

# CONTENTS

<b>PAGE 1</b>	<b>THE DECLINE OF THE PROFESSIONS AND THEIR REGULATION</b> ROGER HENDERSON QC
<b>PAGE 6</b>	<b>CLEAR SEXUAL BOUNDARIES - THE CHRE'S GUIDANCE</b> NICOLA BOWEN
<b>PAGE 7</b>	<b>LEGAL UPDATE</b> KENNETH HAMER, SOPHIE KEMP AND JULIE NORRIS
<b>PAGE 10</b>	<b>FORTHCOMING EVENTS</b>

## THE DECLINE OF THE PROFESSIONS AND THEIR REGULATION

**This is the abridged text of the Ormrod Lecture delivered by Roger Henderson QC on 7 April 2008.**

The structure of my talk this evening will be broadly as follows:

First to consider the decline in the professions, particularly in the sense of the quality of professionalism in service to the public; secondly to consider the decline in the regulation of those professions and then to consider the present and continuing risks of further decline.

Two quotations encapsulate a theme which pervades my talk tonight:

In one corner we have Francis Bacon:

*"I hold every man a debtor to his profession; from the which as men of course do seek to receive countenance and profit, so ought they of duty to endeavour themselves by way of amends to be a help and an ornament thereunto."*

In the other corner we have George Bernard Shaw in the Doctors Dilemma (1906):

*"All professions are conspiracies against the laity."*

I deliberately do not describe the opposing corners of Bacon and Shaw as red and blue. The attack on

the professions in the past quarter of a century has been political but it has not been associated with one particular political party.

Those two quotations are in part reconcilable. Both Bacon in the 16th Century and into the 17th Century and Shaw in the early 20th Century recognised that professions and their members are privileged. Indeed we are. But neither Shaw nor recent governments have recognised as did Bacon that it is an inescapable concomitant of being a member of a profession that one is a double debtor; a debtor to the profession which benefits the professional person – the receipt of countenance and profit – and a debtor to Shaw's laity; i.e. the public or in today's jargon the consumer.

The burden of my song this evening is that the professions have declined both in themselves and in the eyes of the public, of its elected and proliferating unelected representatives and that that loss of respect and loss of self-regulation or professionally led regulation belittles and endangers the professions and its members and endangers the public interest in so doing. I believe that this assault on the professions was partly merited and is now overdone.

That some of the GMC disciplinary process and of its operation were open to criticism was conceded by the GMC (General Medical Council) and established before Dame Janet Smith's Shipman Inquiry. Similarly, the Law Society's operation of its disciplinary process has for a number of years been subject to increasing criticism. By contrast the Bar's and the Accountant's disciplinary processes were largely applauded by independent observers but both their regulatory regimes are subject to consultation which is intended radically to affect them. The accountants and actuaries are in the process of consultation on major changes in their disciplinary process and the Bar Standards Board is reviewing the Bar's Code of Conduct. There have been major changes in the disciplinary review processes of the medical profession and professions ancillary to medicine. I will draw your attention to some of the existing and proposed changes in the belief that the professions need to stand firm in retaining and in part regaining control of themselves and in limiting the ever increasing lay involvement in their regulation. I do not suggest that some lay involvement is inappropriate. Indeed it is highly appropriate but things are going too far and we

need to be aware of it and to limit lay involvement to the extent that it can usefully be deployed and not for the sake of appearances.

I begin with medicine. In medical practice as I saw it in the 1940s, 50s and 60s, weekends were always covered by partners and trainees were taken on and inducted into that quality of service. In today's jargon medical standards were "patient-centred". I will now quote from Dr McCartney who kindly reviewed an early draft of this talk:

*"The standards back then were undoubtedly high...what the patient wanted to discuss was number 1, and quite rightly. Now, the GP contract demands that we gather certain data regardless of whether or not patients want to discuss it – for example, weight, body mass index, smoking status, ethnic group, smear tests, blood pressure – it means that the government has instantly shifted the focus of the consultation away from the patient's concerns. Good doctors have always been proactive in offering preventative healthcare – but at the right time. For example, if a very overweight person comes to see me, for the first time ever, with a rash, I won't usually mention the weight issue unless it is directly related. I will offer a diagnosis, treatment and follow-up, and then, once I have a relationship with the person I will consider the appropriateness of raising the issue. I have lost count of the number of people I know who have been so offended at their weight being the focus of the GP attention that they have not returned to see a doctor with their later serious symptoms for fear of embarrassment, yet again, at their weight being raised again.*

*People are often vulnerable in different ways and protocol medicine – what the government wants us to practise – is not good for truly holistic care."*

We are all actual or potential patients. I doubt if any of us has not encountered some difficulty in respect of the availability of NHS medical services at GP level and almost all of us will have done so in respect of accident and emergency services. To what are those differences and lowering of standards attributable?

Although I accept that the State, as the provider of the vast resources required to operate the NHS, has a need to collect and collate information of public health significance, for example to decide how best strategically to dedicate those resources in an efficient and cost-effective manner, I am not persuaded that this should be allowed adversely to affect patient care. Nor I am persuaded that doctors and nurses who have been properly trained and educated cannot be trusted to retake far more control of medical care from hospital administrators. Government mistrust of doctors' and nurses' ability and inclination to use finite resources

efficiently and in patients' best interests and instead government's trust in an expensive army of non-medical administrators has much to answer for.

The social mix and background of doctors has changed radically. Has this contributed to a change in standards? The same question could probably be asked in respect of all professions. I would answer in the negative. I would reject the increasingly diverse entrance to professions as a material contributor to a decline in professional standards. The cause or causes are to be found elsewhere.

In both medicine and in the law there has been a vast increase in the number of female entrants to the profession. Women in general practice out-number men. More young women than young men are called to the Bar. Although this may have already affected continuity of professional relationships with patients/clients, this is probably the inevitable concomitant of the beneficial development that increasing numbers of doctors are women. It is not my contention that the decline of the medical profession has not been attended by some important improvements, especially in what doctors are now in a position to offer to their patients.

What else has changed which may have lowered the quality and quantity of professional service? Some candidates are more probable than others:

- (a) Increased and different demands for treatment;
- (b) Increased and different availability and types of treatment;
- (c) Reduced professional pride and morale;
- (d) Reduced respect;
- (e) Reduced control of one's own destiny and practice; the corollary of greater outside control and imposition of standards;
- (f) Changes of organisation and structure;
- (g) Money; and
- (h) Imposed structural and regulatory change.

There has been an order of magnitude increase in complaints. This affects perceptions of the medical profession and affects doctors' morale. It even affects their choice of practice. The attacks upon paediatricians, particularly those involved in child abuse cases, have had a deleterious effect on the number of such practitioners willing to undertake that important work.

This environment of increased criticism and complaint may or may not evidence a deterioration in standards. There was some evidence before Dame Janet Smith in the Shipman Inquiry that cavalier screening out of

complaints had been the order of the day and so the increased number of full disciplinary hearings may partially reflect a higher quality of screening. I have no doubt however that today's morals also play a part. People are much quicker to complain than was formally the case. But of one thing I am reasonably confident, that the increase in proved complaints is not attributable to the introduction of laymen or increased involvement of laymen in screening or in Disciplinary Tribunals.

I turn to the Bar. We are now positively encouraged to do things which, when I started at the Bar, would have been a cause for disbarment. Marketing of chambers is *de rigueur*. The concept of conditional fees with their intrinsic and inescapable conflicts of interest would have been rejected out of hand. Today conditional fees are wholly acceptable but they inevitably evidence a decline in professional standards. They may be the only way, in the absence of civil legal aid, that a would-be litigant can bring or defend civil proceedings but the conflicts of interest between the lay-client, the solicitor and the barrister impair the absolute independence of their professional roles. In the CF (Conditional Fee) system they each have a financial interest in the outcome. This is undesirable in principle and is driven by the imperative of filling a gap in the access to justice created by the effective abolition of non-family law civil legal aid.

The basis upon which what may now be seen as old-fashioned rules of conduct existed was that professional integrity was put at the highest premium and nothing which endangered it was to be encouraged. Competition between barristers was to be based not upon self-advertisement or marketing but upon reputation earned by competence and diligence evaluated by independent solicitors to whom the barrister could not be beholden. It certainly cannot be said that the standards have risen in any of those respects and I would unhesitatingly contend that they have fallen.

But I see an overriding decline in one other matter namely the conversion of our profession into a business. Money has made its tentacular way into all aspects of the profession so that everything that we do is measured in monetary terms and evaluated in those terms. It is the evaluation in monetary terms which weakens the character of service upon which the reputation of the Bar rested. I used to be able to liken my professional work to the provision of medical services by my parents to their patients. For some years now it has been impossible to look at the matter in that way. Although I continue to take great pride in the independence of the Bar and although our tenets are fundamentally sound in the preservation of the cab rank rule and the provision of advice and representation to those who

may deserve no advice and representation, nonetheless we have become businessmen in many respects and our standards have been impaired by conditional fees and other changes. We are now encouraged to be businessmen. The competition is no greater but the means of competition are those of tradesmen. We seek work by advertising ourselves and encourage the directories to be fulsome about us. We provide parties and entertain. We provide free seminars to generate business. None of these developments improve our quality of service. They reflect a lowering of our standards.

I move from the decline in professions to the decline in the quality but not the quantity of their regulation. I am particularly concerned with the over-involvement and over-dependence upon people – whom I generally call laymen – who are not members of the profession in question but sometimes may be members who have never practised. The case for their involvement is that in the absence of such persons the professions cannot be trusted to discharge the public interest efficiently and economically and fairly because it is not in their interest to do so; at least not in their transparent interest to do so. In the case of the Bar there is no report which says that we have failed in our public responsibilities. Instead there are reports by a number of persons independent of the profession and committees who have come to contrary conclusions.

The days have long since passed when Disciplinary Committees of a profession could consist exclusively of members of the profession. The inclusion of laymen is universally considered to be a benefit. It serves to show publicly that the profession in question has confidence that outsiders can add value to the task of deciding facts and the sanction if appropriate. However I have a serious caveat to enter. Such is the enthusiasm for the involvement of laymen in professional regulation that it is now possible in some medical disciplinary proceedings for a fitness to practise panel to be chaired by a layman and for the laymen to outnumber the professional members. That was the case in Professor Meadow's disciplinary proceedings. To me this is not acceptable for a number of reasons.

Other professions in which it is presently possible that the disciplinary panel may consist of a majority of persons from outside the profession in question include nurses and midwives, dentists, a number of other professions ancillary to medicine, insolvency practitioners and psychologists. Others with a majority of practitioners from the profession include the Bar, solicitors, accountants and actuaries. I leave aside consideration of professions where the chairmanship of a tribunal is legal and the membership is that of the profession.

My focus is upon over-involvement of persons who have never practised in the profession and who are not imbued with the identification and the acceptability or otherwise of aspects of professional and unprofessional conduct.

Who is best to judge an errant professional person if not his peers assisted by a minority of laymen, probably intended to represent the patient or client to whom the professional service is or should have been provided. The professionals have special knowledge of the standards of the profession and have been imbued in those standards from the outset of their training and experience.

Even if they have no specialist knowledge of the particular field of medicine or surgery or law they nonetheless bring to the judgment seat a wealth of background understanding and knowledge which permit them fairly to judge the facts and the scale of any mistake or wrongdoing and whether any sanction is appropriate and if so what sanction.

Once the disciplinary baton is handed to the layman and once the tribunal may consist of a majority of laymen, not only is the quality of their judgment and the judgment of the whole tribunal endangered but the confidence of the profession is reasonably and justifiably at risk. Some aspects of professional and unprofessional conduct in all fields of professional life are insusceptible to precise definition. They constitute a paradigm for the judgment of professional men and women who have practised in that profession.

Once the professional panel may be constituted more of persons from other backgrounds than from the profession in question the appellate system is also weakened because the Administrative Court can no longer so confidently say that the disciplinary panel had special knowledge and judgment. This is an important aspect of evaluation of the merits of an appeal by an appellate court.

The trend of increasing the representation of lay members and reducing that of members of the profession sacrifices professional discipline in which professionals can have confidence upon the altar of transparent lay disinterest. This has gone too far. For my part, given the increasing length and complexity of some of the most important cases I believe, with Dame Janet Smith, and perhaps now with the GMC, that a tribunal chaired by a lawyer who can be the layman in a tribunal of 3 is probably the most satisfactory small tribunal in a professional disciplinary matter.

In fact the over-involvement of laymen has gone further still as I will shortly consider, but before doing so let me

address some of the principles. A professional person may be taken to have undertaken some years of training by people especially qualified to impart the necessary knowledge ethics and skill and to have been examined in both that knowledge and skill to ensure their sufficiency for the aspirant to be permitted to practise professionally. Existing members of the profession will strive instinctively, and for good reason, to maintain high standards, not least in their own professional interests but primarily because it is of the essence of a profession that it provides high standards of service to those who need that service.

Parliament recognised the principle that a profession should be the arbiter and controller of its own professional standards. For example the GMC is still charged by Section 35 of the Medical Act 1983 with the ownership of the conduct, performance and ethics of the profession. It has the power in such manner as it thinks fit to provide advice for members of the profession on standards of professional conduct, standards of professional performance and medical ethics. The GMC consists by statute of a majority of elected registered medical practitioners by further registered medical practitioners and by a minority of privy council nominated members. I would contend that this constitution enshrines a fundamental principle that the members of a profession are to be trusted to define the standards and ethics of their own profession. In the case of doctors they do so in pursuance of their statutory function to protect promote and maintain the health and safety of the public. It is rightly considered that doctors know best and can be trusted to know best in these respects.

However when appeals from disciplinary proceedings to the privy council were abolished, a new body came into existence, the CRHP (The Council for the Regulation of Healthcare Professionals), which now goes under the name of CHRE (The Council for Healthcare Regulatory Excellence). It has the power promptly to apply to the Administrative Court in cases where it considers that the fitness to practise panel of doctors, dentists or other identified professions supplementary to medicine has been unduly lenient either in terms of under prosecution, or of acquittal or in relation to sanction. To me such oversight is consistent with primary professionally-led discipline but I can see no need in such circumstances for more than one "non-medical" to represent the patient's interest in the disciplinary panel. If the tribunal were to consist of 3 persons, 2 doctors and a chairman lawyer, there should be no need in the medical regulatory system for an extra patient's representative. It is not as though the legal chairman and the other 2 doctors can be assumed to be unable or unwilling to bring objective and patient-orientated

judgments to bear. Were they to fail to do so the CHRE has the power to intervene.

What then of us lawyers and barristers in particular? We now have a Bar Standards Board. For what must have been political reasons it is chaired not by a barrister but by a person with no experience of practice as a barrister. She is no doubt an admirable lady but it is a denial of our professional integrity for us not to have a barrister to chair the Board. Its responsibilities match those of the GMC.

True it is that the Board comprises a majority of barristers, 8 of the 15, but again the 8/7 split between barristers and laymen impugns our necessary and rightful role as the best people to maintain the highest standards. In our consumerist society the professional standards must be set and maintained by people who can be trusted to know what is in the best interests of those whom they serve. The differences between proper and improper behaviour and the extent to which such behaviour should be defined by a code of practice can sometimes only be judged by people who have a breadth of experience in professional relevant practice and these can easily give the lie to expectations of what is proper on the part of laymen. Nuances can make all the difference in proper professional settlement negotiation. There can be occasions when the duty of confidentiality and the duty to the Court raise formidably difficult issues of how to behave and where no person from outside the profession can adequately identify the principles to be applied in general or the application of those principles to the facts in a particular case.

In non-disciplinary matters concerning standards of a profession there is also a limit to the contribution that laymen can make. The truth is that in some respects laymen have nothing to contribute. In others they have a vital contribution to make but in most cases the professional can be expected to achieve competent identification of standards without any or with very little lay involvement. When it comes to fundamental changes, some of which are now the subject of consultation, a deep understanding of why the profession is where it is, is of equally fundamental importance.

It is perceived to be correct for there to be greatly increased non-professional involvement in the setting and maintenance of standards and in the discipline of professions. This perception has been carried too far. It is inconsistent with the tradition of professional integrity. Parliament has entrusted the GMC with the quality of medical education, with the quality of medical standards and with the maintenance of those standards. This was and is sound in principle and substantially sound in practice. There are serious dangers when

the ownership or enforcement of standards is divorced from the profession.

Nor can it be said that the Bar has failed in its setting of standards or in its handling of complaints. The Ombudsman's reports are testament to this. No doubt there was and will be room for improvement but we now face what the Bar Standards Board describes as far reaching proposals to make significant changes to a system which has been independently praised, with the introduction of "a new concept of improper behaviour". This is not the time or place to debate that proposal at length but I would alert you to this. It comes not from the Bar but from a suggestion by Mr Behrens, our lay complaints commissioner, who does not criticise the Bar for serious shortcomings. The AADB (Accountancy and Actuarial Discipline Board) is similarly proposing radical changes to the definition of misconduct of accountants and actuaries. The Bar Standards Board proposes that its new concept should open the profession to complaints which fall short of professional misconduct but which appear to persons who are not the clients of the barrister to be improper. They expressly refer to opposing clients, their representatives, witnesses and even opposing professional's pupils as people suitable to be able to make such complaints. Although if such behaviour is found proved, it is not to constitute a disciplinary offence but is to be treated as more akin to inadequate professional service, it may nonetheless be drawn to the attention of the authorities in relation to applications for silk and for judicial appointment. A complaint of this type of provenance against paediatricians involved in child abuse cases often emanating from the person who has lost or is at risk of losing a child has caused serious damage to the medical profession and even endangered entry into that work by paediatricians. To me the suggestion is a recipe for unfair and unfounded complaints abusing our regulatory regime. A senior member of the Court of Appeal with great experience of criminal practice at the Bar described the idea as lunatic.

I strongly suspect that the common denominator of suggested regulatory changes is that they should make the profession more transparently accountable. Too much weight is being given to lay suggestions for improvement to the appearances of the professions and too little to the merits of the evolved and tried and tested regulatory regimes. There is another danger today and it is that of too much regulation. There can be a decline in professional regulation flowing from an excess of regulation.

I know little of the regulation of banks from professional experience. But I fear that the profession of banking is seeing a different aspect of the same problem as

is facing the Bar, the accountants and actuaries i.e. more regulation and more micromanagement of the profession. It has been received wisdom that there needed to be increased regulation of banks. That may or may not have been right but although, as Irwin Stelzer has commented, it will be a long time before the presumption in favour of deregulation reasserts itself, I suggest that it was the loss of the powers of the Governor of the Bank of England which was most sadly missed when Northern Rock was betting the bank on a continued bull market and there was a run on the Bank.

The most productive engine for the United Kingdom economy is to be found in the Southeast of England. The pistons are to be found in the square mile. Before the law moved into the regulation of the square mile and when the Governor of the Bank of England and the City institutions were able, without redress and without delay, to excise the rotten and to stop the rot there were no runs on banks. It was not a perfect system; far from it. Barings and BCCI went to the wall when the Bank of England was still in primary control, evidencing the persistent difficulty of regulating and controlling complex financial instruments and banks whose largest risk exposure lies abroad. But the vast increase in regulation has failed to prevent not just Northern Rock here but the French and American banking crises.

The generic lessons to be learned may include these; that we endanger the reputation of the City and the regulators if they fail to take instant action to prevent and pre-empt banking trouble and if they are seen to be oppressed by politicians. Robert Bland, a banker and friend of John Maynard Keynes warned that great economist: *“Do not rely on the skill and economic knowledge of bankers harassed by politicians.”* The parliamentary select committee would prefer additional power to be restored to the Governor than to the FSA or the Treasury. I would, with Irwin Stelzer (Sunday Times, 27th January 2008), add “regulators” to those who should not be harassed, whomsoever they may be, by politicians. An answer to today’s banking woes is to restore to the City the faith of those who deal with it around the world. Without that faith, the health of the engine of the square mile will be in doubt. UK Plc will be damaged. I question whether a return to greater unregulated power in the Governor of the Bank of England may not be more important both in practice and in terms of international confidence than in increased FSA or treasury regulation.

Even greater change than that presently proposed by the Bar Standards Board is to come with the implementation of the Legal Service Act institutions in 2010 or 2011. With Sir Andrew Leggatt, I question whether the quality of the disciplinary systems will be enhanced. My abiding concern is that the regulation of this great profession

will continue to decline. It will certainly become more expensive under the aegis of a new office for legal complaints dealing with all complaints of poor service by both barristers and solicitors. The Bar can rightfully say that it has been the continuous judgment of the Legal Services Ombudsman that the Bar’s disciplinary decisions in individual cases and the quality and speed of investigations have been good.

We live in a complaining consumerist society whose values are not those of the professions. Although I agree with the Complaints Commissioner to the Bar Standards Board that the Bar can make good even better, the best is often the enemy of the good. I fear political harassment of the professions and their regulators. I fear political correctness. I fear that the substance and extent of the proposed changes to the regulation of the medical profession, of the Bar, of the solicitors’ profession, of banking and of the accountants and actuaries professions may lower their standards and their regulation. I question the prevalent opinion that there should be ever increasing lay involvement in the regulation of the professions. The cost and quantity of regulation will probably increase for all the professions but must be held in check. We must try hard to restore and preserve professional control and leadership over all aspects of our standards and our discipline. If we succeed the public interest will be best secured.

**Roger Henderson QC**

## **CLEAR SEXUAL BOUNDARIES - THE CHRE’S GUIDANCE**

The cornerstone of any relationship between a healthcare professional and a patient is trust and confidence. However, a number of recent high profile cases where these values have been undermined have prompted the Council for Healthcare Regulatory Excellence (CHRE) to issue guidance to health professionals and healthcare regulators on the maintenance of clear and appropriate sexual boundaries.

The Council’s guidance, published in January 2008 and entitled “maintaining clear sexual boundaries”, is an attempt to underline the appropriate limits of the health professional/patient relationship. Three sets of guidelines have been produced, consisting of guidance to regulators on the responsibilities of healthcare professionals, guidance to fitness to practise panels and guidance for higher education providers.

The guidance to regulators seeks to identify the type of behaviour which crosses sexual boundaries and which must not be displayed. It is described as “sexualised behaviour” and is defined as:

“acts, words or behaviour designed to arouse or gratify sexual impulses or desires”.

Although designed to promote a consistent approach to what is considered inappropriate sexual behaviour, this definition will naturally be open to interpretation, depending, amongst other things, on diverging views of what is, and what is not, acceptable. Helpfully, the Council has published an appendix setting out examples of what it considers to be sexualised behaviour. This includes asking for or accepting a date, and use of sexual humour.

The guidance to regulators contains sections on signs of sexual attraction, what to do if sexual feelings become a cause for concern, sexual activity with former patients or their carers, and reporting problems with other health professionals.

It also sets out good practice in maintaining healthcare relationships, which covers communication, consent to examinations, confidentiality, intimate examinations and use of chaperones. This is of course supplemental to existing standards of conduct published by regulators. However, in an effort to reinforce those standards, the CHRE is now asking healthcare regulators to issue further guidance to their registrants setting out the position in clear terms.

The guidance to fitness to practice panels sets out the special considerations that they should bring to bear when hearing a case involving an alleged sexual boundary breach. It describes the effects on patients and carers of breaches of sexual boundaries by health professionals, and the effect that this can have on the ability of a witness to give evidence. It points out for instance that a delay in making a complaint may be due to post traumatic shock, and that complainants may become frozen or withdrawn when giving evidence and appear to lose concentration. This may mean that they do not present as strongly as might be expected given the nature of their allegations

The guidance also identifies a number of aggravating and mitigating factors for panel members to consider when deciding on a sanction. Aggravating factors include whether a criminal offence has been committed, the vulnerability of the patient, and whether additional breaches of professional standards have occurred such as misuse of confidential information or the provision of inappropriate prescription drugs as an inducement for sexual favours. Acceptable mitigation may relate to any personal difficulties of the health professional, the consensual nature of the relationship, the length of time since the relationship ceased and the reputation of the health professional.

The guidance notes that panels will take into account past fitness to practise cases as guidance about the approach taken in similar cases, but emphasises that they do not serve as precedents.

In considering past case law, panels will have to steer a course between, on the one hand, the public interest in allowing competent professionals to continue working, and on the other, the need to sanction inappropriate behaviour. The High Court has frequently stressed that a finding of misconduct and the imposition of a sanction may be required in order to maintain public confidence in the profession<sup>1</sup> and mark the seriousness of a health professional’s misconduct.<sup>2</sup> However, this does not necessarily mean it will always be necessary to take action on a professional’s registration for failing to maintain appropriate boundaries. In one example, it found it was acceptable not to impose a sanction where the relationship had continued for a number of years and was the only relationship in which that professional was engaged.<sup>3</sup>

**Nicola Bowen**  
**Kingsley Napley**

## LEGAL UPDATE

Although a regulator and prosecuting body must act with complete fairness it has been recently held that the prosecutor need not be independent. In **R (Haase) v. Independent Adjudicator**, The Times, February 11th 2008, Stanley Burnton held, when dismissing an application by John Haase for judicial review of a finding of guilt in prison disciplinary proceedings, that prison disciplinary hearings chaired by an independent adjudicator in which the prosecution case was presented by a prison officer who might also be a witness were not incompatible with the right to a fair trial guaranteed by Article 6 of the European Convention on Human Rights. His Lordship said there was nothing in the Strasbourg authorities to indicate that the prosecutor was required to be independent. Disciplinary proceedings were to be dealt with speedily; prison officers were expected to act fairly and with integrity and their duty to do so was required by the Prison Disciplinary Manual. Fairness, however, did not require an independent prosecutor.

In **R (Siborurema) v. Office of The Independent Adjudicator for Higher Education** The Times, January 10th 2008, the Court of Appeal held that the Office of the Independent Adjudicator for Higher Education

1 Wentzel v General Medical Council (2004) [2004] EWHC 381 (Admin) QBD (Admin) (Lightman J) 4/3/2004  
 2 Council for the Regulation of Healthcare Professionals v (1) General Medical Council (2) Anthony Leeper (2004) [2004] EWHC 1850 (Admin)  
 3 Moody v General Osteopathic Council (2004) [2004] EWHC 967 (Admin)

was entitled to take into account the regulations and procedures of the relevant institution as a starting point and to consider, when assessing a complaint, whether the institution had complied with its own regulations and procedures. Initially, the regulations could be assumed to be a reliable benchmark. In dismissing the applicant's application for permission to apply for judicial review, the Court of Appeal said that the appellant had to establish that the Office of the Independent Adjudicator had erred in law in holding that his complaint was not justified. The adjudicator's office was not obliged to conduct a full investigation into the underlying facts: a complainant dissatisfied with the decision of the adjudication office would often have the option of pursuing a civil claim against the university, which might well be an appropriate alternative remedy.

In **Bryant v. Law Society** [2007] EWHC 3043, another division of the Administrative Court (Richards LJ and Aikens J) agreed with the decision of the divisional court in **Donkin v. Law Society** [2007] EWHC 414 (Maurice Kay LJ and Goldring J) that where the allegation is dishonesty a solicitor is entitled to rely on character references at the fact finding stage of the proceedings. The court agreed that where the issue is dishonesty, evidence of good character is relevant to credibility and to propensity just as it would be in a criminal trial, and a tribunal's refusal to take that evidence into account when deciding a question of dishonesty would be a significant legal error. If the test for dishonesty was a predominantly objective one, then one can see how a tribunal would consider good character evidence to be irrelevant. But if the two-stage objective/subjective Twinsectra test is applied (*Twinsectra Limited v. Yardley* [2002] 2 AC 164), then character evidence is relevant to dishonesty and capable of having real weight.

In **Walker v. Royal College of Veterinary Surgeons**, Privy Council Appeal No 16 of 2007, in considering Dr Walker's appeal against an order removing his name from the register following a finding of providing false certifications on two separate and similar occasions, the Board reminded itself of the approach indicated by the Privy Council in **Ghosh v. GMC** [2001] 1 WLR 1915. Lord Millett said there that, although the Board's jurisdiction is appellate, not supervisory, it is "*incumbent on the appellant to demonstrate some error has occurred in the proceedings before the committee or in its decision, but this is true of most appellate processes*"; that "*the Board will accord an appropriate measure of respect*" to the judgment of a professional disciplinary committee on inter-alia "*the measures necessary to maintain professional standards and provide adequate protection to the public*"; but that it "*will not defer to the committee's judgment more than is warranted by the circumstances*"; and that it is, on this basis, open to the

Board "*to decide whether the sanction of erasure was appropriate or necessary in the public interest or was excessive and disproportionate*". Lord Mance in **Walker** said that these principles apply equally to an appeal relating to the Royal College of Veterinary Surgeons.

After reminding itself of the guidance given by Sir Thomas Bingham MR in **Bolton v. Law Society** [1994] 1 WLR 512, Lord Mance went on to say: "*The reputation of and confidence in the integrity of the profession of veterinary surgeons is important in a manner which bears an analogy to, even if it is not precisely the same as, that described by Sir Thomas Bingham in Bolton v. Law Society but that is not to say that it would be correct to bracket all cases of knowingly inaccurate veterinary certification into a single group and to treat them as equivalently serious. That would not be right when considering how far an offender needs to be deprived of the opportunity of practice in order to prevent re-offending, or what sanction is necessary to maintain or restore public confidence in the profession. Deterrence is an importance consideration, but it must be deterrence in the light of the particular circumstances of the offence to which any deterrent sentence is directed.*" The Board went on to criticise the committee's reasoning and substituted an order for suspension for a period of six months in lieu of an order for removal from the register.

**Kenneth Hamer  
Henderson Chambers**

***The Queen on the Application of Philip Wheeler v Assistant Commissioner House of the Metropolitan Police [2008] EWHC 439 (Admin).***

The applicant (W) applied for judicial review of the decision of Assistant Commissioner House to uphold the earlier decision of a Disciplinary Panel which found him to be in breach of the Code of Conduct applicable to police officers.

Although not an original ground for judicial review, the decision of the Assistant Commissioner was quashed on the basis that the reasons given for upholding the Panel's earlier decision were inadequate.

The vagueness of the charges alleging breaches of the Code of Conduct was however one of the original grounds relied upon and, although this challenge was not upheld, the High Court's criticism of the charges is worth stating.

Stanley Burnton J firmly criticized the vagueness of charges stating that, "Vagueness is a ground for judicial review if it leads to unfairness in the proceedings." He added that the danger of vague charges is that respondents do not know, with precision, what is



alleged against them and are therefore not fully able to address those matters in the course of the hearing.

In W's case, the charges against him had been too vague and should have been clarified. The second of the charges read:

*"Being a member of the Metropolitan Police Service [W] failed to satisfy the required standard in respect of performance of duties in that: in [his] capacity as the officer with operational responsibility for the Highgate Child Protection Team, [he] failed to ensure that investigations were carried out by the team to an acceptable standard."*

Whilst concluding that this and the first charge were vague, Stanley Burnton J did not find that there had been any unfairness. Nonetheless he reiterated that a charge should be sufficiently particularised well before the hearing so that a respondent to disciplinary charges, *"knows not just what it is alleged he failed to do, but in what respects he failed so that he can then see whether or not...he could or should have done that which it is alleged he should have done."* Importantly in his view it is sufficient if a charge is particularised subsequent to it first being formulated.

This case highlights the importance of the formulation of precise particulars of allegation. However, it seems that in order for respondents to successfully challenge the legality of so-called vague allegations before Panels, it will be necessary for there to be demonstrable unfairness. Additionally, it is hoped that challenges can be avoided by the provision to respondents of further particulars if so required.

***Christina Reyburn v The Health Professions Council [2008] EWHC 476 (Admin).***

*"I believe that what probably went wrong was the not hearing of oral evidence...the decision to suspend is not reliably based " per Holman, J.*

This case involved an appeal to the High Court by the Registrant (a Speech and Language Therapist) against a decision and order of the Conduct and Competence Committee (CCC) of the Health Professions Council (HPC), made at a sanction review hearing, to replace a Conditions of Practise Order (CPO) with a Suspension Order (SO).

Following an adverse finding against Christina Reyburn in relation to the impairment of her fitness to practise, the Panel at the Final Hearing imposed a 12-month Conditions of Practise Order (CPO). This Order was reviewed on a number of occasions and CPOs were again imposed.

One of the conditions under the terms of the most recent CPO required the Registrant to submit six-monthly reports to the HPC prepared by a clinical supervisor. It was on the basis of these reports and accompanying letters from her supervisor and present employer, that the Panel reached its decision to impose a SO.

The High Court found that the documents on which the Panel based its decision contained contradictory, vague and imprecise evidence in relation to Ms Rayburn's present level of competency. The vast majority of the content was also challenged by Ms Reyburn. The Panel raised the possibility of adjourning the proceedings in order to secure the attendance of the witnesses to give oral evidence but were urged by both sides to proceed.

In criticising the Panel's decision to suspend the Appellant from practise on the basis of that evidence, Holman, J noted that,

*"the problems in this case...flow from the almost impossible task ...of how to evaluate and balance, on the one hand, what was said in the letters from (the supervisors) and, on the one other hand, the oral accounts being given by Mrs Reyburn."*

The court went on to say,

*"...it is very difficult to see how that sort of conflict could be resolved without hearing the oral evidence (of the witnesses)..."*

The decision to remit the matter for a re-hearing was centred on the question as to whether in the face of such conflicting and vague written evidence as to the Registrant's present fitness to practise, the Panel, in order to reach a proper and reliable determination on sanction ought to have brought about the attendance of those witnesses. The answer was a resounding "yes".

Review hearings are customarily conducted without the requirement for witnesses to attend and give live evidence; rather Panels generally proceed to consider the need for the further imposition of a sanction on the basis of the written evidence before them and on the Registrant's testimony; Panels are very experienced at deciding questions of weight.

This decision establishes no new principle: it is ultimately a matter for the Council to decide what evidence to place before the Panel and for the Panel to regulate their own proceedings by requesting or directing witnesses to attend if necessary. It does however provide a timely reminder to Regulators to consider carefully how they approach hearsay evidence that is contested.

Regulators ought to give consideration to causing

the attendance of witnesses in similar circumstances, even where it is contrary to the express wishes of the Registrant, where they consider that the evidence provided by the witness is insufficiently compelling or is the subject of challenge.

It is noteworthy that the High Court refused a costs order against the Council, noting that Ms Reyburn was, to a certain extent, the author of her own difficulty by encouraging the Panel to proceed in the absence of the witnesses.

**Sophie Kemp and Julie Norris  
Kingsley Napley**

## **FORTHCOMING EVENTS**

**ARDL Sixth Annual Dinner**

**Thursday 15 May 2008**

**Venue: Quaglino's, Bury Street, London**

**Dress: Black tie**

**SOLD OUT AGAIN!**

## **REQUEST FOR COMMENTS AND CONTRIBUTORS**

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

**Angela Hayes Mayer Brown International LLP**

(ahayes@mayerbrown.com)

**Calum Burnett Allen & Overy LLP**

(calum.burnett@allenoverly.com)

**Kenneth Hamer Henderson Chambers**

(khamer@hendersonchambers.co.uk)

This is the last Bulletin with Calum Burnett as an editor. We thank Calum for his excellent work on the Bulletin since ARDL was founded. We welcome expressions of interest from any ARDL member who would be interested in joining the editorial committee.

## **THE LATE MARION SIMMONS QC**

It is with great sadness that we inform you of the death of Marion Simmons QC, who died on 2 May 2008. Marion served on the ARDL committee for two years providing insight into the world of Competition Law, common sense and enthusiasm. She has shared her thoughts on regulation with us through a number of excellent articles in this Bulletin. We shall miss her and wish her family and friends strength and comfort at this difficult time.