PROFESSIONAL, REGULATORY AND DISCIPLINARY
BAR ASSOCIATION OF IRELAND

ANNUAL CONFERENCE, FRIDAY 22nd MAY 2015

REFLECTIONS ON THE ROLE OF THE LEGAL ASSESSOR TO PROFESSIONAL REGULATORY TRIBUNALS

SEAMUS WOULFE S.C.

1. Introduction:

1.1 The Irish legislation regulating the various professions provides for disciplinary or inquiry committees such as the Fitness to Practice Committees of the Medical Council and the Nursing and Midwifery Board of Ireland. The governing legislation makes no express reference to the need for any such committees to have the assistance of a legal assessor and the legal assessor is not a creature recognised by statute in this jurisdiction, unlike the position in the United Kingdom, where there are Statutory Instruments such as the General Medical Council (Legal Assessors) Rules 2004 ("the UK Rules"). Notwithstanding same the legal assessor has been an invariable feature of the disciplinary committee structure here for many years, and it would be regarded as inappropriate and unwise for a disciplinary committee hearing to proceed in the absence of a legal assessor. In the light of this invariable practice it is useful to consider the precise role of the legal assessor and the correct relationship between the legal assessor and the members of the disciplinary committee.

2. Why have a Legal Assessor?:

2.1 As regards seeking to define the role of the Legal Assessor, in the case of **AA v The Medical Counci**l [2003] IEHC 611 O'Caoimh noted that the Fitness to Practice Committee would have the assistance of an experienced member of the legal profession "to ensure that it conducts its hearings in a fair manner". A more detailed summary of the legal assessor's role is now to be found in the judgment of the President of the High Court in **McManus v The Fitness to Practice Committee of the Medical Council**, unreported, 14th August 2012. Kearns P. cited with approval the following statement made by the Privy Council in **Sivarajah v General Medical Council** [1964] 1 WLR 112 (at pp. 116-117):

"The legal assessor's duties are confined to advising on questions of law referred to him and to interventions for the purpose either of informing the committee of any irregularity in the conduct of their proceedings which comes to his knowledge, or of advising them when it appears to him that, but for such advice, there is a possibility of a mistake of law being made…".

2.2 Advising on Questions of Law referred to him or her:

(a) At the outset of a disciplinary hearing:

- Application for an adjournment: The legal assessor may need to advise the committee as to the correct principles governing the committee's discretionary power as to whether to grant an adjournment or not.

- Application for hearing in public or in private: Again the legal assessor may need to advise the committee as to the exercise of its discretionary power to hold the hearing or part of the hearing otherwise then in public, where "it would be appropriate in the circumstances" and the range of circumstances which might render it "appropriate" having regard to the lack of any guidance in the legislation.

- Conflict of interest: Decision of the Supreme Court in **O'Ceallaigh v An Bord Altranais** [2011] IESC 50 suggests that not every association will give rise to a reasonable apprehension of bias. In this case the allegation of objective bias was based on the fact that the Chairperson and the principal expert witness called as a witness for the Board at the inquiry were both employed in the same hospital where the Chairperson was the general manager and thus the superior of the expert witness.

- Undertakings: A novel feature of modern regulatory legislation has been a provision empowering a disciplinary committee to request the registrant to give a particular undertaking or consent, with the consequence (at least in practice) that the giving of same will terminate the inquiry. An example of this type of provision is Section 65 of the Nurses and Midwives Act 2011. A number of uncertainties surround the operation of provisions such as Section 65 and the advice of the Legal Assessor may be necessary in relation to same.

(b) During the course of the hearing:

- Objection by a party to the admissibility of certain evidence, whether on grounds of relevance or hearsay or some other grounds. In advising the committee as to how it should rule on any such objection, the legal assessor may have to advise as regards the principles set out by the Supreme Court in the case of **Kiely v The Minister for Social Welfare** [1977] IR 267 to the effect that a tribunal exercising quasi-judicial functions is not a court and is not bound by the strict rules of evidence in the same way as a court, provided that departing from the strict rules does not imperil a fair hearing or a fair result.

(c) At the conclusion of the hearing:

- Advise the Committee on the definitions of the relevant standards such as professional misconduct and poor professional performance. The judgments of three Supreme Court Judges in **Corbally v The Medical Council**, unreported, 4th February 2015 have clarified the scope of the definition of poor professional performance, and whether it encompasses a single error or single event.

- Burden of Proof: The burden of proof relates to which party must prove a fact or issue at an inquiry; the standard of proof relates to how clearly they must prove it, i.e. whether they simply have to prove that their version is more likely or probable or alternatively whether they must prove it beyond reasonable doubt. The legal principles governing the burden and standard of proof in statutory disciplinary proceedings have their genesis in criminal proceedings, not civil proceedings. In the criminal law sphere the presumption of innocence has been described as "a hallowed principle lying at the very heart of criminal law", in **R v Oakes** [1986] I SCR 103 (at 119 -120), and this hallowed principle has in turn given rise to the so called "golden thread" as articulated by Lord Sankey L.C. in a famous passage in **Woolmington v DPP** [1935] AC 462 as follows:

> "Throughout the web of the English criminal law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt…No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained."

The above statement of principle has been endorsed on numerous occasions in this jurisdiction, and the presumption of innocence has been held to be a constitutionally guaranteed constituent of a criminal trial in due course of law. The presumption of innocence is therefore the cardinal principle underlying two fundamental rules with regard to the burden of proof in criminal cases: (a) the rule that the prosecution bears the legal burden of proving all the elements of an offence necessary to establish

the guilt of an accused; and (b) the rule that the guilt of the accused must be proved by the prosecution beyond a reasonable doubt.

2.3 The second branch of the legal assessor's duties, as set out in the passage from the **McManus** judgment quoted above, involves potential intervention for the purpose either:

(a) Of informing the committee of any irregularity in the conduct of their proceedings which comes to his knowledge, or

(b) Of advising them when it appears to him that, but for such advice, there is a possibility of a mistake of law being made.

These duties appear to me to make complete sense, as there is no point in the legal assessor having to wait to be asked if his intervention is clearly required, and **McManus** has confirmed that they represent the proper practice in this jurisdiction.

2.4 As regards comparing the relationship between a legal assessor and an inquiry committee and that between a judge and a jury, in **McManus** Kearns P. approved what was stated in one English case where the court stated that the differences between a judge and jury in a criminal trial and the legal assessor and members of a disciplinary committee are obvious. The differences were stated to be that the committee is not a jury; they take legal advice from the assessor but they are not bound to follow it; the assessor is not a judge; he gives legal advice but does not give directions as such and does not sum up the evidence to the committee. Kearns P. in **McManus** also cited with approval a statement made by the Privy Council in **Sivarajah** that "the committee are masters both of the law and of the facts".

2.5 While the principle has now been confirmed that a disciplinary committee is not bound to follow the legal advice given by the legal assessor, and the committee itself must ultimately make the ruling on all questions including questions of law, in practice the committee has to be very slow to depart from the legal assessor's advice. The committee would have to give a coherent reason for not accepting that advice, as noted by Kearns P. in his judgment in **McManus** (at page 19):

> "While it was accepted that the committee was nonetheless free to reject the advice of the Legal Assessor, it was necessary for the first Respondent (that is, the Fitness to Practice Committee) to give clear and cogent reasons for doing so."

2.6 During the course of the Fitness to Practice Inquiry relating to Professor Corbally the Legal Assessor advised the Committee that there was a seriousness threshold to be met, before any finding of poor professional performance could be made. When the matter came before the Supreme Court, Counsel on behalf of the Medical Council conceded that it was improbable that the Committee had followed the Legal Assessor's advice on this question. In his judgment Hardiman J. noted that the committee are entitled to disregard the advice proffered by the Legal Assessor, as previously confirmed in the earlier **McManus** case. However, at paragraph 54 of his judgment he held that this entitlement does not end the matter, and at paragraph 55 he stated as follows:

> "In the present case, however, there was no statement by the Fitness to Practice Committee of "clear and cogent reasons" for departing from the advice of the Assessor, which related to matters of law. Accordingly, the representatives of Professor Corbally never had an opportunity to comment on the basis on which the committee were actually going to approach the question of whether poor professional performance had been

made out. It appears to me that, if this ground stood alone, it might be sufficient to quash the decision.".

In his concurring judgment, at paragraph 4, O'Donnell J. also agreed "that the failure to explain whether the Fitness to Practice Committee was departing from the Legal Assessor's advice that there was a seriousness threshold is a further ground to quash the decision".

2.7 The committee cannot of course decide not to follow the advice of the legal assessor simply because they do not like the consequence of that advice, for example if the advice would have the result of certain evidence being excluded which the committee members were keen to consider. The other side of this coin is that the legal assessor must be careful to advise on the correct legal position as he truly believes it to be, as opposed to the legal position which he suspects the committee might like to hear in certain circumstances.

3. Method of Tendering Legal Advice:

3.1 Since the decision of the High Court in **Prendiville v The Medical Council** [2008] 3 IR 122, the general position is that where the legal assessor is required to give advice, then that advice should be given in the presence of the parties to the hearing and the parties affected by that advice should have the opportunity to make submissions in respect of that legal advice. The possible fall back position is that where the advice is given in the absence of the parties in the first instance, say advice given to the committee initially in the committee room, then that advice should be relayed to the parties at a resumed hearing in early course. In practice the legal assessor will normally ask the parties to make submissions on the question of law arising in advance of furnishing his advice at the hearing, and the in the vast majority of cases the parties do not make any further submissions in reasons in respect of that legal advice before the committee makes a ruling, unless there is something new arising out of the advice or if

one of the parties has a concern that the legal assessor may have misunderstood their submissions.

4. Duty to Assist an Unrepresented Party:

4.1 It may seem like an obvious proposition to state that the role of the legal assessor is to provide legal advice to the disciplinary committee and not to the person facing allegations of professional misconduct or poor professional performance before the disciplinary committee. This was confirmed by the High Court in the case of **A A v The Medical Council** [2003] IEHC 611. However, the position is more complicated in practice where the registered practitioner is absent and/or unrepresented. In such circumstances there may be an obligation on the legal assessor to guide the disciplinary committee to identify points that may be helpful to the absent and/or unrepresented registrant. In one English case the court stated that the legal assessor's duty as legal adviser embraces the responsibility to inform the committee of the need for vigilance in circumstances such as these, namely in the absence of the registrant identifying points which might be of assistance to him. If the registered practitioner is present but unrepresented the position can be quite tricky as he may need guidance on certain matters, such as on the crucial issue of whether or not to give evidence, and the legal assessor needs to be very careful as to how far he can go in offering guidance to the practitioner in those circumstances.

5. Role of the Legal Assessor when "Direction" is sought:

5.1 In a criminal trial the accused can seek a direction from the trial judge at the end of the prosecution evidence that he has no case to answer, and the test is whether a jury **could** safely reach a decision to convict in the light of that evidence alone. Over the years a similar procedure became imported into professional disciplinary inquiries, whereby the registered practitioner would sometimes seek a

"direction" at the end of the evidence tendered by the regulatory body. The term "direction" is something of a misnomer, as it is not a case of a judge directing a jury to bring in a particular verdict, but rather the committee reaching a decision to dismiss the allegations at the end of hearing only the evidence of the regulatory authority.

5.2 In **McManus** an application for a direction was made by Counsel for the registered doctor, after the case for the CEO concluded. In essence Counsel submitted that no sufficient evidence had been adduced by the CEO which could lead to a finding of professional misconduct, and the committee should not allow the inquiry to proceed any further. The legal assessor offered his view to the committee that the application should be granted but the committee decided "not to accept the application for a direction as it wishes to hear evidence called on behalf of Dr. McManus". Insofar as it was alleged at one point that the committee was irrational in failing to follow the advice of the legal assessor, it was ultimately accepted by both sides during the hearing of this case in the High Court that the committee were not obliged to accept it. After citing the observations made in the English case set out at paragraph 2.4 above, Kearns P. commented that these observations seemed particularly apt to the facts of the present case where the advice furnished by the legal assessor was directed more to the weight of evidence, rather than any other complex legal consideration, and that was ultimately a matter for the committee to determine. He then addressed the issue of a request for a direction at an inquiry as follows:

> "While the Assessor described in the course of his advices the procedural milestones which might attend a criminal trial, it must be remembered that this was, in fact, an inquiry. Although the standard of proof for both processes is that of proof beyond a reasonable doubt, it does not follow that the two processes are in all other respects identical. The fact that the committee rejected a request

for a direction at the conclusion of the CEO's case on the basis that the wished to hear the Applicant might transgress the rules of a criminal trial, but in the context of an inquiry does not strike me as being an objectionable course of the committee to have adopted. This is not to say that the applicant was obliged to give evidence, or that the onus of proof was reversed or altered in any way".

6. Role of the Legal Assessor during the deliberations of a disciplinary committee and in framing a report:

6.1 There is one other very important function of the legal assessor not mentioned in **McManus.** This additional function is to assist the disciplinary committee during its deliberations and in framing a report. This function is expressly recognised by Rule 2 of the UK Rules, which refers to legal assessors as having the function of "advising on the drafting of decisions of the committee… (Notwithstanding that legal assessors will not themselves be parties to those decisions)". The proviso at the end confirms the position that the legal assessor is not a member of the committee and is not one of the decision – makers on any question of fact. The legal assessor must be careful to maintain the correct boundaries with the members of the committee in that regard. Having said that, the legal assessor may well be able to assist the committee members in making their determination on some question of fact, for example by clarifying the standard of proof as being proof beyond reasonable doubt, and highlighting for the committee the vital importance of carefully applying this standard.

6.2 A disciplinary committee should give reasons for its decisions, and in particular reasons for adverse findings against the registered practitioner and the legal assessor will often have an important role in that regard. The issue of the adequacy of reasons which must be given by a disciplinary committee is a somewhat evolving topic, in my opinion, and it is difficult to state precisely the standard of reasoning

which the Courts will demand. In the **Prendiville** case Kelly J. held that the applicants were entitled to "at least a general explanation" of the basis for the majority decision of the Fitness to Practice Committee. He felt that the committee was not obliged to provide a discursive judgment, but he accepted the applicants' complaint that they were left "absolutely in the dark" as to the basis for the fitness to practice committee's findings.

6.3 In **McManus** Kearns P. cited with approval these statements of law set forth by Kelly J. in **Prendiville** and then went on to apply them as follows:

> "In my view reasons have been given by the Committee for the decision arrived at… and they are sufficient to allow the applicant (and indeed the Court) understand how and why the particular findings were made against him.
>
> This was not a difficult or complex case. Indeed, the essential facts were admitted and a quite minimal explanation would have been adequate in the particular circumstances of this case. I am satisfied that the reasons given both go considerably beyond any minimal explanation which the law may require".

6.4 The most important judgment since **Prendiville** on adequacy of reasons is the decision of Dunne J. in **Brennan v An Bord Altranais** [2010] IEHC 193. In the **Brennan** case, there was a conflict between the two expert witnesses, and Dunne J. stated as follows:

> "It has to be borne in mind that the F.P.C. like any other decision maker is entitled to accept or reject any or all of the evidence of any witness, expert or otherwise. It is for the F.P.C. to weigh and assess the evidence of each witness. It might have been more helpful if some

explanation of the role of the respective evidence of the various expert witnesses in the decision making process had been given.".

In the **Brennan** case the failure to give such an explanation was held not to have been "a fatal error" having regard to the findings and recommendations of the committee, but it is generally felt that a different view might well be taken if a similar situation arose in another case and it is unclear as to the extent of reasons which must be given for preferring one expert witness over another.

6.5 In the English case of **Cullen v General Medical Council** [2005] EWHC 353 (Admin) a doctor was alleged to be unfit to practice by reason of cognitive impairment, but the majority of expert witnesses gave evidence that there was no impairment of fitness to practice. However, the inquiry committee preferred the evidence of the single expert witness who asserted that the doctor was not fit to practice. The court quashed the decision of the committee and held that there had been a failure to express adequate reasons for the committee rejecting the opinions of the two expert witnesses in the majority. The court stated that the failure to do so resulted in a suspicion that there were no good grounds for doing so, and this in itself was a ground to interfere with the decision of the committee given that there was no basis for rejecting those majority opinions that was so obvious that it did not require to be expressed.

6.6 In conclusion there may be a particular onus on a disciplinary committee to provide adequate reasons where there is a conflict of expert evidence and the legal assessor may have an important role in assisting the committee in that regard.

Seamus Woulfe S.C.
19th May 2015.