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MARION SIMMONS QC ESSAY PRIZE

ARDL is delighted to announce that the winners of the 2013/2014 Marion Simmons QC Essay Prize were as follows:

First prize: Michael Ridge
Second Prize: Louise Sivey
Third Prize: Jemma Towers

You can read Michael Ridge's prize winning essay in this edition of the ARDL bulletin.

We are also delighted to announce the launch of this year's competition, with increases in the prize money available; and an extension of eligibility to include lawyers and legal executives who qualified or were called fewer than three years ago.

This year's title is:

Has the regulation of professionals encroached too far into private life?

First Prize £2,000

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WINNING ESSAY IN THE ARDL MARION SIMMONS QC ESSAY PRIZE 2013/2014 - MICHAEL RIDGE

IN JUNE 2013, THE MINISTRY OF JUSTICE ANNOUNCED A REVIEW OF LEGAL SERVICES REGULATION WITH A VIEW TO ITS SIMPLIFICATION: WHAT REFORM, IF ANY, IS NEEDED IN THIS AREA?

The passing of the Legal Services Act 2007 (LSA) was the culmination of many years of work on legal regulatory reform, stretching back beyond Sir David Clementi's report in December 2004 to the Office of Fair Trading's 2001 report, *Competition in Professions*.¹ The changes it introduced were substantial. It began a process of market liberalisation, established the Legal Services Board (LSB) and a set of overarching regulatory principles, and enhanced the independence of regulation by requiring Approved Regulators (ARs) to establish regulatory wings separated from their representative functions.² However, despite this marked progress, the LSA left many issues unresolved, and few regulatory bodies are satisfied with the existing state of affairs. The

¹ David Clementi, 'Review of the Regulatory Framework for Legal Services in England and Wales' (2004); Office of Fair Trading, 'Competition in Professions' (2001).

² Legal Services Act 2007 (LSA 2007).

Solicitors' Regulatory Authority (SRA) has characterized the current settlement as 'clumsy, complex, costly and obscure to consumers'.³ Even the LSB, the body charged by the LSA with implementing many of its provisions, entirely accepts the need for reform.⁴

Given the significant and comparatively recent changes imposed by the LSA, an outside observer might be surprised at the consideration now being given to further reform. However, such a view fails to appreciate not only the significant problems left unresolved, and to some extent created, by the LSA, but also the length of time substantial reform is likely to take. The SRA rightly notes that any primary legislation would require several years to enact, and, given the fast pace of change within the legal sector, now is the time to begin considering reform.⁵

Certain changes are uncontroversial. There is all but unanimous support for amending the LSA to remove unnecessarily prescriptive detail, and to rationalise the statutory basis for empowering regulators. This paper will argue that such reforms should be speedily adopted. On other changes opinions differ starkly. Despite obvious advantages, many ARs remain opposed to abolishing the concept of 'reserved activities' and replacing it with a single, broad definition of legal services. Most contentious are proposals to scrap the eight ARs and the LSB, and to replace them with a super-regulator. Whilst at this early stage it is difficult to state unequivocally that this is the way forward, the option should not be readily dismissed.

The achievements of the LSA

Much of the criticism of the current system is centred around the LSA, yet this should not be taken as a repudiation of the Act or of its aims. On the contrary, although the Bar Standards Board (BSB) and Bar Council have questioned the LSA's inclusion of certain regulatory objectives, and criticised the emphasis the LSB places on public interest-centred

objectives, the response of the ARs to the LSA's new regulatory objectives has been overwhelmingly positive.⁶

As a direct result of the changes brought in by the LSA, ARs have established independent regulatory wings, a process which, it shall be argued below, should be extended. Moreover, in addition to introducing a new set of regulatory objectives, the Act committed the ARs to further those objectives whilst promoting best regulatory practice.⁷ Consequently, an increasingly outcomes-driven approach has emerged, embodied by changes such as the SRA's introduction of a new outcomes-centred Code of Conduct in 2011.⁸ Even more significantly, the Act formalised a process of market liberalisation, permitting the formation of 'alternative business structures' (ABS) by allowing non-lawyers to own and manage legal services.⁹ Such reforms are far from nugatory. Given these successes, the question is not whether to embrace the LSA's objectives, but whether the existing regulatory framework is best suited to delivering those objectives in a rapidly changing legal marketplace. In several significant respects, it is clear that it is not.

Prescription and complexity within existing legislation

There is almost unanimous recognition of the need to reform existing regulatory statutes, most particularly the LSA, which is widely viewed as excessively prescriptive. Examples abound. For instance, the SRA has alluded to the fact that, post-LSA, they are unable to regulate traditionally-structured law firms as entities, where they have a single solicitor principle. This necessitates regulating such firms as sole practitioners, despite sometimes being of considerable size. As a result, the SRA has had to duplicate many of the entity-based regulatory provisions within its regulatory handbook.¹⁰ Similarly, s.91(1)(b) requires the Head of Legal Practice of an ABS to report *any*

³ Solicitors' Regulation Authority, 'SRA Response: Regulation of legal services in England and Wales' (2013), para 1.4.

⁴ Legal Services Board, 'A blueprint for reforming legal services regulation' (2013), para 9.

⁵ SRA, 'SRA Response', para 1.4.

⁶ Bar Council, 'Response to the Review of the Legal Services Regulatory Framework' (2013), para 20(a); Bar Standards Board, 'Submission to Ministry of Justice Legal Services Review Call for Evidence' (2013), para 8(d).

⁷ LSA 2007, s. 28.

⁸ SRA, *Code of Conduct* (8th ed.) (2013).

⁹ LSA 2007, part 5.

¹⁰ SRA, 'SRA Response', para 4.7.

breach of its licence to the regulator, however trivial.¹¹ Indeed both the SRA and the Chartered Institute of Legal Executives (CILEx) have rightly questioned whether a separate system of regulation for ABS, with the consequential time and cost implications, is really justified.¹² These are but a few of a myriad of examples, which cumulatively make the LSA an unnecessary burden upon ARs and, more importantly, the legal profession, who in the majority of cases would be better served by allowing ARs to exercise their discretion. Regulation is costly, and creating unnecessary regulatory burdens at a time of tightening salaries for many legal professionals is unacceptable.

Over-prescriptive legislation is an issue referred to in almost every response to the Call to Evidence. The reports argue persuasively that such detailed regulations are not only unnecessary, but actively undermine the LSA's objective of ensuring outcomes-focused regulation, specifically targeted at areas of particular risk in order to improve the consumer experience.¹³ In addition to constricting ARs, this prescription makes current statutes highly inflexible when addressing future changes in the legal landscape. Given the time required to engender changes to primary legislation, it seems desirable for such legislation to contain only the minimum detail practicable to establish a regulatory framework, giving ARs the discretion to adapt their approach to changing market conditions and to address specific risks. If nothing else is achieved by the Ministry of Justice's (MoJ) review, steps should be taken to strip out the unnecessary, restrictive detail contained within regulatory statutes.

Underlying statutory basis for regulation

Though stripping statutes of detail will improve regulatory outcomes, other problems with existing legislation are more deeply entrenched. Regulation of the legal sector has historically placed great emphasis on titles, focusing on six 'reserved activities' defined by statutes, most recently in the LSA¹⁴. Maintaining

the use of 'reserved activities' and the 'authorised persons' able to perform them, has led to growing gaps of unregulated activity within the legal sector, most notably in employment law, will drafting and intellectual property, as certain legal services are increasingly offered by those not traditionally covered by regulatory arrangements.¹⁵ Such gaps increase the risk to consumers of receiving inferior quality legal services by allowing some practitioners to opt out of regulation. Indeed, the Institute of Trade Mark Attorneys (ITMA) have specifically pointed to increased regulatory costs as one reason for professionals in the area of intellectual property choosing to remain outside of the regulatory regime.¹⁶ The liberalisation of the legal marketplace furthered by the LSA has eroded the historic definitions of many legal professions. This blurring of professional boundaries is evidenced by the growth since the 1990s of solicitor-advocates and the recent enabling of barristers to become partners in solicitors' firms. In this context, regulation by title is increasingly anachronistic and unsatisfactory.

Despite these gaps, the majority of ARs appear to favour either a piecemeal expansion of the existing system by codifying new 'reserved activities', or compromises such as forcing unregulated professionals operating in the legal marketplace to identify themselves explicitly as unregulated on their letterheads.¹⁷ There is a simpler, more effective solution.

Instituting a single definition of 'legal activity', as advocated by the SRA and CILEx, would enable legislation to encompass the entire legal marketplace, whilst adding flexibility to accommodate future developments in the provision of legal services.¹⁸ At the same time the majority of the 10 statutes and 30 statutory instruments alluded to in the MoJ's Call to Evidence should be rationalised into a single, authoritative statute governing the regulation of all

¹¹ Ibid., para 4.4.

¹² Chartered Institute of Legal Executives, 'Review of the Legal Services Regulatory Framework' (2013), para 32; SRA, 'SRA Response', para 5.5.

¹³ CILEx, 'Review of the Legal Services Regulatory Framework', p 3;

SRA, 'SRA Response', part 4.

¹⁴ LSA 2007, Part 3.

¹⁵ CILEx, 'Review of the Legal Services Regulatory Framework', para 39; Institute of Trade Mark Attorneys, 'Review of the Legal Services Regulatory Landscape' (2013), p. 6.

¹⁶ ITMA, 'Review of the Legal Services Regulatory Landscape', p. 1.

¹⁷ Ibid., p. 5.

¹⁸ SRA, 'SRA Response', para 6.7; CILEx, 'Review of the Legal Services Regulatory Framework', para 39.

areas within the legal sector.¹⁹ This is the natural corollary to the set of unifying regulatory objectives established by section 1 of the LSA.

This process would also necessarily involve reforming the current, illogical position in which there can be legal professionals providing identical or very similar services, who are regulated under different rules and by different bodies using different powers. The SRA has referred particularly to the separate provisions for regulating ABSs as being unnecessary and confusing.²⁰ Another example is the provisions in the Solicitors Act 1974 relating to compensation funds and the protection of client money, which do not apply equally to solicitors and other legal professionals. As a result, three different regulatory bodies have been forced to apply independently for special statutory permission to receive powers under the act, at great time and expense.²¹ Consolidating the powers granted to different ARs within one statute and applying them to a single definition of 'legal activity' would remove many problems created by the current 'patchwork of legislation'.²²

Structural Reform

In contrast to the widespread support for simplifying and rationalising underlying legislation, there is little agreement over what, if any, structural changes are required to the current regulatory layout, encompassing the LSB as a so-called 'supra-regulator' and eight ARs. The LSB's outgoing chair, David Edmonds, has proposed establishing a single regulator for the whole of the legal market.²³ Though members of the Justice Committee appear open to his proposal, the idea has been firmly rejected by the vast majority of ARs, justifying predictions of 'enormous resistance'.²⁴ The BSB, Bar Council, ITMA, CILEx and others have all explicitly stated their opposition,

with only the SRA and Law Society reserving judgment.²⁵

Yet even amongst those opposing the creation of a single super-regulator, there is little agreement. Some, such as CILEx, have taken a 'wait and see' approach, hoping that current problems will resolve themselves given time.²⁶ Others, notably the BSB and the Bar Council, have proposed the replacement of the LSB with a new oversight regulator.²⁷ Nevertheless, ARs complain vociferously of the increased cost of the existing regulatory framework and replacing the eight ARs with a single super-regulator may well be the best path to finding significant long-term cost savings.²⁸

The current system, the so-called 'B+ model', which has seen ARs establish regulatory arms granted 'operational independence' from their core representative functions, has been far from an unmitigated success. In the few years since the LSA imposed these changes the ITMA has said they 'felt the absence of an arbitrator' between themselves and their regulatory arm, alluding to 'tensions inherent in the design'.²⁹ The SRA has described the Law Society's ceding of regulatory authority to them as 'grudging', stating they are only able to operate independently as a result of 'constant vigilance... backed up by the prospect of intervention by the LSB'.³⁰ CILEx believe that they are 'the only AR to have made Model B+... truly work'.³¹ In this context, the SRA's call for 'structural independence', i.e. a complete separation of representative and regulatory functions, appears entirely justified as the minimum step to ensuring independent regulation.³²

If the current system is to be maintained, the LSB must rethink its interventionist approach. Dissatisfaction at the level of LSB intervention is another common

¹⁹ Ministry of Justice, 'Legal Services Review Call for Evidence' (2013).

²⁰ SRA, 'SRA Response', Annex A.

²¹ CILEx, 'Review of the Legal Services Regulatory Framework', para 41.

²² SRA, 'SRA Response', para 5.7.

²³ Legal Services Board, 'A blueprint for reforming legal services regulation' (2013), para 23.

²⁴ 'Mixed response to Edmonds' call for a single legal regulator', *Solicitors' Journal* (March 2013),

URL: <http://www.solicitorsjournal.com/news/hot-picks/legal-services-act/mixed-response-edmonds-call-single-legal-regulator> [22/1/14]

²⁵ BC, 'Response to the Review of the Legal Services', para 20(b); ITMA, 'Review of the Legal Services Regulatory Landscape', p. 6; CILEx, 'Review of the Legal Services Regulatory Framework', para 9; SRA, 'SRA Response', para 8.20.

²⁶ CILEx, 'Review of the Legal Services Regulatory Framework', para 54.

²⁷ BSB, 'Submission to Ministry of Justice', paras 19-22; BC, 'Response to the Review of the Legal Services', para 20(e).

²⁸ e.g. BC, 'Response to the Review of the Legal Services', para 13.

²⁹ ITMA, 'Review of the Legal Services Regulatory Landscape', pp. 4-5.

³⁰ SRA, 'SRA Response', para 8.9

³¹ CILEx, 'Review of the Legal Services Regulatory Framework', para 4.

³² SRA, 'SRA Response', para 8.8.

feature of responses to the present framework. CILEx point, for example, to the LSB's policy of giving detailed scrutiny to the AR's internal governance rules as being an unnecessary and unwelcome compliance burden. Objections are not levelled at intervention *per se*, but at the *degree* of scrutiny, which compounds problems created by prescription in the LSA and drives up regulatory costs. Whilst the BSB arguably overstated its case, suggesting that the LSB should be 'constrained' to only challenging AR decisions that are "Wednesbury unreasonable", it seems clear that an LSB less preoccupied with the minutia of AR decisions would be desirable.³³ This would require no legislative reform. The LSB need only respond, as it seems to be doing, to the criticisms made of it.

In calling for a single regulator, the LSB has in many ways gone further. If the MoJ's review were to produce a single, authoritative statute governing the regulation of the whole legal services sector, with a unifying definition of legal services, then a single overarching regulator, replacing the ARs and LSB, would arguably be a logical next step.

Some actors have asserted that introducing a single regulator would necessarily occasion a loss of expertise in the regulation of specific professions.³⁴ Though it ought not to be dismissed entirely, this is a somewhat meretricious argument. Any sensible scheme designed to introduce one overarching regulator would draw on the skills of those same individuals who currently contribute to the work of the ARs.

Of more merit is the argument that a 'super-regulator' would not, in fact, achieve the promised cost savings, as it would still need to establish separate internal 'silos' to regulate the various professions operating within the legal marketplace.³⁵ Reducing the current nine regulators to one would not remove the need to deal separately to some extent with each of the different legal professions, with all of the resulting cost implications. However, such a regulator would avoid the current burden of rules determining the boundaries of the various ARs' authority, defining the extent of

their remits and governing the interaction between them.

It must be acknowledged that the short-term cost implications of establishing a super-regulator would be substantial, and the savings far from certain without a detailed costs study. Given the investment already made to establish the LSB, it may be preferable to maintain the ARs and LSB in the amended form adumbrated above. However, although the case for a single super-regulator is not yet fully substantiated, it is certainly an option worth exploring in detail, and should not be dismissed out of hand as many ARs appear to have done.

Conclusion

Key to the success of any reform of legal services' regulation will be the achievement of a dynamic settlement, which is flexible enough to accommodate, not only the existing complexity of the marketplace, but also any subsequent developments. The liberalisation brought about in part by the LSA is ongoing, and any regulatory framework must be sufficiently versatile to account for the inevitable future changes. Though spatial constraints have prevented numerous other proposals, such as reform of the Consumer Services Panel and Legal Ombudsman, being considered, any reform of these bodies should be approached with the same flexibility in mind.

Given the number and complexity of the issues under consideration, there is much to be said for CILEx's proposal to refer this issue to the Law Commission.³⁶ The Commission's in-depth knowledge of the legal market, and its previous work on reforming professional regulation in other industries (see, for example, its review of health and social care professionals carried out in 2012-13), make it arguably better placed than the MoJ to undertake a review of the regulation of the legal sector.³⁷

Though the LSA had many positive effects, it was also an opportunity missed, leaving the job of reforming

³³ BSB, 'Submission to Ministry of Justice', para 8(c).

³⁴ ITMA, 'Review of the Legal Services Regulatory Landscape', p. 6.

³⁵ *Ibid.*, p. 6.

³⁶ CILEx, 'Review of the Legal Services Regulatory Framework', p 14.

³⁷ Law Commission, 'Regulation of Health and Social Care Professionals', URL: http://lawcommission.justice.gov.uk/areas/Healthcare_professions.htm [22/1/14]

legal services regulation unfinished. The MoJ's review is therefore of crucial importance in ensuring that the reforms identified here are adopted. Several proposed changes, such as adopting a comprehensive definition of 'legal activity', would fundamentally alter the basis of legal services regulation. Although individually each has merit, it is when taken together that the full potential of the reforms becomes clear. A simple rationalisation and stripping of prescription from the existing legislation would be advantageous. However, limiting the scope of any reform to these measures would fail to take full advantage of the singular opportunity this review provides. If the suggested changes are enacted, they will provide a broad, flexible basis for legal regulation, which will manage the industry effectively for many years to come.

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Michael Ridge

SILENT WITNESS – ADVERSE INFERENCES IN REGULATORY PROCEEDINGS

Introduction

The rules of professional bodies or regulators generally do not, with a few exceptions, provide for the panel hearing a fitness to practise case to draw an adverse inference where a registrant declines to give evidence at a hearing. This apparent lacuna in regulatory law was considered by the Divisional Court, albeit obiter, in *Iqbal v Solicitors Regulation Authority* [2012] EWHC 3251 where Sir John Thomas, the President of the Queen's Bench Division as he then was, laid down the gauntlet for the SDA:

"There is one observation that has arisen out of this case in relation to the practice of the Tribunal to which it is the duty of this court to draw attention. As I have observed, the appellant did not give evidence, despite the gravity of the allegations against him. He

merely provided a statement. Of course a person is entitled to decline to give evidence, but it has been the practice of the civil courts from time immemorial to take into account the failure of a person to give evidence or submit to cross examination when reaching a conclusion in respect of him. Similarly in the criminal courts it has been the practice, since the change in the law at the end of the last century, that a court is entitled in considering the whole of the evidence, to take into account the position that the defendant has taken as regards the giving of evidence. We understand that it is the practice of the Solicitors Tribunal not to take into account the failure to give evidence by a solicitor. Ordinarily the public would expect a professional man to give an account of his actions.

It seems to me that it would be appropriate for the Solicitors Disciplinary Authority to review this practice as it can only be in the public interest that the practice, which may have been justified by analogy to the law, as it used to be, in the last century, might be brought up to date for the present century”

In light of this guidance the Solicitors Disciplinary Tribunal (“SDT”) duly issued Practice Direction No. 5, “*Inference to be Drawn Where The Respondent Does Not Give Evidence*” which states that:

“The Tribunal directs for the avoidance of doubt that, in appropriate cases where a Respondent denies some or all of the allegations against him... and / or disputes material facts, and does not give evidence or submit himself to cross-examination, the Tribunal shall be entitled to take into account the position that the Respondent has chosen to adopt as regards the giving of evidence when reaching its decision in respect of its findings.”

When compared with the criminal regime the SDT’s guidance is extremely broad. S.35 Criminal Justice and Public Order Act 1994 (“CJPOA”) provides for an adverse inference to be drawn in circumstances where the defendant does not give evidence. S.35(3) states, in so far as it is relevant, that:

Where this subsection applies, the court or jury, in determining whether the accused is guilty of the offence charged, may draw such inferences as appear proper from the failure of the accused to give evidence or his refusal, without good cause, to answer any question.

There are, within s.35 and the other relevant provisions of the CJPOA, a number of safeguards and both the

European Court of Human Rights (ECtHR) and the Court of Appeal have been diligent in iterating the importance of those safeguards. For example, in the case of *R v Cowan [1996] Q.B. 373* the Court of Appeal set out the five steps that a court must take prior to a section 35 (failure to testify at trial) adverse inference being drawn, namely that;

1. The Judge must tell the jury that the burden of proof remains upon the prosecution throughout and what the required standard is;
2. The judge must make clear to the jury that the defendant has the right to remain silent
3. An inference from failure to give evidence cannot on its own prove guilt
4. Therefore the jury must be satisfied that the prosecution have established a case to answer before drawing any inferences from silence

If the jury concludes that the silence can only be sensibly attributed to the defendant’s having no answer or none that would stand up to cross-examination, they may draw an adverse inference.

So, should a panel hearing a FtP case be entitled to draw an adverse inference from a failure to give evidence? If the answer to that question is yes, then should the panel also be entitled to draw an adverse inference from a failure to mention facts when questioned which are later relied on? If the panel are entitled to draw an adverse inference of any kind what kind of safeguards should there be to ensure that the hearing is Article 6 compliant?

Is an adverse inference appropriate in regulatory proceedings?

To answer this question it is helpful first to consider the approach of the High Court and the Court of Appeal to the application of the privilege against self-incrimination in regulatory proceedings. In *R v Institute of Chartered Accountants in England and Wales, ex parte Nawaz*³⁸ each court considered

³⁸ [1997] EWCA Civ 1530

whether the request made by the Institute of Chartered Accountants in England and Wales (ICAEW) as part of its investigatory process that Mr. Nawaz provide them with information and documents that could have exposed to him to disciplinary proceedings or potentially criminal charges violated the common law privilege against self-incrimination. The High Court considered, and was upheld on appeal, that whilst the privilege against self-incrimination was capable of applying to the ICAEW request by becoming a member of the ICAEW, Mr. Nawaz was taken to have contracted with the ICAEW on the terms of its charter, byelaws and regulations and therefore to have prima facie waived privilege.

Considering the four motives identified by Lord Mustill in *R v Director of the Serious Fraud Office ex parte Smith*³⁹ as causing the existence of the privilege against self-incrimination to become embedded in English Law Sedley LJ dealt with the question of whether any of those motives applied in the present case, concluding that:

“Not one of the motives identified by Lord Mustill for the privilege against self-incrimination applies with any force in the present case. The Royal Charters constituting the Institute and the modern legislation under which it polices auditors make it the Institute’s business to investigate possible cases of unauthorised auditing by its members. That such auditing can also be a criminal offence emphasises, if anything, that it is not merely the accountant’s private business. Although the enforceable requirement to provide information may cause pain, it cannot be equated with torture. It is a reasonable function of the public responsibility which an individual undertakes by becoming a chartered accountant. The same is true of the argument that an accountant in Mr Nawaz’s position will be damned if he answers and damned if he does not. The instinct for fair play which ordinarily makes such a dilemma unacceptable has to accommodate the public interest in detecting malpractice in a profession which is central to the financial wellbeing of millions of individuals and of the country as a whole. The final consideration, the risk of untrue admissions, has no present bearing.

On appeal, Leggatt LJ, with whom Thorpe LJ and Mummery LJ agreed, stated:

“When a person enters a profession he accepts its duties and liabilities as well as its rights and powers. Similarly, he may acquire or surrender privilege and immunities... In my judgment, acceptance of a duty to provide information demanded of an accountant constitutes a waiver by the member concerned of any privilege from disclosure. It is plainly in the public interest as well as the interests of the profession, that the Institute should be enabled to obtain all such information in the profession of its members as is relevant to complaints of their professional misconduct.

The decision in *Nawaz* was subsequently applied in two cases brought by the SRA⁴⁰ where it was contended that the duty to supply information in the course of an investigation was a violation of the privilege against self-incrimination.

More recently, in *Ashiq v Bar Standards Board* the Tribunal were asked to draw an adverse inference from Mr. Ashiq’s refusal to provide evidence showing that he had paid a cheque said to have been left unpaid despite being given time to provide such information. The Tribunal accepted the invitation to draw the inference. On appeal the Visitors to the Inns of Court upheld the Tribunal’s decision concluding that in requiring Mr. Ashiq to provide evidence the Tribunal had not effectively reversed the burden of proof. In their decision the Visitors said this:

The Tribunal had given Mr. Ashiq an opportunity to consider his position and to say that he would provide documents redacted to conceal anything that was no material. If he had said that he would, an adjournment would have been necessary. But he had refused. The Tribunal’s considered that this reasons for doing so had not weight, which was plainly correct. It was Mr. Ashiq’s duty as set out in paragraph 905(d) of the Code of Conduct to “respond promptly to any request from the Bar Standards Board for comments or information on the matter..” “Respond” plainly means to respond positively, not by way of a refusal. The evidence before the Tribunal was thus the unjustified refusal. It was for the Tribunal to consider what inference they should draw from the refusal.

It is the view of the authors that the cases relied upon, above, put it beyond doubt that where there is an

³⁹ [1993] A.C. 1 at pp. 31 - 32

⁴⁰ *Macpherson v Law Society* [2005] EWHC 2837 (Admin) and *Holder v Law Society* [2005] EWHC 2023 (Admin) where, in each case the High Court concluded that a request made by the Law Society for information that had the potential to incriminate the Registrant did not violate the privilege against self-incrimination.

explicit agreement between an individual and his regulator that he will comply with requests made by that regulator and where there is a strong public interest in the proper regulation of the profession in question the duty of an individual to comply with a regulator's request for information is paramount. Indeed per *Ashiq* in circumstances where you refuse to comply with that request such a refusal can be held against you.

In the face of such authority it would seem impossible to argue that a regulator should not be able to provide for an adverse inference to be drawn in circumstances where a registrant who is subject to fitness to practice proceedings does not give evidence or, per *Ashiq*, where a Registrant does give evidence but fails to provide information requested of him. The courts' emphasis on the importance of ensuring that professional bodies are able to investigate the affairs of its members in the public interest and to discipline such members of breaches of the rules that apply to such professions coupled with the express waiver to co-operate with one's regulator are simply too persuasive.

If the above conclusion is correct then it becomes even more important to ensure that where an adverse inference may be drawn it is done so in such a way that is compliant with article 6. Per *Murray v UK*⁴¹ whether or not any particular inference has been drawn in such a way as to be article 6 compliant is to be determined in the light of all the circumstances of any individual case, however the following measures, at least, would be considered appropriate:

- a. a Cowan direction;
- b. guidance on when it may be proper to draw an inference;
- c. provision that the Tribunal may only draw an adverse inference in relation to a failure to answer any question if it was the only inference to be drawn from the fact of the refusal.

Despite the apparent novelty of the SRA guidance some may consider that in so far as the concept of impairment of fitness to practice requires an element of insight there has always been, in fitness to practice

proceedings, the possibility of an adverse inference being drawn in circumstances where the Registrant fails to mention when questioned in the internal investigation facts which he or she later relies on In criminal proceedings and in police discipline the circumstances in which such a failure can found an adverse inference are strictly drawn and include a number of safeguards, specifically the need to caution the interviewee. Such provisions are not yet in place for a number of other regulators - the question yet remains as to whether and if so how they could be?

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THE CARE ACT 2014

The recently enacted [Care Act 2014](#) which is due to come into effect in April 2015, is intended to open the occasionally foetid world of hospitals, old people's and nursing homes to the fresh air of legal regulation.

Prompted by the recommendations of Robert Francis QC's damning 2013 report into the Mid-Staffordshire Hospital the Act is ambitious in its aims, which range from imposing new duties on local authorities to increasing the powers of the Care Quality Commission ("CQC") and Monitor, the independent regulator of NHS trusts.

Nevertheless, it is the changes to the criminal law which are, perhaps, the Act's most eye catching reforms. They are designed not so much directly to prevent the abuse of sick and elderly residents, but to prevent cover-ups and promote a culture of openness. Once the Act is in force "care providers" (an expression which is defined to include the operators of virtually any NHS or private hospital or care home) will find it much harder to suppress embarrassing facts and, under [S.92 will commit a criminal offence if they publish false or misleading information](#). The precise scope of this section will depend upon exactly which information is "specified" under regulations that have yet to be promulgated. Those who are likely to be affected should note that the Department of Health is, until 15th August this year, [conducting a consultation](#) on the scope of any such regulations. Nevertheless some points can be made already.

First, the offence is one of strict liability; that is, it does not depend upon intention or negligence, although a statutory defence is available if a defendant can prove he "took all reasonable steps and exercised

⁴¹ (1996) 22 EHRR 29. See also *Saunders v UK* (1996) 23 EHRR 313 and *Condon v UK* (2001) 31 EHRR 1.

all due diligence to prevent the provision of false or misleading information.” Secondly, the offence can be committed not only by an organisation, but also by senior officers within the organisation.

An allegation under S.92 can be tried in the Magistrates or the Crown Court, and if tried on indictment carries a maximum sentence of 2 years imprisonment and an unlimited fine. But the sentencing court is not limited to these traditional sanctions.

Under [S.93](#), it is able to impose two other penalties: a “remedial order” and a “publicity order.” The former gives wide powers to the Court to require an organisation to change its “policies, systems or practices” in specified ways, whilst a publicity order will require “care providers” to publicise their own convictions.

Whether the courts will readily be willing to make detailed “remedial orders” about how care homes should be run remains to be seen. Many judges are likely to feel uneasy making orders about, say, future staffing levels or the frequency of managerial inspections.

On the other hand there is no reason to doubt their enthusiasm for making “publicity orders.” Some judges already enjoy their more trenchant *obiter dicta* being plastered over the local press and plenty of others will feel, with good reason, that the threat of adverse publicity will create the strongest possible incentive to ensure that staff and managers treat their patients properly. Indeed, it may give others the confidence to come forward and report abuse, knowing that it is taken seriously by the Police and the courts. In reality, this power may be used to force the care provider to record the conviction on its website and in its annual report, and to inform the relatives of those who currently use its services: a modern day equivalent of the humiliating “Naughty Boy” badges that some of us were made to wear at school. With the Press currently having care homes firmly in their sights, such orders will have limited additional impact as adverse publicity and consequent public outcry normally occur before any trial or conviction.

Mark Ruffell
**Head of Pump Court Chambers’ Regulatory and
Disciplinary Team**

CASE LAW UPDATE

***L v. Health and Care Professions Council* [2014] EWHC 994 (Admin)**

In dismissing L’s appeal against an order striking her off the HCPC register of practitioner psychologists, Haddon-Cave J at [14] said that the general principles applicable to an appeal against a decision of a professional disciplinary committee can be summarised as follows:

- (1) The Court will give appropriate weight to the fact that the Panel is a specialist tribunal, whose understanding of what the health care professional expects of its members in matters of medical practice deserves respect.
- (2) The Court will have regard to the fact that the tribunal has had the advantage of hearing the evidence from live witnesses.
- (3) The Court should accordingly be slow to interfere with decisions on matters of fact taken by the first instance body.
- (4) Findings of primary fact of the first instance body, particularly if founded upon an assessment of the credibility of witnesses, are close to being unassailable, and must be shown with reasonable certainty to be wrong if they are to be departed from.
- (5) Where what is concerned is a matter of judgment and evaluation of evidence which relates to areas outside the immediate focus of interest and professional experience of the body, the Court will moderate the degree of deference it will be prepared to accord, and will be more willing to conclude that an error has, or may have been, made, such that a conclusion to which the Panel has come is or may be “wrong” or procedurally unfair.

(See the helpful summary of the authorities by Langstaff J in *Bhatt v. GDC* [2011] EWHC 783 (Admin), in particular at para [9]; and in particular see *Meadow v. GMC* [2007] QB 462 and *Southall v. GMC* [2010] EWHC 407).

***R (Mafico) v. Nursing and Midwifery Council* [2014] EWHC 363 (Admin)**

M, a Band 5 nurse, accepted a caution in respect of the theft of unspecified quantities of Amitriptyline and Tramadol which she admitted taking from the ward at the hospital where she was employed. The NMC’s Conduct and Competence Committee imposed a sanction of striking off. M’s health had deteriorated during the period of the offences and she had attempted suicide by an overdose of Quinine Sulphate

tablets which she had purchased online. M appealed claiming that the legal assessor erred when commending to the committee the application of the decision in *Solicitors Regulation Authority v. Sharma* [2010] EWHC 2022, which gave the committee the erroneous impression that striking off would be appropriate in all cases of dishonesty absent exceptional circumstances; and that the present case was on all fours with *Hassan v. General Optical Council* [2013] EWHC 1887. In dismissing M's appeal, His Honour Judge Gore QC (sitting as a judge of the High Court) said at [18] that in alleged misdirection cases two quite distinct questions must be addressed based on *Libman v. General Medical Council* [1972] AC 217, namely: firstly, was there a material misdirection and, if so, secondly, was it of sufficient significance to the result to invalidate the decision? Whilst *Hassan v. General Optical Council* was persuasive and weight should be given to it, Leggatt J did not ask or then answer the second question posed in *Libman*, namely, was any misdirection of sufficient significance to the result to invalidate the decision? Moreover, there were several points of distinction between *Hassan* and this case that were highly relevant. They included, firstly, that the qualification to *Sharma* expressed in *Parkinson v. NMC* [2010] EWHC 1898 (Admin), which was not referred to the panel in *Hassan*, was referred to the committee in this case. Secondly, the matters taken into account by the committee were much more carefully and extensively set out in the decision letter than they were in *Hassan*.

***Sharma v. General Medical Council* [2014] EWHC 1471 (Admin)**

On 10th January 2014, the fitness to practise panel of the GMC found three allegations of dishonesty against the appellant proved: (1) that he had dishonestly failed to inform his employers of a Warning given to him by the GMC in 2007; (2) that he had dishonestly failed in 2010 to complete accurately an Employer Details Form by omitting therefrom details of his hospital employers; and (3) that he had dishonestly failed to inform his hospital employers that he had been the subject of a Conditions Order imposed by an Interim Orders Panel in October 2010. In allowing the appellant's appeal in relation to the 2007 Warning, but dismissing the 2010 employer details form and the failure to disclose the decision of the IOP, His Honour Judge Pelling QC (sitting as a judge at the High Court) said that it was common ground between the parties that for a finding of dishonesty to be made, the GMC must prove that (a) the act or omission concerned was dishonest by the standards of reasonable and honest people and (b) that the practitioner must have realised

that what he or she was doing was dishonest if applying those standards. The onus of proof rests throughout on the GMC and the applicable standard of proof is the civil standard – that is the balance of probabilities. In *Re H (Minors) (Sexual Abuse: Standard of Proof)* [1996] AC 563 at 586, Lord Nicholls observed that in assessing the balance of probabilities, the more serious the allegation the less likely it is that the event occurred and hence the stronger should be the evidence before a court concludes that the allegation is established on the balance of probabilities. His Lordship agreed that the principle identified by Lord Nicholls of Birkenhead in *Re H* applies in relation to allegations of dishonesty such as those that gave rise to the findings of dishonesty in this case. It was noteworthy that the legal assessor did not draw the attention of the panel to this point, which is one that all fact-finding tribunals applying the civil standard of proof are bound to have regard to when considering an allegation of dishonesty. He ought to have done so. However, on the facts of this case, it might only have made a difference in relation to the 2007 Warning issue and it was immaterial to the two other findings of dishonesty.

***Thorneycroft v. Nursing and Midwifery Council* [2014] EWHC 1565 (Admin)**

T was a Senior Nurse (Modern Matron) at a residential care home. He had 25 years' experience and worked primarily with clients with learning disabilities or neurological impairment. The allegation against T was that he had used derogatory language about patients. It was not suggested that any of the words had been used directly towards patients. The alleged incidents took place between 2002 and 2007. The allegations did not come to light until an investigation in 2011. Four witness statements were disclosed in support of the NMC's case: a support worker, two nurses, and a member of the human resources team who had investigated the allegations. T in a written statement to the panel emphatically denied the allegations and said they were based on "rumours, distortions and lies" and the investigation had been part of a "witch-hunt" instigated by senior executives against him. He produced testimonials from other colleagues who had never heard him use unprofessional language of the type alleged. T put forward specific reasons why the support worker and one of the nurses might have personal antipathy towards him. The second nurse's evidence related to a single conversation in 2002, and the member of the human resources team had no first-hand knowledge of any of the incidents. The evidence of the support worker and the first nurse was the sole and decisive evidence on all but one of the charges. T

did not attend the fitness to practise hearing and his decision not to attend was “very unwise”. However, the appeal would be allowed. The support worker and the first nurse refused to attend the hearing. The second nurse was the only witness present. The member of the human resources team had emigrated but would give evidence over a telephone link. The panel were led into error in their approach to the evidence of the two missing witnesses. The decision to admit the witness statements despite their absence required the panel to perform a careful balancing exercise. It was essential in the context of the present case to take the following matters into account:

- (i) whether the statements were the sole or decisive evidence in support of the charges;
- (ii) the nature and extent of the challenge to the contents of the statements;
- (iii) whether there was any suggestion that the witnesses had reasons to fabricate their allegations;
- (iv) the seriousness of the charge, taking into account the impact which adverse findings might have on T’s career;
- (v) whether there was a good reason for the non-attendance of the witnesses;
- (vi) whether the NMC had taken reasonable steps to secure their attendance; and
- (vii) the fact that T did not have prior notice that the witness statements were to be read.

The panel were not given the opportunity to read T’s witness statement before they took their decision to admit the witness statements of the support worker and the first nurse, and would not have been aware of the potential motives which he had suggested these two witnesses might have to lie. The issues raised by T were not outlined to the panel. Insufficient consideration was given to the fact that, despite some reference to ill health, the witnesses did not appear to have good reasons for their failure to attend. Their reluctance to attend in itself was capable of undermining the credibility of their evidence. There was no consideration of the further steps which could have been taken to compel the attendance of the witnesses. There was no reference to the serious consequences for T if the evidence was admitted and accepted. There was a second material error. The panel should have been provided at the fact-finding stage with all the documents which T had submitted.

As *Donkin v. Law Society* [2007] EWHC 414 (Admin) shows, there are cases where character evidence goes to the credibility of the allegation itself. The statements submitted by T were relevant and admissible for that purpose. The error in this case was more fundamental. The decision on admissibility was a judgment for the panel to make, not the legal assessor or the case presenter. In the absence of T, the only proper way for the panel to judge the relevance and admissibility of the statements was to read them for themselves. That was not done. The transcript shows that, on the advice of the legal assessor, the panel left it to the case presenter to decide whether or not they should read the statements. The determination of the panel should be quashed and a re-hearing was undesirable. The allegations now date back many years, the last incident being approximately seven years ago. The appellant had also served long periods of suspension both from the Trust before his dismissal and by virtue of an interim order.

***Angamuthu Arunkalaivanan v. General Medical Council* [2014] EWHC 873 (Admin)**

The appellant (known as Mr Arun) was a consultant obstetrician and urogynaecologist with an impressive curriculum vitae. He appealed against a decision of the fitness to practise panel of the GMC who found that he had conducted a breast examination of a patient in the absence of a chaperone and in an inappropriate manner and that his conduct was sexually motivated. The disputed allegations turned on the evidence of the patient. The issue in relation to the appropriateness of Mr Arun’s handling of the patient’s breasts was a straightforward factual one to be determined by the panel having considered the evidence of the only two people who were present when it happened, that is the patient and Mr Arun. This was a classic case for the tribunal to hear oral evidence and, having done so, to decide which version of events it preferred. What was called for was a comparative evaluation of each party’s evidence. It is clear that the panel undertook that exercise before reaching their decision and their primary findings were unassailable. The position was somewhat different in relation to the finding that Mr Arun’s actions were sexually motivated. Although, this is a finding of fact, it depends not on direct evidence but on the inference to be drawn from the primary facts as found by the panel and the surrounding circumstances. The panel made no reference at all to Mr Arun’s good character in their reasoning on the issue of sexual motivation. Having considered their reasons, they appeared to have taken the character evidence into account in the first stage when determining the factual dispute between Mr Arun and the patient. However, having decided that



the patient was the more credible and reliable witness (which they were perfectly entitled to do), they apparently did not weigh up the extent to which the evidence of Mr Arun's character might be relevant to the final issue of whether he was sexually motivated. This was a material omission. The panel's reasoning in relation to sexual motivation was very closely tied up with their decision that the patient was the more credible and reliable witness. The choice for the panel was effectively between, as the defence submitted, a clumsy, inappropriate (and the court added) insensitive examination or a sexual assault. There was no real justification within their reasons for finding one rather than the other. Moreover it was unlikely that Mr Arun's actions were sexually motivated and far more likely that he carried out an inappropriate examination because he was rushing, probably distracted and so clumsy and insensitive to the patient. As a result, he left her feeling violated even though he did not intend to touch her sexually. Accordingly while the court would decline to interfere with the panel's primary findings of fact as to how the patient's breasts were handled by Mr Arun, it was appropriate to reverse the finding that his conduct was sexually motivated. That part of the decision was wrong and could not be supported by the evidence. The GMC in such circumstances did not contend that Mr Arun's fitness to practise was impaired on the basis of the remaining findings, but the matter would be remitted to a differently constituted panel to consider whether in the light of the primary findings it would be appropriate to impose a warning under rule 17(2)(1) of the 2004 Rules.

Samuel v. Royal College of Veterinary Surgeons
[2014] UKPC 13

253. Rule 23.6 of the Veterinary Surgeons and Veterinary Practitioners (Disciplinary Committee) (Procedure and Evidence) Rules 2004 provides that any charge which may result in a direction by the Committee that a respondent be removed from the register, "shall be proved so that the Committee is satisfied to the highest civil standard of proof; so that it is sure." The wording of the rule is confusing, particularly in view of the decision of the House of Lords in *In re B (Children)(Care Proceedings: Standard of Proof)(CAFCASS Intervening)* [2009] 1 AC 11, that the civil standard of proof is in all cases on the balance of probabilities. The phrase "is satisfied...so that it is sure" is the standard form of wording used to direct juries in criminal cases, and Leading Counsel on behalf of the College properly accepted that the Rule is intended to require the same standard of proof as in a criminal case.

FORTHCOMING EVENTS

ARDL Seminar: 12 November 14

Nabila Zulfiqar will speak on:

"The Adjudication Function of the Solicitors Regulation Authority"

at the offices of Hempsons in Manchester

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:

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