Regulating the professions

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In this article, Dr Ellard looks at current and past methods of regulating the medical profession, with a side glance towards the legal profession.

The debate about the regulation of the professions is always topical. In June, a committee of the Parliament of New South Wales completed its annual review of the Health Care Complaints Commission, and in the past year the Australian Tax Office and the Supreme Court of NSW have dealt with some barristers who had been using their knowledge of the law of bankruptcy to avoid paying income tax.

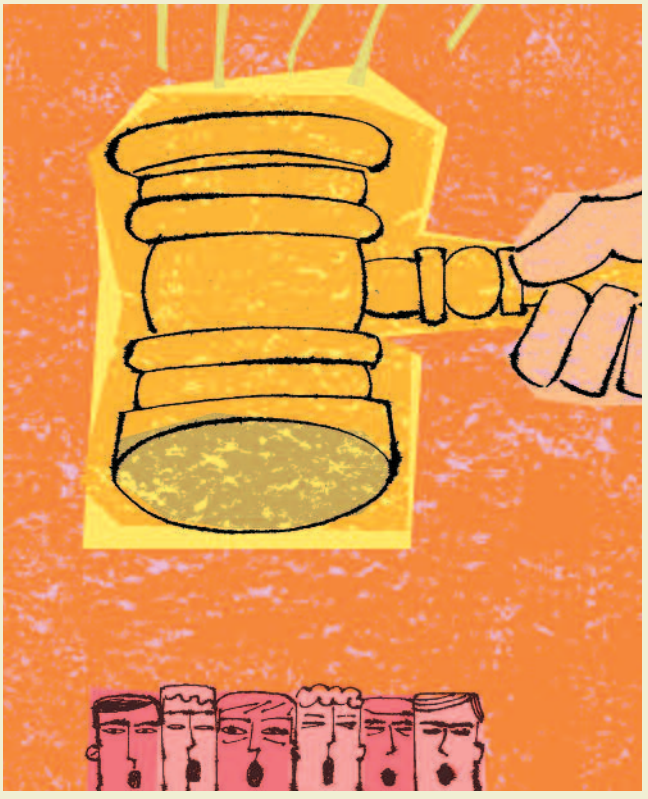
A hypothesis and a little history

George Bernard Shaw put his view succinctly: 'All professions are conspiracies against the laity'.[1] I take it that he meant that professionals put their own interests before those of the rest of the population and that they use their skills and power to keep their advantages intact. It is a reasonable hypothesis; one way of testing it would be to examine the activities of professionals when there are complaints about them. Such an activity would have three outcomes: it would provide data on the competence and righteousness of professionals, safeguard the public, and detect whether or not professionals cover up for their colleagues.

Let us first consider how medicine is regulated. Put aside mere exhortations to behave properly, such as the Hippocratic oath. Admirable though they may be, they inform and guide the righteous and leave the miscreants untroubled.

There have been attempts to supervise the practice of medicine over the millennia. I am indebted to an article by Dr Robert Forbes for most of the following examples.[2] The Babylonian code of Hammurabi (about 2250 BC) laid down fees for certain surgical procedures and also provided penalties for getting them wrong. For example, regulation 218 stated that for certain surgical misadventures the doctor's hands shall be cut off, and an Egyptian physician whose patient died in a manner not approved by the licensing authorities might be put to death.

In Europe in 1224, the Emperor Frederick II introduced registration. To practise medicine, one had to have a specified period of instruction and pass an examination. Near the end of the 14th century, the surgeons of Paris, the barbers of Alsace and the medical faculties of Leipzig, Cologne and Vienna all



laid down punishments, fines or imprisonment for unethical or improper behaviour.

Then, as the profession gathered strength and power, the controls were brushed aside. Percival's much acclaimed 1803 book of ethics and rules is little more than a system of etiquette governing behaviour between doctors.[3]

In the United States, such rules as were proposed were 'soon nullified by the development of medical diploma mills offering little training but impressive certificates of completeness'.[4] The tide turned when Texas led the way in 1873 with a medical licensing board and some appropriate laws. Most of the other States followed in the next two decades. A practitioner who met none of the criteria for licensing took his case all the way to the US Supreme Court in 1888. The Court upheld the law.[5]

In 1935, Dr Forbes, whose article I have quoted, gave an address to the Paddington Medical Society in his role as secretary of the British Medical Defence Union. His address considered what doctors should do if they became aware that a colleague had 'committed an act against a patient professionally assessed as wrongful'. If the law insisted on disclosure then the law should be obeyed, 'but in so doing he shall avoid securing any commercial advantage over his brother practitioner or laying an accusation or counter charge which would bring the profession into disrepute'.[6] In other words, the profession came first and patients second.

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The local scene

My observations must be confined to New South Wales and Sydney in particular because this is where I spent my first years after graduation.

The NSW Medical Board was constituted in 1838. I know nothing of its earlier history but I think that all practitioners will be aware that its Act has been revised with some frequency so that it can take a closer interest in the behaviour and competence of registered medical practitioners.

As a member of the Australian Army Psychology Service, I had watched doctors at work during the war. They seemed to be honourable people, doing their professional best, so after my discharge I studied and graduated in medicine. As a graduate I found I had to modify my opinion. Most doctors were competent, caring people doing their best for their patients, but a few were not. I could give many examples of this, but one will have to suffice. I was a very inexperienced intern in what was then called casualty. A woman came in who had tripped and fallen against her gatepost. I examined her and decided that she had bruised her abdominal wall but had sustained no further harm. Aware of my lack of knowledge, I asked the surgeon of the day for his opinion. He examined her and said 'We shall operate on her'. Anxious to learn, I assisted him in the theatre; we found a bruised abdominal wall. Obviously I had missed something – I asked him what had caused him to operate. 'Oh', he said, 'She was insured'. My education had begun.

We all know that things can go wrong in the practice of medicine. The cause varies from the extreme complexity of some of the tasks involved to negligence, incompetence and unscrupulousness. The essential problem in those days was that very little of this was ever challenged. Soothing words were said and a veil was drawn across what had happened. The regulatory authorities of the day were no more active than was the profession.

There was a need for a catalyst and it arrived in the 1970s. Some recent graduates may not be aware of the events at Chelmsford Private Hospital. In essence, a large number of patients were treated with deep sedation, often combined with electroconvulsive therapy. There was a wide range of diagnoses but nothing to suggest that the diagnosis and the treatment had any particular connection. Records existed for some 11,000 patients, 24 of whom died as a result of the treatment. Sixteen of those who died were under the age of 50.

Although concerns were raised over some years, the regulatory authorities of the day did nothing effective, even though there were such stimuli as coverage of the issue by widely watched television programs. Finally, in 1988 the general disquiet could not be ignored and there was a Royal Commission. Its findings occupy 15 volumes, most of them a catalogue of calamities.

The Commissioner examined the activities of all the persons and institutions who should have acted and saved lives and prevented suffering. The substantial blame was laid at the door of those who had power and did not use it. Psychiatry was in the spotlight, but subsequent experience has shown that psychiatrists are no better and no worse than any other branch of the profession.

The RANZCP changed its structure. To the Board that had the responsibility of assessing those who wished to enter the College was added another Board of equal status concerned with the behaviour and performance of Fellows of the College.

The most important consequence in New South Wales was the formation in 1984 of the Complaints Unit of the New South Wales Health Department, now known as the Health Care Complaints Commission (HCCC).

The Commission receives complaints, investigates them, discusses them with the New South Wales Medical Board and on that basis determines what should be done. Peer review is an essential part of the process. Obviously enough, some complaints can be dismissed out of hand, some can be conciliated, some are valid but of limited significance, and some are potentially serious.

The first point I would make is that a patient who feels powerless can be supported and can achieve a hearing. The second is that the interests of both parties are protected because significant matters are tried by a medical tribunal, which is in effect a District Court. There is a judge assisted by two senior medical practitioners and a lay member of the community. If either party is dissatisfied with the outcome, there can be an appeal to the Supreme Court and thence upwards.

Having been in the profession for half a century, I am convinced that the faults of the past are much less and that the regulatory bodies of today are much more alert and even-handed than once they were.

No complex process works serenely, and from time to time there are delays and imperfections that attract the ire of some. Few professionals take kindly to being reviewed by those outside their profession.

Unhappily, some doctors whose behaviour or competence is unacceptable are charismatic, or at least persuasive, and removing them from the Register provokes much protest and turmoil from their former patients, some of whom may well have been protected from future harm.

The consequence of all these changes is that not only is our profession more upstanding than it has ever been in the past, but if anyone takes the contrary view we can ask them to prove it knowing that they will receive a fair hearing.

A contrast

It is interesting to compare the regulation of our profession with the regulation of another. I thought that it would be

instructive to consider the activities of lawyers since they are at the heart of regulating us. One would expect that their procedures would set a shining example.

Whereas there was a time when judicial officers were almost beyond scrutiny in New South Wales, the establishment of the Judicial Commission has changed the situation in that State. (I do not know what is happening in other parts of Australia.) For example, *The Sydney Morning Herald* of 14 December 2001 reported some remarks made by the judges of the NSW Court of Appeal on the behaviour of a District Court judge. The appeal judges described one of the District Court judge's statements as 'disgraceful and totally unjudicial' and said that her behaviour 'falls far short of acceptable judicial behaviour'.[7]

My understanding is that the matter will come to the notice of the Commission only if a complaint is made in the form of a statutory declaration (and not on the basis of the appeals judges' remarks alone). I do not know the procedures or possible outcomes that may follow if that occurs, but it is reassuring to know that even the most principled profession is not beyond censure.

Regulation comes later and more reluctantly to some professions. There are barristers who once could not be sued at all but who have recently found out that using their legal skills to become bankrupt rather than paying income tax is not compatible with professional registration.

The Sydney Morning Herald of 22 November 2001 reported that, in spite of an Australian Tax Office crackdown on barristers' tax avoidance, one in five NSW barristers still owed an average of $100,000 in tax.[8] The Tax Office pointed out that the necessary action costs the general community money, and that in the Office's experience there is some recidivism. The courts are dealing with these matters now. One wonders how long it has been going on.

What if you wish to make a complaint against your solicitor? Who will support you as does the HCCC if a patient wishes to make a complaint against a doctor? In NSW we have the Office of the Legal Services Commissioner. I think it is fair to say that it is a new player in the field, having been set up in 1994. While it is a step in the right direction, to the outsider it does not seem to be as far removed from the profession as does the HCCC. For example, its web site states: 'Investigations are often referred to the practitioner's professional body'.[9] Imagine how a patient would feel if his or her complaint against a doctor were referred to the AMA for a decision.

If you are not happy with the decision of the Law Society, Bar Association or the Department of Fair Trading, you may

seek to have it reviewed by the Office of the Legal Services Commissioner. The Commissioner's decision is final, and the only basis for appeal is that the decision was not made in good faith. You may think it unreasonable or unjust, but that is how you will have to remain.

I read in *The Sydney Morning Herald* of 16 June 2001 that the Australian political parties said that they had received about $200,000 from 12 major law firms, only one of which had obeyed the law that requires it to disclose the donation to the Australian Electoral Commission.[10] Some said they were unaware that they had a duty to disclose, others that their money was just for lunches and dinners. I am not a lawyer, but here was a public allegation of widespread law breaking by legal bodies. I waited for the Law Society to come out and say that the law had not been broken or that it would institute an inquiry into law breaking by large firms – one or the other. I am still waiting.

And what if your barrister forgets to turn up at your trial – perhaps because he was preoccupied with his bankruptcy – what is the situation then? I know something of the history of barristers' obligations and immunities, but I do not know the present situation. Fortunately I do not need to know.

Envoy

It is not easy to define what constitutes a professional, but part of my definition is that professionals are people who put their patients' or their clients' interests before their own. If one looks around, it seems that the title is claimed more often than it is earned. Perhaps George Bernard Shaw had something going for him. MT

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