inquiry means, in *Calvin v Carr* the appeal was by way of a rehearing. However, in its decision in *Graham Bradley* the Appeal Board concluded that although The Jockey Club's Appeal Board could not itself:

*“carry out a re-hearing of the facts [its] powers of review are, in the circumstances, sufficient to bring the overall process within Article 6” and “in so far as this Appeal Board is not itself considered to be part of an Article 6 compliant process, then, because of the powers of the High Court on a review, the process overall is Art 6 compliant”*<sup>150</sup>.

38. I need therefore to look at the powers of the Appeal Board.

(2) Powers of the Appeal Board

39. The grounds for bringing any appeal are:

*“14.1 that the reasons given are insufficient to support the decision,  
14.4 that the hearing was conducted in a way that was substantially unfair  
and prejudicial to the appellant,  
14.5 that there was insufficient material on the basis of which a reasonable  
decision maker could have made the decision in question,  
14.4 that the decision maker  
14.4.1 misconstrued,  
14.4.2 failed to apply, or  
14.4.3 wrongly applied,*

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<sup>150</sup> §16.28(4)

*these Rules, General Instructions or regulations which are relevant to the decision,*

*14.7 that any Disciplinary Penalty or award, order or other sanction is so disproportionate that no reasonable decision maker could have decided upon it, or*

*14.8 that there is evidence for the appeal which, had it been available at the original hearing, would have caused the decision maker to reach a materially different decision.”*

40. Subject to one exception, an appeal shall be by way of review on the documents, video evidence and submissions<sup>151</sup>. It is essentially a Board of review and not a fact-finding body.
41. The exception is that the Appeal Board may receive new evidence in exceptional circumstances where:

*“22.3.1 it is satisfied with the reason given as to why it was not, or could not reasonably have been, obtained and presented at the original hearing, and 22.3.2 it is satisfied that the evidence is cogent and might reasonably have caused the decision maker to reach a different conclusion.”*<sup>152</sup>

42. The Appeal Board “*should*” allow an appeal:

*“29.1 if satisfied that one or more of the grounds in Paragraph 14 have been made out and it would be unfair to allow the decision to stand, or*

*29.2 where new evidence has been presented on the appeal and the Appeal Board is satisfied in the light of that evidence that the decision was wrong.”*<sup>153</sup>

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<sup>151</sup> Schedule (A)7 §21.1

<sup>152</sup> Schedule (A)7 §22.3

<sup>153</sup> Schedule (A)7 §29

43. In addition to allowing or dismissing an appeal the Appeal Board has extensive powers. It may exercise any power which the original decision maker could have exercised (save for limited exceptions), remit the matter for re-hearing, order forfeiture or return of a deposit, increase or decrease a disciplinary penalty or award<sup>154</sup>.
44. In 2002 the Appeal Board declared the whole process fair. I know of no subsequent challenge to the fairness of the overall disciplinary structure. The Appeal Board has extensive powers of review, to make in many respects a fair and full inquiry. It can hear 'new' evidence and remit a case. In addition, there remains the supervisory jurisdiction of the High Court. My view is that overall the BHA's disciplinary system, is 'fair' both at common law and for the purposes of Article 6(1).

(3) *De novo (hearing a case afresh)*

45. One specific matter calls for mention. The Appeal Board does have the power to "*make such further or other order as it considers appropriate, either generally or for the purpose of giving effect to its decision*"<sup>155</sup>. However no one suggests this gives it the power to hear a case *de novo*. My own view is that it does not. In other words, the Appeal Board cannot presently – as I read the Rules – conduct a rehearing. This was a topic I canvassed with each of the Appeal Board Chairmen.
46. They were not persuaded that such was necessary. They questioned whether such was desirable where the Board has the power to remit a case. I see the force in both.
47. A provision enabling the Appeal Board to proceed by way of a *de novo* hearing is not unusual. For example RFU Regulation 19.12.5 provides:

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<sup>154</sup> Schedule (A)7 §30

<sup>155</sup> Schedule (A)7 §30.5

*“A de novo hearing (hearing a case afresh) against the decision of a Disciplinary Panel shall only be permitted by an Appeal Panel if it is demonstrated to the requisite standard by the appellant that the circumstances are exceptional and there are compelling reasons why the decision of the Disciplinary Panel should be set aside and the Appeal Panel should hear the case de novo.”*

48. The RFU Appeals Panel also has the power to remit the matter for a rehearing<sup>156</sup>.
49. The Regulations for FA Appeals provide grounds which are classically those of a review tribunal:

*“The grounds of appeal available to Participants shall be that the body whose decision is appealed against:*

*(1) failed to give the appellant a fair hearing and/or*

*(2) misinterpreted or failed to comply with the rules or regulations relevant to its decision; and/or*

*(3) came to a decision to which no reasonable such body could have come and/or*

*(4) imposed a penalty, award, order or sanction that was excessive.”<sup>157</sup>*

50. It has the power (in limited circumstances) to admit ‘new’ evidence. The FA Appeal Board may also remit the matter for a rehearing<sup>158</sup>. The relevant regulations also state that *“Appeal hearings shall be conducted how, when and where the Appeal Board considers”<sup>159</sup>*.
51. World Rugby Regulation 18 provides that:

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<sup>156</sup> RFU Regulation 19.12.12(c)

<sup>157</sup> Regulations for FA Appeals - Regulation 1.6

<sup>158</sup> Regulations for FA Appeals - Regulation 3.3(3)

<sup>159</sup> Regulations for FA Appeals - Regulation 2.10

*“The Appeal Committee shall determine the basis on which an appeal will proceed, including the standard of review and may, in its discretion rehear the whole or any part of the evidence given before the Judicial Officer or Judicial Committee (as the case may be) as it considers appropriate. For the avoidance of doubt World Rugby shall have the right to be represented and shall be entitled through its nominated representative to make submissions in any proceedings conducted by Appeal Committees.”<sup>160</sup>*

52. It can also hear ‘new’ evidence (not reasonably available to the lower panel). Its powers include:

*“An Appeal Committee shall have the power to:*

*(a) allow or re-affirm, or dismiss the appeal;*

*(b) vary the decision in such manner as it shall think fit (including power to reduce, uphold, decrease or cancel any penalty);*

*(c) make such further order (in relation to costs or otherwise) as it thinks fit; and*

*(d) take any other step which in the exercise of its discretion the Appeals Committee considers it would be appropriate to take in order to deal justly with the case in question.”<sup>161</sup>*

53. My own view is simply this. To enable the Appeal Board to hear cases by way of a rehearing in exceptional circumstances would lance at a stroke any suggestion (if it were ever made) that the Appeal Board’s current powers of review are insufficient.

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<sup>160</sup> World Rugby Regulation 18.7.3

<sup>161</sup> World Rugby Regulation 18.8.1

(4) Recommendations

54. I make the following recommendations:

**R21: The categories of persons exempted from Appeal Board's Chairman's Panel (at Schedule (A)7 §2.3.1 and 2.3.3) should be extended to the non-Chairman's Panel.**

**R22: The Appeal Board's powers should be extended to permit it to conduct a *de novo* hearing in exceptional circumstances when considering an appeal against a decision of the Disciplinary Panel or the Licensing Committee**

55. Like the Disciplinary Panel, the Appeal Board has two Active Stewards. No issue was raised in relation to their role in this part of the process. No doubt that reflects the fact that each hearing is chaired by an external Queen's Counsel who cannot be outvoted. Further, appeals from Stewards' racecourse decisions cannot be heard by the Appeal Board. There are advantages, as I have said in Chapter 7, in their involvement in the process. I see no particular need or desirability for change in this respect. The effect is that R9 is not a bar to their sitting on the Appeal Board.

56. Going forward, I see no reason why the present members should not stay in place. As and when their terms expire, and should they wish to be reappointed, the Judicial Panel Chairman would no doubt consider their respective positions. As with the Disciplinary Panel I am not persuaded that there should be a maximum term of service.

57. A consequence of my suggested broadening of the composition of the merged Disciplinary and Licensing Panel, will be that as new members become eligible to sit on the Appeal Board so the composition of that body will broaden. New members to the Chairman's Panel would be appointed

by way of an open competition following the same lines as the process for the Disciplinary and Licensing Panel.

58. There should be a deputy to the Judicial Panel Chairman. He would deputise for the Judicial Panel Chairman and also convene the Appeal Board where the Judicial Panel Chairman sat at first instance. He could also sit on the Appointments Committee and should come from the Appeal Board Chairman's Panel.
59. Hereafter I look at particular issues which I have been asked to consider as part of this Review.

**D. Deposit**

60. I addressed this in the context of appeals from the racecourse to the Disciplinary Panel. So far as the fact of and reason for deposits are concerned, the same issues arise and I repeat the same recommendations.
61. There is a remaining related issue, which has arisen during the course of this Review. It concerns the relationship between the deposit and an order for costs. It arises when an order is made for costs but the deposit would not (notionally) be forfeited. In a recent case the BHA contended that:

*".... deposits stand independent of any costs, as some contribution to the administrative expenses of convening the Appeal Board and towards the costs of transcription of the hearing before the Disciplinary Panel. ... They should be forfeited and used for the administrative costs of the Appeals."*

62. As the Appeal Board observed, *“that is one possible interpretation”*. The counter proposition was that it should be used towards defraying the costs award. On this issue the Appeal Board said:

*“We have conducted some, but not exhaustive, research into the treatment of the deposit by the Appeal Board in previous cases in which appeals have been dismissed and have encountered varying approaches to the issue of forfeiture (or not). In some cases ...the deposit has been notionally returned, in other words not as such forfeited: rather the amount of £800 has been credited against the appellant’s quantified liability for costs. In other cases, but they are not many in number, a true forfeiture has been strictly applied.*

*This is a matter which ideally requires further argument from counsel; but we are not going to direct such an exercise, the costs of which would in our view be disproportionate in the instant case. That is for another day....”*

63. Where the Appeal Board forfeited the deposits, it directed that they be credited towards the costs orders. I am not in a position to resolve the debate, not least because as the Appeal Board observed in that case, it would benefit from further argument. I do however see significant merit in the Appeal Board’s approach. It has the virtue of being consistent with the rationale of the deposit (as I have found it to be). It is an approach also adopted by the ECB which makes specific provision for it in its rules. I would recommend that it is a matter which is given further consideration and should be addressed by way of a specific provision.

**10. RELATIONSHIP BETWEEN THE BHA EXECUTIVE STRUCTURE AND  
THE DISCIPLINARY PANEL, LICENSING COMMITTEE AND APPEAL  
BOARD**

1. Paragraph 3.14 of my Terms of Reference requires:

*“A review of the relationship between the BHA Executive and the administration and operation of the Disciplinary Panel, Licensing Committee and Appeal Board, to include recommendations for changes to the BHA’s organisational structure, if appropriate.”*

**A. Corporate Structure**

2. If my recommendations are implemented that will involve a degree of reorganisation. I have been informed by the BHA Chief Executive that prior to my work with this Review he had considered and was formulating proposed organisational changes within the BHA. During my Review I met with him on two separate occasions. During the first on 23 June 2016 he told me in general terms something of his proposals. In a later interview conducted on 26 July 2016 he showed me documents which set out something of those proposed amendments. Such changes are not directly for me and do not come within my Review. I was told of them not for comment but for information. As I understand it they are not finalised and I do not consider it appropriate to comment further nor to reveal their provisional scope or nature in this document. However, I think it appropriate for me to observe that I would expect the BHA, insofar as it implements my Recommendations, to carry out any future organisation consistent with that implementation.
3. I envisage an addendum to the present structure of the kind set out in Appendix E. At present I have suggested that the Secretary to the merged Disciplinary Panel/Licensing Committee and Appeal Board should report to an appropriate member of the Executive Team.

**B. Disciplinary Review Group**

4. The Disciplinary Review Group ('DRG') comprises Patrick Russell (Chair), Nick Rust, Sir Paul Stephenson and Jeremy Gompertz QC. Sir Paul Stephenson is one of the BHA's Independent Regulatory Directors and a member of the Board. Patrick Russell is the BHA's Disciplinary Officer ('DO'). The DRG reports to the Board. I have consulted with Nick Rust, Sir Paul and with Patrick Russell. I observed a DRG meeting.

5. Pursuant to its Terms of Reference its purpose is:

*"To review and oversee the matters within the responsibility of the Disciplinary Officer, and to establish the regulatory policy to be applied in carrying out his role as set out in Schedule 1."*

6. Schedule 1 provides:

*"1. The Disciplinary Officer has the authority and responsibility to review all cases and take the final decision as to:*

- *whether a prosecution under the Rules of Racing should be initiated or not,*
- *the nature of the charges, and*
- *case preparation and presentation;*

*and shall report and be accountable to the Disciplinary Review Group.*

*2. The Disciplinary Officer is expected to:*

- *have a close personal involvement regarding all betting related corruption cases, cases that have serious implications for the sport, such as welfare matters, and doping violations whether concerning horses or licensed individuals;*
- *delegate to others the necessary decision making in less serious offences subject to his ongoing review;*

- *advise the Executive and the Board on when and on what terms an investigation should be passed to the Gambling Commission for the consideration of criminal charges being brought against suspect individuals under Section 42 of the Gambling Act 2005;*
- *take the important prosecution decisions in the course of proceedings including the decision whether or not to accept any form of plea bargain offered;*
- *decide as to the preparation and presentation of evidence for disciplinary proceedings;*
- *decide as to whether a decision made by Raceday Stewards during a Stewards Enquiry be re-considered, which may include a further investigation and/or Disciplinary Panel hearing;*
- *at all times act within the regulatory policy of the Authority and in the event of a novel case or ambiguity make reference to Disciplinary Review Group so that policy can be established; and*
- *ensure that all decisions are properly documented."*

7. It is through the DRG that the DO reports to the Board. He is not a member of the Board and is not a Director. The post of DO was created following the *Neville Review*.

8. The DO has authority and responsibility to:
- a. Review all cases (including appeals and referrals) and take the final decision as to whether a prosecution should be initiated, or not, and the nature of the charges. He is required to do so in close liaison with the Director of Integrity, Legal and Risk.
  - b. Where necessary, and again in close liaison with the relevant persons (including external Counsel if instructed), take decisions as to case preparation and presentation.
  - c. Where called upon, he must take prosecution decisions that arise in the course of disciplinary proceedings including the decision whether or not to accept any form of plea bargain.

- d. Keep an accurate and complete record of such decisions and the justification for them.
  - e. Where such decisions have been taken by the Director of Integrity, Legal and Risk, review and discuss each decision and ensure that such matters are appropriately recorded.
  - f. Ensure that each decision (no matter whether taken personally, or by delegated authority) is reported to the DRG.
9. I have detected no issues (and none has been raised with me) with this arrangement. The DO needs a reporting line to the Board, for example the Board needs to know about important cases. On the evidence I have seen, the DRG appears to work. Its efficacy is naturally dependent upon the individuals. They need to understand and work within the perimeters of what can and cannot be discussed or shared. They must also appreciate the proper boundaries of their roles. The prosecutorial decisions must remain solely for the DO, uninfluenced by the DRG and the Board which must remain out of the decision-making process
10. I am sure it is necessary for someone to fulfil the role and functions of the present DO. I have no recommendations to make in this respect.

**C. Disciplinary Panel Meetings**

11. Paragraph 2.5 of the Disciplinary Panel's Terms of Reference provides:

*"Also the following ex-officio members shall attend meetings of the Disciplinary Panel; the Chairman of the Stewarding and Disciplinary Policy Committee (Andrew Merriam), the Chief Executive and the Director of Raceday Operations and Regulation."*

12. Within the standard letter of appointment or reappointment for Disciplinary Panel members is the following paragraph:

*“Frequency of meetings: Approximately three Panel meetings per year and 16 Enquiry days.”*

13. The Disciplinary Panel meetings take place three times a year<sup>162</sup>. The fact, nature and content of such meetings was the subject of concern amongst some participants prior to my Review. The PJA raised it in correspondence with the BHA in March 2015. It made the point that it seemed “*odd - even improper*” for “*the three parties*” (“*the Panel, the racecourse Stewards and the Disciplinary Function*”) to meet and asked whether the “*defence*” could attend. The BHA replied that it did not consider the meetings “*compromise a fair process...and will not be acceding to your request to have representatives for the defence attend*”.
14. The fact and nature of the meetings received a good deal of critical comment from some of my consultees, mainly the PJA and defence advocates. However others recognised the tension and difficulties of perception and/or suspicions that the meetings might or do create.
15. The issue has been expressed to me in this way: the fact and nature of the meetings, with the opaqueness as to who attends and what is discussed creates – to some – an appearance of bias in favour of the BHA. At the heart of this is the concern as to whether:
- a. The executive, prosecution and judiciary are meeting?
  - b. If they are:
    - why is that happening?
    - why is the defence excluded?
    - what is being discussed?
    - is anything being discussed which should not be?

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<sup>162</sup> They used to be held four times a year and are also known as the “quarterly meetings”.

16. The Disciplinary Panel members and the Panel Secretary are (obviously) attendees. In addition to the Secretary, other BHA employees also attend. That may include the Director of Integrity, Legal and Risk, the Head of Legal – Regulation, the DROR and the Head of Stewarding.
17. It is of note that members of the Appeal Board are not invitees, though Appeal Board Chairmen have attended as observers. It is right that the Appeal Board is not involved in the everyday cases of racecourse referrals and appeals. So the need for an intimate knowledge of Rule changes may be thought to be less acute. There is another reasonable inference to draw from their exclusion. It is to keep them at arm's length from the BHA.
18. I have read the Minutes of the meetings dating back to 2005. I have also discussed the meetings with the ten Disciplinary Panel members I met.
19. I have undertaken a great deal of historic research on the available documents in an attempt to ascertain the origins of these meetings. They were the forum for the then Jockey Club's Disciplinary Committee to discuss its more widespread responsibilities. For example, when it had Rule making capacity or was responsible for the training of Local Stewards. Those functions have gone as it has evolved into a Disciplinary Panel.
20. It seems to me that one purpose of these meetings was to facilitate communication between the BHA and those who dispense justice ('the judiciary'). A degree of conversation between the executive arm of a sports governing body and its judiciary is not uncommon. Nor is it necessarily improper. Such meetings must be conducted within proper limitations and then only with the appropriate people present.
21. The Panel members view them as training and learning exercises. I see the merit in the judiciary discussing together their previous decisions. There is a deal of valuable shared learning to be derived from such a

process. But that should be limited to the judiciary; it should not be a vehicle by which the regulator or the defence comments upon the correctness or otherwise of the decisions. Nor should it be one in which the regulator or the defence are able to make submissions on, for example, the meaning of the Rules or of policies.

22. It is unnecessary to examine this on a meeting by meeting basis, because if my recommendations are accepted in substance, they will be addressed by the consequential reforms. They will create a clear independence in structural terms between the BHA on the one hand and the Disciplinary Panel on the other. The Judicial Panel Chairman will take the lead on and chair such meetings. The detail I see as something for that Chairman.
23. Therefore, I recommend as follows:

**R23: The nature, purpose and content of the Disciplinary Panel meetings held three times a year should be formalised in the Rules or procedural guidelines.**

**R24: In respect of Disciplinary Panel meetings:**

- a. **The automatic attendees should comprise the Judicial Panel Chairman and members of the judiciary, as well as the Secretary.**
- b. **If BHA employees are invited to any meeting, then such invitation should be extended only for appropriate and specifically minuted purposes. By way of example, certain BHA employees might properly attend such meetings to report on Rule changes and amendments. They would not be expressing any interpretative view, simply informing (as a fact) what the changes are. That is something I would expect them also to provide to (for example) the PJA.**

## **11. CONCLUSION**

1. This Review has been conducted in just three months. When it started in June it did so against a background of significant discontent about the disciplinary system amongst important constituents. The BHA was under attack in some parts of the media. Like the Review Team, the BHA did not enjoy a quiet or restful summer.
2. Some I have spoken to outside the organisation think the Review an unnecessary pandering to a querulous minority. Responsibly the BHA did not approach the issues in that way. It is worth remembering that it was the BHA that instigated this Review. It was not forced nor compelled to. It did so under the leadership of an outsider. It undertook *at the start* to publish the Review when it could not have known what it would recommend. All of that demonstrates a number of qualities including leadership, responsibility and confidence.
3. I have firmly concluded that the disciplinary system should not be, and in reality is not, in crisis. I encountered dedicated, quality, able people, deeply knowledgeable about horseracing at every level and part of the disciplinary system: on the panels, advocates for and against the BHA, BHA employees and so on. In common with many sports, most if not all are involved because of or through a passion for the sport.
4. I was not long into my task before I appreciated where the substantive issues lay. They were (and are) with the Disciplinary Panel. I want to emphasise (again) that is not a comment on the individuals involved with or who sit on it. It is, in my view, the result of history, of its original purposes and how it has not evolved sufficiently with modern and best practice. That is not through malice or ill will or bad faith on the part of anyone. That must be seen in the context of my conclusion that the BHA's disciplinary process overall meets its legal obligation to provide a fair disciplinary system.

5. The recommendations I have made therefore address principally the Disciplinary Panel. In common with others I have made, the majority are ones I deem desirable for the reasons I have explained. They are intended to enhance, and to generate greater confidence in, the disciplinary process. I hope the BHA agrees with them. I hope also that it concludes, as have I, that these recommendations will provide a modern disciplinary system which consistently delivers, is seen and is accepted to deliver, justice to all.

## Terms of Reference

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### 1. **Background**

- 1.1 The BHA's Integrity Review, published on 23 March 2016, recommended that the BHA, working closely with stakeholders, should review the structure, composition, and processes of its Disciplinary Panel, Licensing Committee, and Appeal Board as a matter of urgency, to identify and implement a practical and legally robust solution which generates greater confidence amongst the sport's participants.
- 1.2 Following the Jim Best proceedings, in which an allegation of appearance of bias was made against the Disciplinary Panel Chairman, Matthew Lohn, which was not contested by the BHA, the BHA considers that it is appropriate to accelerate this review and to appoint an Independent Person (**IP**) to lead the review supported by the BHA (the **Review**).
- 1.3 The broad aims of the Review are to identify and implement improvements to the BHA's overall approach, building on the current system and updating it in line with current best practice in sports governance and regulation, in order to deliver the highest standards of fairness for participants. With those broad aims, the IP will produce a report, which will include his recommendations for consideration by the BHA.

### 2. **Independent Person**

- 2.1 The IP appointed is Christopher Quinlan QC, a leading expert in the field of sports governance and regulation. The IP is independent of the BHA and its stakeholders.

### 3. **Scope of the Review**

- 3.1 The scope of the Review shall include:
  - 3.1.1 a review of the current structure, composition, and processes of the BHA's Disciplinary Panel, Licensing Committee and Appeal Board;
  - 3.1.2 a review of the composition and role of the BHA's Disciplinary Review Group;
  - 3.1.3 consideration of changes to the structure, composition and processes of the BHA's Disciplinary Panel, Licensing Committee and Appeal Board to:

- 3.1.3.1 ensure that the disciplinary, licensing and appeal functions remain legally robust and would withstand legal challenge;
  - 3.1.3.2 ensure that proceedings before such bodies comply with the highest standards of procedural fairness; and
  - 3.1.3.3 generate greater confidence in the disciplinary, licensing and appeal functions amongst the sport's participants and stakeholders; and
- 3.1.4 a review of the relationship between the BHA Executive and the administration and operation of the Disciplinary Panel, Licensing Committee and Appeal Board, to include recommendations for changes to the BHA's organisational structure, if appropriate.

**4. Methodology**

- 4.1 In common with the Integrity Review, the methodology of the Review will focus extensively on consultation. This will include British Racing's principal stakeholders, participants and media, and other sports and regulators outside sport.

**5. Timescale**

- 5.1 The BHA intends the final Review report to be presented to the BHA Board on 13 September 2016 and published by 30 September 2016.

1 June 2016

## **Biography**

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### **Christopher Quinlan QC**

Christopher advises, appears before, and chairs disciplinary tribunals in a wide range of sports, including association football, athletics, sailing, swimming, rugby union, rugby league, horseracing and equestrian, motorsport, lawn tennis, boxing and golf. He has experience in misconduct, foul play, anti-doping, safeguarding, as well as selection, agency and other regulatory matters.

Christopher chairs cases at all levels of rugby union, including English Premiership, European and International. Christopher is a World Rugby Judicial Officer. He has officiated at Tier 1 nation test matches all over the world. He was a Judicial Officer at the Rugby World Cups in 2007, 2011 and 2015. As well as rugby union, Christopher chairs (English) Football Association Disciplinary Panel and Appeal Board hearings.

Christopher has been a trial advocate practising in the criminal courts for over 24 years. He advises and has defended sportsmen charged with criminal offences. He has advised and represented persons charged in proceedings (of national prominence) brought by sport governing bodies, including the British Horseracing Authority, as well as motor sport and golf.

Christopher has considerable experience in anti-doping regulations. He has been a legal member of the UK National Anti-Doping Panel since its inception in 2008. He has chaired many such hearings involving most sports.

Christopher acts as chairmen for the World Rugby Anti-Doping cases. He is a member of World Rugby's Anti-Doping Advisory Committee.

Christopher has chaired a number of selection appeals, including for the 2012 London Olympics and 2014 Commonwealth Games.

### **Directory recommendations for sports law:**

#### **Chambers UK 2016**

Leading Silk, Band 1 - Recommended for his wide ranging expertise on doping, disciplinary and regulatory work in football, rugby and sailing.

Strengths: "He is a formidable advocate who leaves no stone unturned in any case he deals with."

#### **Chambers UK 2015**

Sport

Listed Band 1, Silks in the Regions: Handles a number of sporting disciplinary matters concerning anti-doping misconduct cases. He is retained as an arbitrator

on a number of sporting panels across various sports, including football and rugby.

### **Chambers UK 2014**

#### **Sport**

Has extensive experience in sports disciplinary cases, most notably in rugby union, but also across a wide variety of sports, including football, tennis, boxing and golf. He also sits as chairman of a number of disciplinary and anti-doping panels.

### **Chambers UK 2013**

#### **Sport**

Christopher Quinlan QC of Guildhall Chambers has been successful in translating the skills he has forged at the Criminal Bar over to the sports sector. He is "as thorough as you could wish for," yet "doesn't get lost in the detail, and keeps sight of the overall picture," say those that instruct him. A "powerful advocate, who has real presence in court," he is a "punchy" barrister with a phenomenal reputation for expertise in sports disciplinary proceedings. He has appeared in cases across a broad range of sports, including football, both codes of rugby, and equestrian sports. He was appointed as one of the International Rugby Board's judicial officers at the 2011 Rugby World Cup.

### **Review Team**

The Review Team also comprised the following:

- Catherine Beloff, BHA Head of Legal - Governance
- Fiona Carlin, PA to the BHA's Director of Integrity, Legal and Risk
- George Coombs, BHA Compliance and Legal Assistant
- Sam Jones, Barrister, Guildhall Chambers
- Paul Lifton, BHA Head of Business Change

## List of Consultees

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During the course of the review, Christopher Quinlan QC and/or members of the Review Team spoke to 62 stakeholders and other individuals.

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Name	Area
<b>Racing</b>	
Rupert Arnold	NTF Chief Executive and BHA Board Member
Stephen Atkin	RCA Chief Executive
Dawn Bacchus	NTF Legal Advisor
Caroline Davies	RCA Racecourse Services Director
Clare Hazel	Point to Point Association
Charlie Liverton	ROA Chief Executive
Paul Struthers	PJA Chief Executive
Anita Anderson	Applicant for a Licence to Train
<b>Lawyers</b>	
Andrew Chalk	Withy King
Philip Evans QC	QEB Hollis Whiteman
Robin Leach	3PB
Rory Mac Neice	Ashfords
Nick de Marco	Blackstone Chambers
Graeme McPherson QC	4 New Square
Roderick Moore	Slee Blackwell
Tim Naylor	QEB Hollis Whiteman
Stephen Ralph	Keystone Law
Harry Stewart-Moore	Stewart-Moore Solicitors
Louis Weston	3PB
<b>BHA Board Members</b>	
Andrew Merriam	Independent Regulatory Director
Sir Paul Stephenson	Independent Regulatory Director
<b>Disciplinary Panel</b>	
Lucinda Cavendish	Disciplinary Panel Chair
Jeremy Barlow	Disciplinary Panel Member
William Barlow	Disciplinary Panel Member
Roger Bellamy	Disciplinary Panel Member

Lady Celina Carter	Disciplinary Panel Member
Timothy Charlton QC	Disciplinary Panel Member
Judge Philip Curl	Disciplinary Panel Member
Edward Dorrell	Disciplinary Panel Member
Matthew Lohn	Disciplinary Panel Member
Diana Powles	Disciplinary Panel Member

### **Appeal Board**

Bruce Blair QC	Chairman of Appeal Board
George Bartlett QC	Member of Chairman's Panel
Anthony Boswood QC	Member of Chairman's Panel

### **Licensing Committee**

Richard Russell	Chairman of the Licensing Committee
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### **BHA**

Annette Baker	Licensing Team Leader
Paul Barton	Head of Stewarding
Adam Brickell	Director of Integrity, Legal and Risk
Shirley Cowan	Secretary to the Disciplinary Panel and Appeal Board
Brant Dunshea	Head of Raceday Operations
Gavin Jefferies	Director of Communications
Hannah McLean	Head of Legal - Regulation
Robin Mounsey	Media Manager
Danielle Sharkey	Legal and Compliance Adviser
Patrick Russell	Disciplinary Officer
Nick Rust	Chief Executive
Jamie Stier	Director of Raceday Operations and Regulation
Lyn Williams	Disciplinary Team Leader
Sheena Wynn	Compliance Adviser

### **Other Sports Bodies**

Nick Bitel	Sport England - Chairman
Meena Botros	LTA – Disciplinary Officer
David Brown	UKA – Welfare Officer
Stephen Farrow	LTA – Legal Director
Andy Gray	British Swimming – Judicial Commissioner
Richard Harry	Sport Resolutions - CEO

Amanda Hill  
Mark Ives  
Gerard McEvilly  
Graeme Sarjeant  
Gordon Valentine

ECB – CDC Secretariat  
The FA – Judicial Secretary  
RFU – Disciplinary Officer  
RFL – Head of Legal  
EB – Compliance Manager

## **Media**

Chris Cook  
Tom Kerr

The Guardian  
Racing Post

## Documents and Materials Reviewed

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Christopher Quinlan QC and members of the Review Team referred to a range of documentation as background to the Review, including the following:

### *Previous Reviews*

- The Richmond-Watson Committee – Report to the Stewards
- Stewarding at Race Meetings – A Report by General Sir Cecil Blacker
- Review of Disciplinary Function (Mildmay-White/Brotherton/Pilkington/Player/Foster)
- The Jockey Club/British Horseracing Board – Security Review Group Report (Gunn)
- The British Horseracing Authority and Integrity in Horseracing – An Independent Review (Neville)
- 2016 Integrity Review (Brickell)

### *Relevant Case Law*

### *BHA documents*

- BHA Memorandum and Articles of Association
- Rules of Racing
- BHA General Instructions
- BHA Operating Procedures
- BHA Committees Diagram
- Internal Policy and Procedural Documents
- Press Guidelines for Open Enquiries
- Relevant Licensing documentation
- Letters of Appointment and Terms of Reference for Appeal Board, Disciplinary Panel and Licensing Committee
- Internal documents relating to the Stewarding function
- Relevant correspondence

**APPENDIX E**

**Schematic Representation of Proposed Disciplinary Structure**

