

## Time to overturn the regulatory capture?

### Wendy Harris

A key function of professional regulation is to police the conditions of entry into a profession. In other words, to ensure an individual is fit and eligible to practise their chosen profession safely.

Historically, those thus regulated have drawn up the regulatory framework, since Government does not have the capacity or desire to design regulation itself. This activity requires a sizeable and influential group of professionals, resulting in what has been termed professional regulatory capture<sup>1</sup>, with the group becoming *de facto* the professional regulator. In healthcare, regulatory capture effectively embraces all of the regulatory functions we recognise today as being undertaken by professional regulatory bodies.

Dame Janet Smith's Shipman Inquiry focused, in part, upon the regulation of the medical profession by its regulator, the General Medical Council. At the time, the role of the GMC was to manage control of entry and maintain the regulatory framework through educational and professional standards, and by investigating and making determinations on those practising medicine where concerns regarding incompetent or unacceptable behaviour existed. The extent of the regulatory capture was whole-scale.

Dame Janet described this model of professional regulation as having fundamental flaws and as perpetuating a culture of self-interest. Regulatory capture by the profession, despite changes introduced to afford some independence and separation of the adjudication function from other activities, had gone too far. The Shipman Inquiry recommended that the decision-making on fitness to practise matters should be severed; the GMC losing the right to be both prosecutor and judge, and the final adjudication stage being undertaken by a body independent of the GMC. This was said to be essential to ensure complete public and professional confidence in the independence of the decisions made by the adjudicator.

The Inquiry proposed that the new body would "appoint and train lay and medically qualified panellists and take on the task of appointing case managers, legal assessors (if they are still necessary) and any necessary advisors. It should also provide administrative support for hearings. Consideration could also be given to appointing full-time, or nearly full-time, panellists who could sit on the FtP panels of all of the healthcare regulatory bodies<sup>2</sup>". Panellists were to be appointed for their expertise

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<sup>1</sup> Soderlund & Tangcharoensathien (2000) Health sector regulation – understanding the range of responses from government. *Health Policy & Planning*; 15(4):347-348.

<sup>2</sup> The Shipman Inquiry's Fifth Report (2004) Safeguarding patients: lessons from the past, proposals for the future. Cm 6394. Recommendations 51 & 52.

and specifically trained to undertake their duties in a fair and impartial manner.

The then Government accepted these recommendations in its response<sup>3</sup> and set about the establishment of an independent tribunal (to be known as OHPA, the Office of the Health Professions Adjudicator) to adjudicate in the final stage of FtP procedures against doctors. In broadening the remit, it also suggested that the panellists maintained by the independent tribunal might, by invitation, sit on hearings of other health professions regulators, to provide clear separation between adjudication and the other functions of those regulators too<sup>4</sup>. The Government believed that over time this would provide further assurance of independence to the public.

In urging even greater transparency, and fairness in levelling the playing field across the professions, a working group to advise the Department of Health and chaired by Niall Dickson recommended that this broader remit be introduced much more quickly than implied by Government, with all regulators joining before 2011<sup>5</sup>. The Department disagreed with this view, preferring a process of managed entry and evaluation.

With this groundswell of support and continuing public pressure that the authorities should learn from adverse events, even the most casual observer might have expected the independent tribunal to have been quickly brought into existence and already to be delivering adjudicatory decisions on at least some healthcare professionals. Yet that is not the case. Instead, the new Coalition Government has decided to repeal the legislation that established OHPA and to ask the GMC to reform its procedures by setting up a new Medical Disciplinary Tribunal. Why?

The Office of the Health Professions Adjudicator was intended to solve a problem: to separate the adjudication of fitness to practise from the other roles of the health profession regulators and thus provide better public assurance and protection. The proposal had enjoyed cross-party Parliamentary support when the Health and Social Care Act 2008 went through Parliament, and detailed legislation was in place to provide for its establishment and future workings. This had been carefully crafted so that the establishment of a new independent tribunal did not add a further tier of regulation. Most importantly, it delivered a solution that released that aspect of regulation most perceived to have been captured by the professions, removing any accusation of self-interest or lack of independence. In addition, OHPA would have followed all of the principles of good regulation and provided public and professional assurance of fairness and proportionality in decision-making. In other words, it would

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<sup>3</sup> HM Government (2007) Safeguarding patients. The Government's response to the recommendations of the Shipman Inquiry's fifth report and to the recommendations of the Ayling, Neale and Kerr/Haslam Inquiries. Cm 7015.

<sup>4</sup> HM Government (2007) Learning from tragedy, keeping patients safe. Cm 7014.

<sup>5</sup> Department of Health (2008) Enhancing confidence in healthcare professional regulators – final report. Gateway reference 10007.

have been a much cheaper option in the medium term, benefiting from economies of scale as more regulators came on board.

When developing a solution to a problem, it is always good practice to pause and reflect on whether the problem persists and, if so, whether the solution remains the right one. Health professional regulators acting as the investigator, prosecutor and judge have been subject to major criticism; but do those regulated and those doing the regulation agree and see a need for change? If they do, then it is fair to suggest the problem remains.

OHPA commissioned some benchmarking research, reported here for the first time, to measure perceptions held by regulators, and by those they regulate, of current investigation and adjudication functions. Quantitative surveys (n=1055) and focus groups of all of the health professions were undertaken, alongside in-depth interviews with key opinion leaders within each of the health profession regulator Councils.

Opinion was evenly divided between those who wanted to retain control of adjudications and those who favoured an independent adjudication service. Nurses, pharmacists and healthcare professionals (i.e. those registered with the Health Professions Council, HPC) were most in favour of an independent body. Benefits described besides independence were transparency and fairness, and standardisation. Doctors and pharmacists were those least likely to see their current adjudication process as fair (just 15% did so), and doctors believed the current system needed to change to regain public trust.

A significant view existed amongst the individual professions that they were each adjudicated upon differently; in other words that there was not a level playing field between the professions. Almost all agreed that the procedures needed to be improved (to be quicker and more efficient), and become more harmonised (to remove disparities and be more consistent).

Conversely, all professions agreed that a lack of specialist knowledge was a significant disadvantage of a single, independent adjudicator. Without having the specialist input, they did not believe an independent adjudicator would understand the context. Interestingly, those who spoke on behalf of the regulator Councils saw specialist knowledge more as a benefit for translating the learning into professional developments post-adjudication than as being necessary to the fairness of the hearings themselves.

The Councils did agree that the current process was 'costly, cumbersome and dogged', but were also worried how they could justify fee increases to their members if an independent tribunal were to prove more costly than their existing processes. But, as noted above, a centralised system that managed all professions, accommodating the widening scope of health profession practice and enjoying economies of scale, would go a long way towards allaying these concerns.

Whilst separation of adjudication to an independent body was welcomed by most respondents, a move focusing exclusively upon doctors was not. Several Councils said that to focus just on doctors “dilutes the message and looks like a PR managed move, merely to show that something is being done.” Rather than developing in isolation, a tribunal that encompassed all the professions was judged the more palatable.

The professionals who took part in the benchmarking research OHPA commissioned did not believe an equitable approach existed across the regulators, and the professionals and the regulators themselves agreed that the current system was slow, expensive and inefficient.

Health care provision is not static. New treatments and new ways of working constantly develop in response to scientific developments and changes in practice. As the boundaries between individual professions blur, so the need for a shared or joined-up regulatory framework becomes necessary. It may be concluded, therefore, that the problem identified by Dame Janet Smith persists, and that there are sufficient risks associated with it that it cannot be ignored. The recent consultation by the Department of Health, while saying that the new Government was not persuaded that OHPA was the right way forward, acknowledges as much since it recommends that independent adjudication remains the solution.