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WHERE IS PROFESSIONAL REGULATION GOING (IF IT HASN'T GONE)?

I have worked in professional regulation sector for 16 years – 11 years at the General Medical Council, dealing with the mad doctors, bad doctors, sad doctors, governments and medical schools; and five years as Chief Executive of the General Dental Council, dealing with dental teams in which the model of the dentist and his or her employed assistants is giving way to the notion of a team of dental professionals. And this year, I've been offered (flatteringly) and taken up (worryingly) the challenge of being the first Chief Executive of the Law Society Regulation Board, where my first task is to try to decode the draft Legal Services Bill. The Bill aims to implement the much-heralded reforms proposed in David Clementi's review of legal services. These reforms include the separation of the representative and regulatory functions which, for barristers and solicitors (unlike doctors and dentists), have traditionally been merged.

Professional regulation is going through an upheaval reminiscent of the 19th century traumas of the Christian churches. As recently as the 1960s, the dental creed published by the GDC (the totality of its advice to dentists) amounted to four A3 pages. These warned dentists of the dangers of bigamy, deplored the use of flashing neon signs in dental surgeries, and remained

steadfastly silent on the issue of quality of care and consent (matters which could safely be left to the individual professional). Ensuring that dentists married only one spouse at a time was a task left in the hands of a Council composed exclusively of dentists.

Congregations will not stomach this now. Faith in professional self-regulation, battered by a series of scandals, has ebbed. In medicine, and the other healthcare professions, regulatory Councils now have a bare professional majority (or even a lay majority); and the regulated professional is increasingly called to account not for his or her marital practices, but for the quality of service provided to the empowered patient. Similar shifts have occurred in the law, though lay involvement has tended to lag behind.

What are those of us who work in professional regulation – regulators and regulated – to make of these changes? For some, there may be mourning for the loss of certainty (the trusted professional, unquestioned by the grateful client). For others, the notion of a more democratic, adult relationship between professional and client, and between the profession and society, may offer the chance of an interesting debate on the extent to which protecting the vulnerable can shade into protecting the professional preserve. Are safeguards designed for a less educated society without access to the internet any longer appropriate?

But there is no doubt – and there should be no regret – that the old, closed world of professional self-regulation has largely gone. The question is what to put in its place; and whether the Government and Parliament have a coherent view on what (if anything) professional regulation has to offer.

Healthcare regulation gives some clues. The inquiry by Ian Kennedy into the Bristol babies case led to the establishment by Parliament of the Council for Healthcare Regulatory Excellence – a body comprising only a bare lay majority, and on which the healthcare professions' regulators are heavily represented. That Council has a mixture of powers to promote good practice, to appeal against over-lenient disciplinary decisions, and in the last resort to go to Parliament to compel a regulator to comply

with the Council's direction. But the Council is a compromise – it is not a super-regulator, and it sits uneasily between the individual regulators and Parliament. It is a statement of lack of faith rather than an alternative creed.

In the law, the Clementi reforms offer a different solution. The proposed Legal Services Board is explicitly a super-regulator, with powers to license and de-license the “front line regulators”. But here too, are signs of compromise. Clementi criticised the lack of separation between the representative and regulatory functions of the Bar Council and Law Society; but he stopped short of recommending the complete separation that exists, say, between the General Medical Council and the British Medical Association. Instead, he envisaged the existing professional bodies acting as umbrellas for both functions, but with robust separation. One of my tasks is to help the new Regulation Board for solicitors to work with the Law Society to achieve this squaring of the circle.

As Tennyson remarked, “There is more faith in honest doubt ... than in half the creeds.” Perhaps that is what society, Governments, and Parliaments are saying, in a slightly ham-fisted way. Old professional certainties won't wash in a sceptical age; but we still wish to believe in the ideal of the self-motivated, ethical professional, putting our interests as clients before personal advantage. The new structures emerging from Clementi, and from the reviews of other areas of professional regulation, are an attempt to reconcile conflicting aspirations. Our job as regulators is to use imperfect structures to justify the faith.

Antony Townsend
Chief Executive, Law Society Regulation Board

BOOK REVIEW

FITNESS TO PRACTISE: HEALTH CARE REGULATORY LAW, PRINCIPLE AND PROCESS

By Joanna Glynn QC and David Gomez
971 pp, Thomson Sweet & Maxwell, £139

In his foreword to this excellent book on the law and practice of health care regulatory and disciplinary proceedings, Lord Justice Henry Brooke rightly says that: “Health care regulation is on the move”. Joanna Glynn QC and David Gomez identify the major changes that have been introduced by Parliament and the professions, and clearly set out the modern fitness to practise procedures of the various health care regulators. In the great case of *Allinson v. General Council of Medical Education and Registration* [1894] 1 QB 750, Lord Esher MR, in seeking to uphold proper standards of conduct and behaviour, and the maintenance of public confidence

in the profession, stated that “the question is, not merely whether what a medical man has done would be an infamous thing for any one else to do, but whether it is infamous for a medical man to do.” Lord Esher and Lopes LJ laid the foundation of modern professional standards by declaring that “if it is shown that a medical man, in the pursuit of his profession, has done something with regard to it which would be reasonably regarded as disgraceful or dishonourable by his professional brethren of good repute and competency,” then it is open to the General Medical Council to say that he has been guilty of “infamous conduct in a professional respect”.

The expression “infamous conduct in a professional respect” first introduced by the Medical Act 1858 was succeeded by the expression “serious professional misconduct” appearing in the Medical Act 1956, as amended by the Medical Act 1969, and today the test is whether the practitioner's “fitness to practise” is “impaired” by virtue of sections 35C(2) and 35D of the Medical Act 1983, as inserted by the Medical Act 1983 (Amendment) Order 2002.

Glynn and Gomez skilfully examine the concept and categories of impairment contained in the new legislative framework for the General Medical Council, the General Dental Council, the Nursing & Midwifery Council, and other professional bodies which seeks to adopt a more holistic approach to the concept of fitness to practise based on modern expectations of the public interest. Joanna Glynn is a practising silk with wide experience of acting for health care regulators, and a contributing editor to *Archbold, Criminal Pleading Evidence and Practice*. David Gomez is legal advisor to the Royal Pharmaceutical Society of Great Britain, and has considerable knowledge of drafting legislation in the field of health care regulatory law. Both are well qualified and able to bring practical guidance to this complex area of the law which continues to attract the attention of the professions, lawyers and the public.

In all there are nine health care regulators in the United Kingdom operating under primary legislation and separate rules, with the overarching Council for the Regulation of Health Care Professionals established to promote best practice and consistency by the regulators. Glynn and Gomez examine in turn the jurisdiction of each of the regulatory bodies that make up the health care professions, and explain how the respective fitness to practise schemes operate both prior and subsequent to recent changes. The statutory provisions and practice rules are helpfully set out in appendices so that the reader has at his or her fingertips a valuable commentary, as well as easy access to the source material.

Having given an overview of the law and processes of the General Medical Council, the General Dental Council, the Nursing & Midwifery Council, the Royal Pharmaceutical Society of Great Britain, the General Optical Council, the General Chiropractic Council, the General Osteopathic Council, and the Health Professions Council who regulate amongst others dieticians, physiotherapists, and radiographers, Glynn and Gomez consider some wider issues that are common to all disciplinary processes. There are chapters devoted to human rights considerations, disclosure, confidentiality and data protection, and evidence as well as the decision-making process of the tribunal, sanctions, and appeals. An interesting feature of the book is the way the authors draw on the rules applied in the criminal and civil courts, and then apply them by analogy to regulatory bodies. Thus, there are useful examples of the approach of the courts to expert witnesses, the right to an independent and impartial hearing, and to considerations of delay at common law and under Article 6(1) of the European Convention on Human Rights, and the application of such rules to health care regulatory proceedings.

In this way the book strikes a fair balance between the regulator's role to investigate, and if appropriate, to prosecute concerns which raise the question whether the practitioner concerned should continue to practise either with restrictions on registration or at all, and the rights of the practitioner to a fair hearing. The statement of policy approved by the General Medical Council on the meaning of fitness to practise provides that to practise safely, doctors must be competent in what they do. A doctor whose conduct has shown that he or she cannot justify the trust placed in him or her should not continue in unrestricted practice while that remains the case.

In their introduction to this work Glynn and Gomez say that their intention is to provide easy access to the legislation and procedural rules and to the case law (much of it unreported), which govern the fitness to practise procedures of the various health care regulators. This task they have amply discharged, and if this excellent and timely book has drawn attention to these important public issues it has served a useful purpose.

Kenneth Hamer
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LEGAL UPDATE

Council for the Regulation of Health Care Professionals v. GMC and Dr Biswas [2006] EWHC 464 (Admin)

In this case Jackson J. held that whilst the criminal standard of proof was to be applied by the fitness to practise panel to any findings of fact, the panel should

make a judgment as to whether or not those findings constitute serious professional misconduct. Accordingly, the legal assessor to the panel was wrong in law when advising the panel that it had to be satisfied so that it was sure that the practitioner was guilty of serious professional misconduct. In her *Fifth Shipman Inquiry Report* of December 2004, Dame Janet Smith, at paragraph 21.32 said that "in her view", it was a matter of judgment for the professional conduct committee panel, rather than a matter of proof, whether the facts proved or admitted did amount to serious professional misconduct, and, if so, what sanction should be imposed. Mr Justice Jackson in the *Biswas* case agreed with the views expressed by Dame Janet Smith, and held that the panel should not have applied the criminal standard of proof to stage two of the proceedings. Instead, the panel should have considered the charges which had already been established (either by admission or by proof) in stage one, and then made a judgment as to whether or not those failings by Dr Biswas constituted serious professional misconduct.

Gleadall v. Huddersfield Magistrates Court [2005] EWHC 2283 (Admin)

The essence of the application in this case for judicial review was a stay of criminal proceedings as an abuse of process because the Crown Prosecution Service had refused to answer a questionnaire which required it to make detailed enquiries of witnesses as to their past conduct, and as to any court or disciplinary proceedings in which they had been involved. The Claimant was charged with an offence of common assault. As primary disclosure, the prosecution had informed the defence that none of the five lay witnesses to be called by the prosecution had any previous convictions. Despite this the Claimant served a detailed questionnaire asking, amongst other things, whether any of the witnesses had ever been the subject of a disciplinary investigation or hearing (regardless of the outcome). Lady Justice Smith and Simon J. held that the bad character provisions in section 100 of the Criminal Justice Act 2003 were designed to provide increased protection for non-defendant witnesses, and it was not in the interests of justice that in every case comprehensive inquiries were to be made by the police about the character of every prosecution witness whose evidence was to be challenged.

This decision may limit the extent to which a regulator owes any obligation to make inquiries as to the bad character of any proposed witness. The witnesses to whom a regulator intends to rely in disciplinary proceedings might have criminal convictions or have been subject to disciplinary proceedings which could be material to the case and affect witnesses' credibility. However, regulators do not have access to the Criminal Records Office records or to the Police National Computer.

R (on the application of Malik) v. Waltham Forest Primary Care Trust

[2006] 3 All ER 71, The Times, May 26th 2006

In this case, Dr Malik applied for judicial review of the decision of the Waltham Forest Primary Care Trust to suspend him temporarily from practise on full pay, pending investigations. Collins J held that Dr Malik's suspension had been improperly and unlawfully imposed, and that Dr Malik was entitled to claim damages for his unlawful suspension. Collins J held that damages were recoverable because a doctor's inclusion in the performers' list was akin to the possession of a licence, and therefore could be considered a possession within article 1 of Protocol No. 1 to the European Convention on Human Rights, concerning the right to peaceful enjoyment of possessions. While the goodwill of a doctor's practice was not marketable, the inclusion in the list had an intrinsic value in that it enabled the doctor to practise. Where the doctor's right was unlawfully interfered with he had a right to claim damages under section 6 of the Human Rights Act 1998.

Baxendale-Walker v. Law Society

The Times, May 17th 2006

In this important case on costs the Court of Appeal held that regulators of professional bodies should not, in the absence of bad faith, be ordered to pay any costs of a professional who had committed a disciplinary offence. Lord Justice Moses said that a regulator brought proceedings in the public interest in the exercise of a public function which it was required to perform. In those circumstances, the principles applicable to an award of costs differed from those in relation to private civil litigation. Absent dishonesty or a lack of good faith, a costs order should not be made against such a regulator unless there was good reason to do so. That reason had to be more than that the other party had succeeded. In considering an award of costs against a public regulator, the court had to weigh the financial prejudice to the professional against the need to encourage public bodies to exercise their public function of making reasonable and sound decisions without fear of exposure to undue financial prejudice, if the decision was successfully challenged.

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**REQUEST FOR COMMENTS
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