Grey Areas
A COMMENTARY ON LEGAL ISSUES AFFECTING PROFESSIONAL REGULATION
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Right Touch Reform – Part 1

by Rebecca Durcan
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The UK is currently undertaking a significant and comprehensive review of the regulation of the health and social work professions. The oversight body, the Professional Standards Authority (PSA), has just released a lengthy report in support of that review. The PSA report, entitled "Right Touch Reform" outlines the current regulatory model and makes some suggestions for direction for reform. The PSA still intends to make actual submissions to the review.

Regulatory enthusiasts will read the entire report with care as it provides a comprehensive overview of the work done by the PSA in recent years and offers a clue as to its current thinking.

A few highlights of the report, in the first two topic areas it covers, include the following:

Harm Prevention

This section of the report discusses various theories, models and approaches to harm-reduction that the PSA has explored over the years. The report identifies aspects of each that have been found to be helpful, some limitations in them and areas for more study.

The report said:

> "In *Right-touch regulation* we defined harm as 'physical injury or psychological distress experienced by people through interaction with health or social care practitioners'."

For example, the report provides an excellent summary for professional regulators of Professor Malcolm Sparrow's conceptual framework on hazards and harm. One portion stated:

> This way of thinking about harm prevention involves an analysis and identification of the 'hazards', the contributory factors that convene and result in harm occurring. In the context of health and care professional regulation these hazards could include those relating to the competence, health, or wellbeing, individuals involved when such harms occur; to the vulnerability of a patient or patient group; to the state of professional relationships within a team; or to features of the working environment or employing organisation, amongst others.

Another interesting discussion related to the retrospective review of discipline cases for patterns. After summarizing a number of such studies, the report said:

> The Authority will support and encourage further work to continue to develop our understanding either of traits of perpetrators of misconduct, of patterns of misconduct, or other such analysis which will further our understanding of the circumstances in which misconduct occurs, using both fitness to practise [i.e., discipline] records and any other data, research and insight which can contribute to developing and enriching our understanding of the circumstances where things go wrong.

FOR MORE INFORMATION
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Discipline Process

The PSA report emphasizes that discipline proceedings should move beyond the notion of punishment for past misconduct towards ensuring that the practitioner, going forward, is of less risk to the public. Hence the use of the term "fitness to practise" in this context (which in Canada is generally used to address medical incapacity issues).

The report divides its analysis into two parts. The first deals with reforms that can be made under the existing regulatory structure. It focusses on the preliminary screening of complaints and their informal resolution. On the first issue the report says:

> There is a concerning lack of clarity and transparency in this area, and the possibility of cases being closed where there is a risk to the public. We are recommending a review of the regulator's practices in this area, to identify areas of risk, and to encourage greater consistency and transparency.

On the second issue, it says:

> Even more so than with hearing proceedings, there is a need for transparency and accountability because these decisions are made 'behind closed doors' by members of staff, rather than independent panels. Furthermore, there is little understanding currently of what works and where the risks are in these processes. We are proposing a review across the regulators of how undertakings work in practice, to understand more about how effective they are as a form of remediation, and to identify where there may be risks to the public.

The report's more radical proposal is to reserve public discipline hearings for contested matters and to develop a less formal, but transparent and accountable, process for consensual matters (even where the allegations were serious). Features of this model include:

- Investigations should be about obtaining all of the relevant facts rather than gathering evidence for prosecution.
- The client would be consulted on the proposed resolution.
- The resolution would become public.
- The resolution would be reviewed by the PSA who would have the authority to "appeal" the outcome if it did not adequately protect the public.

This proposal would appear to formalize the joint submission approach that resolves many discipline cases in Canada. However, there are some key differences: there would be a formal consultation with the client; there would be no need for resolution to be accepted by the discipline panel; and the resolution would be reviewed and appealable by the PSA.

The next issue of Grey Areas will review the other two portions of the report dealing with

- The professional regulator's role in education and training and
- Modernizing registers.

The report can be found at: www.professionalstandards.org.uk.