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PROFESSIONAL, REGULATORY AND DISCIPLINARY BAR ASSOCIATION OF IRELAND

The Regulation of Social Workers

November 12, 2016

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The Honorable Society of King's Inns



THE BAR
OF IRELAND
The Law Library

SPEAKERS:



The Honourable Ms Justice Bronagh O'Hanlon

The Honourable Ms Justice Bronagh O'Hanlon was called to The Bar of Ireland in 1989 and was then called to the Inner Bar in 2005. She had a general practice, although she focused much of her work on family law. Ms Justice O'Hanlon was appointed to the High Court of Ireland on January 8, 2014. She has since been sitting as a High Court Judge in Family Law. In addition to this, she takes the Child Abduction List and the Minors Review List.



Teresa Blake SC

Teresa Blake has been practising at The Bar of Ireland since 1995 in child protection and welfare law, asylum and immigration law, and education disability law. She was called to the Inner Bar in 2014. She holds the following qualifications: BSS, CQSW (Trinity College Dublin, 1977); LLB (UCC, 1986); LLM Public International Law (University of Nottingham, 1988); BL (King's Inns, 1994). Teresa has worked as a social worker in child protection and as a prohibition and welfare officer. She has worked in human rights protection as a field officer with the United Nations. She has lectured in law at UCC and developed courses in law and social work. She is a chairperson for the Mental Health Tribunal.



Gloria Kirwan

Gloria Kirwan is Assistant Professor of Social Work in Trinity College Dublin. She is also a registered social worker with over 30 years professional experience. She has a research interest in the professionalisation of social work and one of her recent publications in the British Journal of Social Work is titled 'Taking Care: Criticality and Reflexivity in the Context of Social Work Registration' [co-authored with Brian Melaugh]. This article reports on a review she conducted of social work fitness to practise cases in the UK. She is a chairperson for the Mental Health Tribunal.



Mark de Blacam SC

Mark de Blacam is a senior counsel and has been practising as a barrister since 1977. He is the author of Judicial Review and has a special interest in public law.



Barry O'Donnell SC

Barry O'Donnell was called to the Bar in 1995 and took silk in 2016. Barry practises in general civil law, with an emphasis on commercial, health services and constitutional law. For over a decade, Barry has acted in the area of health services and child care law; and has represented the HSE, the Child and Family Agency, hospitals, guardians ad litem, and others in all levels of the court system and various tribunals.



Ciara McGoldrick BL

Ciara McGoldrick BL was called to the Bar in 1997. She is an Adjunct Professor in the Sutherland School of Law, UCD and a fellow of the Institute of Chartered Accountants in Ireland. Ciara advises a number of regulators in relation to disciplinary proceedings. She was formerly the Deputy Registrar and Head of Legal Affairs at the Pharmaceutical Society of Ireland. She is a member of a number of regulatory panels including the Administrative Sanctions Panel of the Central Bank of Ireland and the Enquiry and Investigation Committees of the Irish Auditing and Accounting Supervisory Authority.



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**PROFESSIONAL, REGULATORY AND DISCIPLINARY BAR
ASSOCIATION OF IRELAND**

THE REGULATION OF SOCIAL WORKERS

12 NOVEMBER 2016

THE SYSTEM OF REGULATION FOR SOCIAL WORKERS

LEGAL OVERVIEW

SPEAKER: TERESA BLAKE SC

Introduction

The primary legislation that provides for this regulatory system is the Health and Social Care Professionals Act of 2005, as amended by the Health and Social Care Professionals (Amendment) Act of 2012, Health Identifiers Act 2014, and the Health (Miscellaneous Provisions) Act of 2014. Statutory instruments and bye-laws made under the legislation provide the detailed rules and codes of practice which form the wide rule base for the multi-professional regulatory body, known as 'CORU', which is established under the legislation. Currently 15 professions are designated under the legislation.

The Vision - Statutory Registration for Health and Social Care Professionals – the Way Forward (Department of Health and Children) 2000.

Definition of Statutory Regulation

'Statutory Registration is a system whereby each individual member of a profession is recognised by a specified body as competent to practice within the profession under a formal mechanism that is provided for by law. Unlike systems of voluntary registration it is a legally binding process. All persons wishing to practice must be registered and can be prosecuted for practising if not registered'

Background to the Regulation of Health and Social Care Profession in Ireland

The expansion in both the need for and provision of personal and social services in Ireland over the last fifty years led to the inevitable growth in the number of professionals involved in the delivery of personal social services. Further, developments such as the use of a human-rights-based analysis in the provision of services, the acknowledgement of the need for standards in the delivery of care, as well as a shift in focus to a rights-based model in the approach of service users and their advocates, highlighted the need for protection of the public interest in setting and maintaining standards for the professions involved. A fuller recognition of the benefits of professional regulation for the professions and for society was also becoming clearer from the operation of such systems of regulation elsewhere.

The Department of Health and Children committed itself to delivering statutory regulation of health and social care professionals and commenced the process of consultation with the professional bodies, looking at what would be the best and most suitable process of regulation for these very particular and specific professions. What emerged from that consultation process is the Health and Social Care Professionals Act of 2005, which has subsequently been amended.

Structure of Regulation -The Health and Social Care Professionals Act of 2005

The Health and Social Care Professionals Act of 2005 [herein the Act] was commenced in March 2007. It puts in place the regulatory system for the designated professions. The sponsoring government department is the Department of Health.

The main provisions of the Act deal with the following:

- Preliminary Matters [Part 1 sec 1-5]
- Health and Social Care Professionals Council [Part 2 of the Act sec 6-25]
- Registration Boards [Part 3 of the Act sec 26-35], one for each of the regulated professions.
- The Registration Process is covered in [Part 4 sec 36-47].
- Education and Training is covered in [Part 5 section 48-49].
- Complaints, Inquiries and Discipline is covered in [Part 6 sec 50 -78]
- Use of Professional Titles and Offences is covered in [Part 7 sec 79-81].
- Dissolution of National Social work Qualification Board [Part 8 sec 82-89]
- Transitional Provisions [Part 9 sec 90-91]
- Miscellaneous Matters [Part 10 92-96]

There are three Schedules to the Act. Schedules one and two deal with membership of the Council and Board and conduct of their meetings. Schedule three deals with qualifications required by existing practitioners.

Social Work as a Designated Profession.

Section 4.1 of the Act designates the professions for the purposes of the Act, 'social worker' being among them. Section 4.2 provides for further professions being designated under the Act, after consultation between the Council and the Minister. Some of you may be aware that that process is currently being conducted in relation to counselling psychotherapists. The potential for further additions to the 'designated professions' under the Act is an on-going reality.

Section 4.3 provides

A health or social care profession is any profession in which a person exercises skill or judgment relating to any of the following health or social care activities:

- (a) the preservation or improvement of the health or wellbeing of others;*
- (b) the diagnosis, treatment or care of those who are injured, sick, disabled or infirm;*
- (c) the resolution, through guidance, counselling or otherwise, of personal, social or psychological problems;*
- (d) the care of those in need of protection, guidance or support.*

The Council - CORU.

The Health and Social Care Professionals Council is established under Section 6 of the Act to perform the functions and exercise the powers assigned to it under the legislation. It is a body corporate. It's objective is set out in Section 7 as being

to protect the public by promoting high standards of professional conduct and professional education, training and competence among the registrants of the designated professions.

The functions and powers of the Council are to be exercised in the public interest. Section 8 (2) details the functions (a- j):

- (a) oversee and co-ordinate the activities of registration boards,*
- (b) provide administrative support and secretarial assistance to registration boards and their committees,*
- (c) receive applications and make decisions under Part 4 concerning the refusal of registration boards to grant or restore registration,*
- (d) enforce standards of practice for registrants of the designated professions, including the codes of professional conduct and ethics adopted by their registration boards,*
- (e) establish committees of inquiry into complaints under Part 6 against registrants of the designated professions,*
- (f) make decisions and give directions under Part 6 relating to the imposition of disciplinary sanctions on registrants of the designated professions,*

(g) advise the Minister, either on its own initiative or at the Minister's request, on all matters relating to the Council's functions under this Act,

(h) encourage registration boards to collaborate with each other, where practicable, including in the professional education and training of registrants,

(i) issue assessment guidelines for the purposes of section 91

and

(j) perform any function that may be assigned by the Minister

to the Council and that relates to—

(i) the registrants of any designated profession, their education and training and the practice of the profession, or

(ii) the implementation of any directive or regulation of the Council of the European Union concerning the practice of, and persons engaged in, health care or

social care.

Section 8(3) provides that: *The Council has power to do anything that appears to it to be requisite, advantageous or incidental to, or to facilitate, the performance of its functions under this Act.*

Section 9 of the Act provides that the Council is made up of a Chairperson and ordinary members, all of whom are appointed by the Minister. Currently there are 30 members (including the Chairperson), drawn from the designated professions and from lay persons. The Chairperson is part of the lay majority on the Council. Its composition reflects what many would consider best practice in the area of professional regulation. The lay members are drawn from the education sector, patient and service user advocacy groups, the voluntary sector and representatives of the public and private sector organisations who are involved in the delivery of health and social care. This is in accordance with section 9(5) which provides

'Persons appointed to represent the interests of the general public may include members of advocacy groups and users of services provided by the designated professions.

This emphasises the strong public interest focus in the regulatory mechanism and reflects a genuine commitment to protecting the public, while promoting and maintaining high standards in the professions regulated.

The executive functions of the Council are discharged by the Chief Executive Officer whose duty it is to manage and control the administration of the Council and the Registration Boards, to act as the registrar for each of the registration boards (Sec 11). and to discharge the functions of each Registration Board under part 4 of the Act (Sec 30).

Section 22 deals with the power of the Council to make rules which are clearly essential for the discharge of its functions in relation to the process of registration, taking of evidence or submissions by the committees established under the Act and other related matters.

Four committees of Council provide specific expertise and advice to the Council and the Executive in the following areas:

- Audit Risk and Governance
- Registration
- Education
- Fitness to Practise

The Annual Reports of the Council and other information are on the CORU website which is extremely helpful. According to CORU's Annual Report 2015 there were 3,928 Social Worker registrants.

THE REGISTRATION BOARDS

Part 3 of the Act provides for the establishment of registration boards. Registration is compulsory for all practitioners in each of the registered professions. It extends to practitioners in all forms of practice whether public or private and applies to all sectors in which the professions operate, be it health and social care, education, industry etc.

Sections 26 to 35 of the Act deals with the Registration Boards. Each Registration Board is a body corporate with perpetual succession and seal and may sue or be sued in its corporate name. Each may regulate its own procedure but within the overall general governance of the Council.

Section 27 of the Act provides that:

(1) The object of the registration board of a designated profession is to protect the public by fostering high standards of professional conduct and professional education, training and competence among registrants of that profession

The powers and functions are to be exercised in the public interest.

The functions of a Registration Board as stated in section 27 are to:

- (a) establish and maintain a register of members of the designated profession, social work in this instance.*
- (b) Issue certificates of registration under section 41,*

- (c) give guidance to the registrants concerning ethical conduct, guidance and support concerning the practice of the designated profession and continuing professional development.*
- (d) Monitor the programmes of education provided for the training of applicants for the registration. (sec 49)*
- (e) Make recommendations under Part 6 with respect to sanctions to be imposed on registrants of the designated profession. (Sec 64 - sec 67)*

Each Registration Board has power to do what is necessary and incidental to the performance of its functions. It can engage in research into education and training in relation to the profession it is responsible for, including contribution to the development of curriculum, evaluation of existing programmes, examination and assessment and the maintaining of statistical records and data to assist in research and planning.

Membership of the Registration Boards

Like the Council, all registration boards have a lay majority. The membership of a Registration Board is made up as follows:

- Six persons appointed by the Minister on their election by the registrants of the Board comprising as follows:
 - Three registrants of the designated profession who are engaged in the practice of the profession.
 - Two registrants of the designated profession who are engaged as members of the profession in the management of services provided by it be it in the public or private area.

- One registrant of the designated profession who is engaged in the state in education and training of persons with respect to the practice of the designated profession.
- Seven persons appointed comprising of the following:
 - (i) One representative of the management of the public health sector, social care sector or both
 - (ii) One representative of the management of voluntary or private sectors concerned with health or social care.
 - (iii) One representative of the third level establishment involved in the education and training of persons with respect to the designated profession who was nominated by the Minister for Education; and
 - (iv) Four representatives of the interest of the public who are appointed with the consent of the Minister for Enterprise, Trade and Employment.

As referred to earlier, with Council approval each Registration Board is entitled to make bye-laws in relation to specified matters including: the applications for registration in the register and for restoration to the register; approval of qualifications for the purposes of attesting to the standard of proficiency required for registration; requirements as to the knowledge of the language that is necessary for practising the profession in the State; the procedures for assessing, for the purposes of registration, qualifications or training or experience acquired outside of the State; setting criteria for restoration to the register; providing guidance on education and training for continuing professional development and the adoption and revision of a code of professional conduct and ethics.

Section 31(2) states that a code of professional conduct and ethics adopted by the Registration Board of a designated profession must specify the standards of conduct, performance and ethics expected of registrants in that profession. The

Social Workers Registration Board has made a number of statutory instruments since it was established:

- Approved Qualifications for Social Workers bye-law 2011 SI 137/2011
- Application for Registration of Social Workers bye-law 2011 SI 142/2011
- Code of Professional Conduct and Ethics for Social Workers bye-law 2011 SI 143/2011
- Election of Members for Appointment to Social Work Registration Board bye-law 2011 SI 174/2012
- Returners to Practice bye-law 2013 SI 319/2013

The Board also published in 2013 “Guidance for Educators - Criteria and Standards of Proficiency for Education and Training Programmes”.

Section 33 of the Act provides that committees can be established to perform any of the functions of a Board or any of its powers under Part 4 dealing with registration and Part 5 dealing with education and training. Provision is also made for the removal of the members of a Board. Each Registration Board is required to prepare an annual report.

Disciplinary Committees.

The Act provides in Section 50 for the definition of terms encountered in complaints concerning professionals such as ‘allegation’, ‘poor professional performance’ and ‘professional misconduct’.

Section 51 of the Act provides for the establishment of the following:

- (a) a preliminary proceedings committee
- (b) a professional conduct committee and a

(c) health committee.

The Council established the Preliminary Proceedings Committee in January 2015. All complaints received by Council in relation to Fitness to Practise of registrants are reviewed and considered by this committee. The committee is the screening process to weed out trivial or vexatious complaints, and complaints without substance. The committee considers if there is a case to answer by a registrant or not and makes recommendations to Council on these matters. According to the 2015 Annual Report, 44 complaints in relation to Fitness to Practise were received by CORU in 2015 the Committee decided in the case of a number of complaints that there was insufficient cause to warrant further action.

The Professional Conduct Committee deals with complaints about a registrant concerning conduct and competence. This is a three-member committee, one of whom is a member of the profession complained of, one from another registered profession and one lay member. The Committee can have a legal assessor advise it.

The Health Committee decides whether or not a registrant's ability to practice is impaired because of a disability, mental or physical, or emotional disturbance or addiction. It can be advised by a doctor and legal assessor.

Section 52 of the Act identifies the grounds upon which a complaint can be made. These are:

(a) professional misconduct,

(b) poor professional performance,

(c) impairment of the registrant's ability to practise the designated profession concerned because of a physical or mental ailment, an emotional disturbance or an addiction to alcohol or drugs,

(d) a failure to comply with a term or condition of registration imposed under this Part,

(e) a failure to comply with an undertaking or to take any action specified in a consent given in response to a request under section 61,

(f) a contravention of this Act, the rules or bye-laws, or

(fa) a failure to comply with a provision of the Health Identifiers Act 2014 applicable to the registrant in his or her capacity (if any) as a health services provider within the meaning of section 2 of that Act, or

(g) a conviction in the State for an offence triable on indictment or a conviction outside the State for an offence consisting of acts or omissions that, if done or made in the State, would constitute an offence triable on indictment.

A complaint may be made on the grounds of professional misconduct or poor professional performance even though the matter to which the complaint relates occurred outside the State.

The complaint must be in writing or in any other form acceptable to the Council and it may be made by or on behalf of any person or by a registration board.

The Council is obliged to make reasonable efforts to ensure that the complainant is kept informed of all decisions made by the Council or a committee in relation to a complaint and that complaints are processed in a timely manner

The Act details comprehensively with the processes and procedures for dealing with complaints, including the right of appeal to the High Court.

Conclusion

The objective of introducing a regulatory system for health and social care professions is achieved by the legislation. The structure of one over-arching Council with the Registration Boards was arguably the best system, given the diverse nature of the professions regulated. The objective of securing the protection of the

public interest in the system of regulation has also been achieved by the lay majority in the Council and lay participation in the system.

The challenge now is to ensure that the system works for all in a fair and transparent manner.

A PRACTITIONER'S PERSPECTIVE – THINKING CRITICALLY AND REFLECTIVELY ON THE CONTEXT OF REGULATION

SPEAKER: GLORIA KIRWAN

1. Introduction – Opening Comments

I wish to thank the organisers of today's event for inviting me here today.

In today's presentation I will draw on my previous experience as a practitioner for many years, my current role as a social work educator as well as my current involvement in research related to the topic of fitness to practise.

The aim of my presentation today is to position the relatively new system of statutory registration for social workers in Ireland within the broader historical development of the profession and to pose a set of questions which arise for social work in the context of professional regulation.

In my presentation I will provide a very brief overview of the social work profession in terms of its history, how it self-defines its role and purpose and I will follow this with some messages from research regarding social work fitness to practise and the questions which arise from these research findings.

I will start with a brief tour of the history of social work, the purpose of social work and some of the challenges that generally face the profession.

2. Social work : A brief overview

Defining exactly what it is that social workers do has been a point of some debate and it is clearly difficult to arrive at a summary which captures the different fields of practise as well as the many cultural and geographical contexts in which it is

practised across the world. The global definition agreed at international meetings of the International Federation of Social Workers states:

“Social work is a practice-based profession and an academic discipline that promotes social change and development, social cohesion, and the empowerment and liberation of people. Principles of social justice, human rights, collective responsibility and respect for diversities are central to social work. Underpinned by theories of social work, social sciences, humanities and indigenous knowledge, social work engages people and structures to address life challenges and enhance wellbeing.

The above definition may be amplified at national and/or regional levels”.¹

In line with this definition, social workers have, for many decades, regarded the work they do as significant in terms of its contribution to society. This contribution and the serious nature of the issues that social workers engage with have not always been reflected in the status of the profession. The opening of the Social Work Register in Ireland in 2011 marked the final stage in a longstanding campaign by the social work profession in Ireland for professional recognition.

The establishment of the Social Work Register is regarded by many social workers as a significant landmark in the recognition of the responsibilities that rest on social work shoulders. The setting up of the statutory register confirms societal recognition that social workers engage in work with vulnerable populations (indeed that work often has a central focus regarding the protection of vulnerable groups) and that, therefore, only those who demonstrate competence and suitability should be recognised by society as fit to carry out this work.

¹ International Federation of Social Workers, ‘Global Definition of Social Work, IFSW, 2014) <<http://ifsw.org/policies/definition-of-social-work/>> accessed 20 October 2016.

Legal protection of title is central to this status. Only those who are registered as social workers can now use the social work title and this inherently guarantees the public that the suitability of individual social workers whom they encounter is regulated and that they have recourse to an independent regulatory authority in the event of any concern arising regarding the suitability or competence of any such social worker.

The history of social work illuminates (in terms of timeline) the journey social work has travelled from the first generation of paid social workers to the present first generation of registered social workers.

History tells us that social work emerged in western societies at the height of the Industrial Revolution in the 1800's when mass migration from agrarian communities into urban centres produced new problems in society.

Initially, society had no means to systematically ensure that those most in need were provided with minimum resources. In fact, there was a general consensus in that era that state support should be restricted to only the most destitute and the most deserving. Without the protection of a social welfare system, many people who were unable to earn a livelihood for one reason or another sought charitable and philanthropic assistance.

The origins of the social work profession can be found in the activities of the charitable organisations which became prolific in number during this era.

Also, businesses headed by philanthropically-minded or religiously motivated entrepreneurs began to employ Welfare Secretaries whose work focused on promoting the health and wellbeing of the workforce and attending to the needs of employees injured at work or in need of assistance of one form or another.

Thus in the late 1800's we see the beginnings of paid work for trained social workers – they weren't actually called social workers then, that name evolved over time. An early such example is the Guinness Brewery which employed a Welfare Secretary from the late 1800s onwards. Further employment opportunities developed at the beginning of the 20th century. For example, the Jacobs factory employed a number of Welfare Secretaries and assistants. Other businesses followed suit in what has been termed a form of welfare capitalism which rested on the notion that a happy workforce was a more productive workforce.

While Ireland was slow to grow its social work workforce, the two World Wars gave an added impetus to increased numbers of paid social workers in the UK and there is no doubt that the geographical proximity of the two jurisdictions influenced over time the growth of the profession in Ireland. Developments in healthcare, child welfare, mental health care, the criminal justice system and the continuing demand for social workers to work in a variety of voluntary sector agencies led to a slow but steady growth in the number of paid social work posts in Ireland over the course of the 20th century and into the 21st century.

Taking these various factors together, I have suggested in a chapter on early examples of industrial social work in Ireland that the emergence of the social work profession in Ireland arose from “a nexus of personal, professional, religious and class-related motivations”.²

In terms of the education of social workers in Ireland, university-based social work courses emerge from the 1930s onwards.³ Currently, four universities offer social work qualifications approved by CORU - they are TCD, UCD, UCC and UCG. Somewhere in the region of 220 to 250 social workers now qualify each year.

² G. Kirwan, 'Welfare and Wedding Cakes: An Example of Early Occupational Social Work'. In N. Kearney and C. Skehill (Eds.) *Social Work in Ireland: Historical Perspectives*. (IPA, 2005) 196.

³ Noreen Kearney, 'Historical Background' in Department of Social Studies, *Social Work and Social Work Training in Ireland: Yesterday and Tomorrow* (Department of Social Studies, Trinity College Dublin 1987). Queens University Belfast also provided social work education programmes from early in the 20th century.

At the present time, the main sites of employment for social workers include the Probation Service, the Health Service Executive (in mental health, disability, hospital, older people, child psychiatry services) and TUSLA, the Child and Family agency. Other employers include the Local Authorities, particularly in housing and traveller services, and also a wide range of large and small voluntary organisations. More recently there is a new trend of self-employed social workers offering specialist interventions and assessments. There is also a small group of social work academics located across the four Irish universities.

The criteria for approval of social work qualifications in Ireland reflect the social science basis of the profession plus the importance of additional education on topics and skills development related to the different fields of practice, the types of issues social workers may encounter and the potential strategies or methods they can use to guide their work with individuals, families and communities.

The Health and Social Care Professionals Act was passed in 2005, and on foot of this legislation CORU was established in 2008 to regulate a list of 13 health and social care professions. The first profession on that list to be regulated was social work and the Social Work Register was opened in 2011. It is now possible for any member of the public to raise a concern about the suitability of a registered practitioner and CORU has a system in place to process complaints and where necessary to hold fitness to practise hearings. Following consultation with the profession, CORU has published a Code of Professional Conduct and Ethics for Social Workers and social workers who are registered can refer to this code as a guide in situations of ethical problems and ethical dilemmas.

A final word relating to terminology which is relevant to this overview of social work. The term 'social work' and the distinct term 'social care' are not one and the same – in this jurisdiction at least. The Social Care profession will have its own register under the CORU umbrella and it is my understanding that preparations for the opening of the Social Care Register are being actively progressed. In other

jurisdictions, the distinction between social work and social care is not so clear cut and decisive and sometimes both groups are housed under the one register – but that will not be the case here. At present there are over 3,000 registrants on the Social Work Register but when it opens it is anticipated that the Social Care Register will have far greater numbers.

3. Pre-regulation social work in Ireland

From the early days of its history, the social work profession has moved to articulate agreed standards of education, skills development and accreditation of qualified practitioners. Initially, such agreements were voluntary and it took time to bring all relevant stakeholders on board. For many decades, social work degree programmes in Ireland were accredited by UK bodies, the last of which was the Central Council of Education and Training in Social Work (CCETSW). Graduates received the CQSW (Certificate of Qualification in Social Work) alongside their Irish degree.

In 1994, the National Validation Body on Social Work Qualifications and Training was established in Ireland and in 1997 by the National Social Work Qualifications Board (NSWQB) was set up by statutory order.⁴ The remit of the NSWQB was the accreditation of social work courses and the assessment of international qualifications in situations where social work graduates from other jurisdictions wished to work in Ireland. However, the NSWQB was not empowered to operate a register of individual practitioners or to monitor individual practitioners. Furthermore, there continued to be no protection of title for social work practitioners. The Health and Social Care Professionals Act 2005 addressed these issues and with the setting up of CORU under its provisions, the NSWQB was eventually ceased and its work subsumed into CORU.⁵

4. Social work as a regulated profession

⁴ The National Social Work Qualifications Board (Establishment) Order 1997, S.I. No. 97/1997

⁵ Health and Social Care Professionals Act 2005

<http://www.irishstatutebook.ie/eli/2005/act/27/enacted/en/html> accessed on 20 October 2016

With the establishment of the Social Work Register, Ireland joins a growing number of countries where some form of social work registration or licensing is in place. These countries include the United States, Canada, England, Scotland, Wales, Northern Ireland and New Zealand. Therefore, the introduction of social work registration in Ireland can be located within a broader, global context which supports an increasing focus on professional governance.

The primary purpose of registration in Ireland is to protect the public from professionals whose work is below the expected standard or which transgresses ethical boundaries in a way that is unacceptable, illegal or harmful.

We can see that regulation thus becomes an indicator of the standards of service the public can expect in their interactions with professional service providers. It fits neatly with increasingly high public expectations of quality and accountability in service provision; it flows from a growing focus on risk avoidance and clinical governance and, ultimately comes to be regarded as a good in and of itself, a phenomenon which Walshe refers to as “sunshine regulation”, wherein it is believed that professional regulation itself informs and promotes improved service delivery.⁶

Throughout most of its history, social work has attempted to theorise the ethical dimensions of its work. Recent examples include consideration of the moral character of social work⁷, professional integrity⁸, ethical awareness⁹, and boundary management.¹⁰ Therefore, it has not had to wait for the introduction of registration to start thinking about these issues, but the fact that the Social Work Register is now in

⁶ Kieran Walshe, ‘The effectiveness of healthcare regulation: Lessons from research’ (2009). Presented at the 7th EPSO Conference, Cork, Ireland <http://slideplayer.com/slide/4999166/> accessed on 20 October 2016

⁷ Cath Holmström, ‘Suitability for professional practice: Assessing and developing moral character in social work education’ (2014) 33(4) Soc Wk Ed, 451. Chris Clark, ‘Moral character in social work’ (2006) 36(1) Br Jnl SW 75.

⁸ Sarah Banks, ‘Integrity in professional life: Issues of conduct, commitment and capacity, (2010) 40(7) Br Jnl SW 2168.

⁹ Ilene E Nathanson, Elissa D Giffords and Orly Calderon, ‘Expanding awareness: Issues in the development of an ethics scale for the social work profession’ (2011) 47(1) JSWEd 133.

¹⁰ Lynda Shevallar and Neil Barringham, ‘Working in Complexity: Ethics and Boundaries in Community Work and Mental Health’ (2016) 69(2) Australian Social Work 181.

operation confirms the importance for practitioners of paying attention to the ethical dimension of social work practice and provides any member of the public who is concerned about the competence or suitability of a registrant with a legitimate forum in which to raise those concerns.

5. International Messages – what can we expect?

Although it is still early days for social work registration, even in countries where it is already up and running, there are some indicators from published reports and research studies which offer clues as to what we may expect to see in the coming years in Ireland regarding the types of issues that will arise regarding social work fitness to practise.

Before outlining some of my thoughts on what we might expect, it is important to note that in this jurisdiction the level of proof required in fitness to practise adjudications is 'beyond reasonable doubt', whereas in other jurisdictions, including those geographically close to Ireland, the standard of proof is lower. It is my view that the burden of proof level in Ireland will impact to reduce the volume and nature of cases that will be taken forward into fitness to practise adjudications.

So with that proviso, it is useful to look at the international literature on social work fitness to practise in general and misconduct in particular. There is a substantial volume of information in hard copy and online sources but it is mainly in the form of individual reports of cases. With a few notable exceptions, there is a notable dearth of analysis of general trends or interpretation of what any trends which can be identified mean for the profession.¹¹

¹¹ See Kim W. Boland-Prom, 'Results from a national study of social workers sanctioned by state licensing boards' (2009) *Social Work* 54(4) 351. Also K. Strom-gottfried, 'Understanding adjudication: Origins, targets, and outcomes of ethics complaints' (2003) *Social Work* 48(1) 85.

With my colleague, Brian Melaugh, I conducted a study of a sample of individual fitness to practise hearing reports for the year 2010 (n = 72) which were published on the websites of the four social work regulatory bodies of Scotland, England, Wales and Northern Ireland.

While some of the published reports are longer than others, most of them provide essential details of the complaint against the social worker, the facts established in the fitness to practise hearing and the decision of the fitness to practise committee. Our method of examination involved reading through each case report, thematically coding key details in each case and building an overview picture of these cases. This may sound quite mundane but without this type of analysis all that we have is a set of individual cases suspended in the space we call the internet, and appearing there as examples of fitness to practise situations but which individually offer no sense of the overall picture of what is happening at a wider professional level. We tried to begin to construct that overview picture.¹² We found it very difficult but with perseverance we came to the following findings:

We identified 2 distinct types of cases which are funnelled through the same fitness to practise system.

- a. The first are what we might consider to match the accepted understanding of misconduct and these involved situations in which social workers were accused of acts which involved ethical breaches or transgressions of the boundaries of acceptable conduct. They included actions which in some cases could be classified as criminal (some of the registrants were before the Fitness to Practise committee because they had acquired a criminal conviction already), abusive or inappropriate in nature. Examples of criminal issues included assault and drug-related offences. Examples of inappropriate conduct, which may not have attracted a criminal conviction but which had crossed the line in terms of acceptable professional behaviour, included relationship boundary issues or sending inappropriate texts to clients or

¹² Gloria Kirwan and Brian Melaugh, 'Taking Care: Criticality and Reflexivity in the Context of Social Work Registration' (2015) 45(3) BJSW 1050.

colleagues. The behaviour in this category generally involved activities which in my view would be regarded by most social workers as completely incompatible with the expected standards of professional behaviour and which most social workers would most likely identify as inappropriate.

- b. The second category of cases we found fitted better with a description of poor professional performance or poor professional judgment. Examples included situations where registrants were accused of failing to properly investigate reports of risk to children or other vulnerable groups or of failing to act to protect people in situations where risk was identified and actions should have been taken in line with the social worker's legal or agency responsibilities. Failure to carry out important line management instructions, or failing to notify supervisors where there was evidence of serious risk or closing cases when serious risk remained evident were further examples within this category.

The analysis of the data set proved quite challenging, not least because of the breadth of issues that led to fitness to practise hearings as well as the difficulties in assigning some of these issues into categories.

In a different project in which I participated in 2013 to 2014, the focus of the work was on identifying the ethical issues which might arise for social workers in relation to their usage of electronic communication or social media, such as email, twitter, facebook, and so on. The International Technology Taskforce was convened by the Association of Social Work Boards with the aim of considering the use of digital communication technology in social work practice and to produce what was eventually titled the *Model Regulatory Standards for Technology and Social Work Practice*.¹³

¹³ Association of Social Work Boards, 'Model Regulatory Standards for Technology and Social Work Practice' (ASWB, 2014) < <https://www.aswb.org/wp-content/uploads/2015/03/ASWB-Model-Regulatory-Standards-for-Technology-and-Social-Work-Practice.pdf> > accessed on 24 October 2016.

This work of the Task Force flagged some of the new types of ethical issues which upcoming generations of practitioners will face. For example, in some jurisdictions, there is increasing growth in the use of online counselling or advice services. The Model Standards published by the Task Force recommend to social workers that they actively consider the implications of offering counselling to individuals, families or groups in the online environment and put in place any necessary safeguards. These safeguards may include consideration of geographical distance and the practicalities of working with someone who may be located at considerable physical distance, possibly in another jurisdiction. Working across jurisdictions raises challenges regarding registration in the other jurisdiction but also the service provider needs to assess the laws which may apply regarding advertising, insurance, data protection, data sharing, confidentiality, and so forth.

In my broader reading of fitness to practise case reports I have come across some cases where electronic technologies offered the means by which the registrant breached their ethical code and which ultimately led to a concern regarding their fitness to practise. Examples included storage or sharing of indecent images but also of contact with clients, for example on Facebook, which was not recorded on the agency file and therefore was not available for review by supervisors. For example, should a social worker befriend a client on Facebook and if they do should they inform their agency? Do they need parental permission if befriending a minor? What about Instagram? Or Snapchat? These are some of the challenges coming down the line for the next and future generations of social workers and other professionals, many of whom fit with the definition of digital natives or people who have used electronic communication all of their lives. In another research study in which I was involved with my colleague, Dr Conor Mc Guckin, we found that newly qualified professionals disagreed among themselves on the limits of acceptable and unacceptable electronic communication with clients and service users.¹⁴ Therefore, I have no doubt that we will see increasing numbers of complaints into the future which involve some aspect of electronic communication.

¹⁴ Gloria Kirwan and Conor Mc Guckin, 'Digital Natives or Digitally Naïve? E-Professionalism and Ethical Dilemmas Among Newly Graduated Teachers and Social Workers in Ireland' (2014) *Journal of Technology in Human Services* 32, 119.

6. Observations

The research which I have read or been involved in conducting, coupled with commentary within the wider literature, has left me with a set of observations, some of which are well formed and some of which are still in the process of formulation.¹⁵

Firstly, the funnel analogy, referred to earlier, raises some questions for me. This is the issue of channelling different types of complaints into one adjudication system. I believe more consideration needs to be given to whether or not it is useful or appropriate to have only one system which deals with both professional misconduct (as in behaviour which is unacceptable) and performance issues which may or may not be related to wider organisational conditions in which individual social workers are employed. For example, a social worker could be of good character but finds themselves working under pressure, lacking resources or adequate supervision or without adequate training for a particular specialism. While the responsibility lies with every social worker to only undertake work which they are competent to carry out, the question still needs to be asked if poor professional performance is best processed through the same fitness to practise system which deals with misconduct because of its potential to be linked with wider organisational deficits in some cases.

Secondly, what research techniques can or should we use to evaluate the extent to which current systems of fitness to practise contribute to public safety? We need to be able to answer basic questions such as this given the level of investment in regulatory activity. For example, to what extent can we say that regulation helps to make the world a safer place? What evidence can we draw on to support or refute that suggestion? Have complaints about social workers dropped in number in countries where fitness to practise systems have been in place for some time – or should we use those types of statistics as a valid way of measuring the success of regulation? Perhaps, increased complaints signal something else, such as increased confidence by the public in the system of regulation which results in increased

¹⁵ See general discussions in articles such as Sheila Furness, 'Conduct matters: The regulation of social work in England' (2015) 45(3) BJSW 861. Also Kenneth McLaughlin, 'Regulation and risk in social work: The General Social Care Council and the Social Care Register in context' (2007) 37(7) BJSW 1263.

complaints. Essentially, going to the heart of research on fitness to practise, we must ask how do we know that systems of regulation make any difference?

What is even more concerning for me is that there seems to be very little research being conducted to address any of these questions not just in relation to social work but in relation to any profession.

McLaughlin highlights three distinct discourses of risk and social work.¹⁶ In the past he points out that risk was something which social workers protected people from, they were the risk assessors, the protectors of the vulnerable in society. Then the focus shifted to a concern about the risk *to* social workers and it was held that social workers needed skills in identifying risky individuals so that they could go about their work in safety. Now, McLaughlin suggests, the focus has shifted to the *social-worker-as-a-risk*.

The problem then arises that the more the public is exposed to negative criticism of social work (or any profession), the more likely the individual members of that profession are to encounter negative attitudes from the public as they try to carry out their role. It is something of a vicious circle. Should regulatory systems be concerned with this? Our system of administration currently favours openness and transparency, which translates into open hearings and media reporting of fitness to practise hearings. There are good grounds to argue in favour of open administration. But are we sure that the benefits always outweigh the negatives? Have we tested that assumption? How should we try to balance the need for justice to be seen to be done versus the reputational damage which can stick by association to other completely innocent registrants?

Thirdly, in the paper we published on our research, Brian Melaugh and I refer to what Dickens describes as the paradoxes of regulation.¹⁷ Dickens queries if increased regulation actually produces better service provision. He also queries if professional autonomy is overly constrained by the emphasis on following the rules and he

¹⁶ Ibid n. 13.

¹⁷ John Dickens, *Social Work and Social Policy: An Introduction* (Routledge 2010).

wonders if defensiveness in practice arises from individual practitioners' concerns that they will be the subject of a complaint or will somehow be found guilty of poor professional performance if they attempt to devise new or novel ways to address the needs of clients. The potential for regulation to stifle innovation in practice is the main concern in this regard.

We also identified an additional paradox whereby the focus on individual conduct and performance distracts attention away from profession-wide performance and places the spotlight only at the individual practitioner level rather than at the wider profession and societal levels. In this way, individual social workers become accountable and responsible for meeting the needs of people who have been failed by structural or systemic problems, such as gaps in social welfare provision, gaps in housing provision, patchy health provision, poor systems of management in the agencies they use, etc. We think it is unhelpful to only look at the problems that arise in practise through an individual fitness to practise lens. This is a particularly important point for social work, a profession with a majority made up mainly of people who are employed directly or funded indirectly with public money. It is the possibility that individual social workers may inadvertently become the scapegoats for wider shortfalls in resource allocation and service delivery which most often raises concerns for social workers vis-à-vis social work regulation. Fitness to practise hearings will not address those wider systemic shortcomings, they can really only deal with individual performance.

7. Conclusions

In conclusion, the establishment of the Social Work Register represents a key landmark in the professionalization of social work in Ireland. The establishment of the Social Work Register within CORU offers the public for the first time in Ireland independent oversight of social work competence and suitability and provides mechanisms for the removal from practice of anyone who falls short of the minimum accepted standards of competence and/or good character. However, it is probably naïve to suggest that with the introduction of these systems that misconduct can be eradicated or that no mistakes will ever be made again. Therefore, it is my view that

regulation must only be one part of a wider strategy which aims to promote and uphold standards and it must be accompanied with commitments to providing the resources social workers need to carry out their work safely and to the ongoing upskilling and educational development of the profession.

LIFE CYCLE OF A COMPLAINT

PART 6 OF THE HEALTH AND SOCIAL CARE PROFESSIONALS ACT 2005

SPEAKER: CIARA MCGOLDRICK BL

Introduction

The Health and Social Care Council (known as Coru) was established under the Health and Social Care Professionals Act 2005 (The Act).¹⁸ The Council currently regulates 15 categories of health and social care professionals including social workers who have been subject to fitness to practise proceedings since 31 December 2014.¹⁹

The system for processing complaints made about social workers under Part 6 of the Act is broadly similar to that used in the regulation of health professionals such as medical practitioners and pharmacists. Guidance can therefore be taken from caselaw regarding challenges to the manner in which the regulation of such other professionals has been carried out.

Generally, the purpose of any system for the regulation of healthcare practitioners is:

- (a) protection of the public;
- (b) preservation of public confidence in practitioners;

¹⁸ The Act has been amended by the Health and Social Care Professionals (Amendment) Act 2012, the Health (Miscellaneous Provisions) Act 2014 and the Health Identifiers Act 2014 (section 52 only).

¹⁹ The other professionals regulated under the Act are: clinical biochemists, dietitians, dispensing opticians, medical scientists, occupational therapists, optometrists, orthoptists, physiotherapists, podiatrists, psychologists, radiographers, radiation therapists, speech and language therapists and social care workers. Under section 4(2) of the Act the Minister for Health may designate further health and social care professionals for regulation under the Act. A public consultation has recently commenced in relation to the proposed designation of counsellors and psychotherapists.

(c) declaring and upholding professional standards.²⁰

The object of the Council under section 7 of the Act is

“... to protect the public by promoting high standards of professional conduct and professional education, training and competence among registrants of the designated professions.”

This paper addresses the disciplinary process that is followed once a complaint is made to the Council about a social worker.

Grounds for Making a Complaint

Part 6 of the Act sets out the process for dealing with complaints about registrants. A complaint may be made by or on behalf of any person or by the Social Workers Registration Board.²¹

The grounds upon which a complaint may be made are set out in section 52 of the Act which provides:

“52.- (1) A complaint may be made to the Council concerning a registrant on the grounds of-

(a) professional misconduct,

(b) poor professional performance,

(c) a relevant medical disability,

(d) a failure to comply with a term or condition of registration imposed under this part,

²⁰ Building a Culture of Patient Safety - Report of the Commission on Patient Safety Commission and Quality Assurance - July 2008.

²¹ Section 52(3)

(e) a failure to comply with an undertaking or to take any action specified in a consent given in a response to a request under section 61,

(f) a contravention of this Act, the rules or bye-laws,

(fa) a failure to comply with a provision of the Health Identifiers Act 2014 applicable to the registrant in his or her capacity (if any) as a health services provider within the meaning of section 2 of that Act, or

(g) a conviction in the State for an offence triable on indictment or a conviction outside the State for an offence consisting of acts or omissions that, if done or made in the State, would constitute an offence triable on indictment.”

A complaint may be made on the grounds of professional misconduct or poor professional performance even though the matter to which the complaint relates occurred outside the State.²²

Unlike the legislation governing the regulation of medical practitioners and nurses and midwives, the term professional misconduct is defined. Section 50 provides that professional misconduct is:

“... any act, omission or pattern of conduct of the registrant that –

(a) is a breach of the code of professional conduct and ethics²³ adopted by the registration board of that profession, or

(b) if the registrant has been granted by a body outside the State a licence, certificate or registration relating to the practise of that profession, is a breach of a standard of conduct, performance or ethics that applies to a

²² Section 52(2)

²³ Code of Professional Conduct and Ethics for Social Workers issued by Social Workers Registration Board in March 2011

person holding that licence, certificate or registration and that corresponds to a standard contained in in the code referred to in paragraph (a).”

Poor professional performance is defined in section 50 as:

“... any failure of the registrant to meet the standards of competence that can reasonably be expected of registrants practicing that profession.”

The Supreme Court in *Corbally v Medical Council* considered the nature of the distinction between professional misconduct and poor professional performance under the Medical Practitioners Act 2007 and considered the threshold of seriousness required before such findings could be made. Note, however, that there is no definition of professional misconduct in the Medical Practitioners Act and the definition used in the regulation of registered medical practitioners is that set out by Keane J in *O’Laoire v Medical Council*, namely conduct that is either *“infamous or disgraceful in a professional respect”* or *“conduct connected with his profession in which the medical practitioner concerned has seriously fallen short, by omission or commission, of the standards of conduct expected among medical practitioners.”*²⁴ Hardiman J, delivering the majority judgment in *Corbally v Medical Council*, stated:

*“A significant aspect of the foregoing statutory scheme is that the “sanctions” which are available in the case of a finding of poor professional performance are exactly those available in the case of a finding of professional misconduct. These include “cancellation of a practitioner’s registration” i.e. striking off the medical register. There is, therefore, no sense in which the offence of “poor professional performance” is intrinsically less serious than “professional misconduct.”*²⁵

As regards what is captured by the term poor professional performance Hardiman J concluded:

²⁴ *O’Laoire v Medical Council*, Unreported, High Court, Keane J 27 January 1995, at 106-107

²⁵ Para 17

“...only conduct which represents a serious falling short of the expected standards of the profession could justify a finding by the professional colleagues of a doctor of poor professional performance on his part, having regard, in particular to the gravity of the mere ventilation of such an allegation and the potential gravity of the consequences of the upholding of such an allegation.”²⁶

It would appear therefore that for conduct to amount to a breach of the Code of Professional Conduct and Ethics for Social Workers only a serious breach will suffice. Further, given the similarity of the definition of poor professional performance in the Medical Practitioners Act and the Health and Social Care Professionals Act, only a serious falling short of the standards expected of a social worker will support a finding.

Where a complaint is made on the ground specified in section 52(1)(g) the matter must be referred directly to the Council for consideration. Where the Council is of the opinion that:

“(i) the nature of the offence or the circumstances in which it was committed ought to disqualify the registrant from practicing ... and (ii) it is in the public interest that it take action immediately under this paragraph, the Council shall give a direction under section 66(1) to the registration board concerned to cancel the registration of the registrant”²⁷

Where the Council is not so satisfied the complaint is processed in the usual way.

²⁶ Para 40

²⁷ Section 53(1A)

Preliminary Investigation of Complaint

Once a complaint is received it is referred to a committee known as the Preliminary Proceedings Committee for its opinion “*on whether there is sufficient cause to warrant further action being taken in relation to the complaint.*”²⁸

The Preliminary Proceedings Committee is assisted by case officers who are employees of the Council and are appointed to this role under section 53A(1). These officers have broad functions and may interview any party who may have relevant information in relation to a complaint, take statements, prepare reports and give advice and assistance to the committee.

Section 53(2) provides:

“53.-(2) The preliminary proceedings committee may, by written notice, do one or more of the following:

- (a) require the complainant to verify, by affidavit or otherwise, anything contained in the complaint;*
- (b) request the complainant to supply to the committee, within a reasonable time specified in the notice, more information relating to the matter raised by the complaint;*
- (c) require that information requested under paragraph (b) be supplied by the complainant by means of a statutory declaration.”*

²⁸ Section 53(1). Section 51 of the Act provides for the establishment of three disciplinary committees: the preliminary proceedings committee, the professional conduct committee and the health committee.

The Preliminary Proceedings Committee must notify the registrant of the complaint, its nature and the name of the complainant.²⁹ Ordinarily when a complaint is received it is sent, together with any supporting documentation, to the registrant for observations. The registrant may supply the committee with any information he or she believes should be considered by the committee.³⁰ Further, the Preliminary Proceedings Committee may require that the registrant provide information in relation to the complaint.³¹ Once it has obtained and considered all necessary information the committee will make its decision as to whether it believes that there is sufficient cause to take further action in relation to the complaint.

The Act does not specify a test that is to be applied by the committee when forming its opinion as to whether there is sufficient cause to warrant taking further action in relation to a complaint. The High Court in *Law Society of Ireland v Walker* considered the test to be applied by the Solicitors Disciplinary Tribunal when deciding whether there is a prima facie case to refer a complaint to a hearing before the Disciplinary Tribunal. The Court held:

“While at this stage of the procedures the tribunal is not the fact finding body it may for the purposes of deciding on whether a prima facie case is disclosed make findings of fact where the facts are clear, for example, where the complaint is based on a clear misapprehension as to the facts or the law. Subject to this the tribunal should consider all the material before it and determine whether the application has any real prospect of being established at an inquiry any doubt in favour of an inquiry being held. The purpose of this stage of the regulatory process is to enable complaints which are frivolous, vexatious, misconceived or lacking in substance to be summarily disposed of.”³²

²⁹ Section 53(3)

³⁰ Section 53(4)

³¹ Section 53(5)

³² *Law Society of Ireland v Walker* [2007] 3 IR 581, 600

The Court also stated that the committee could take into account in its consideration the fact that the standard of proof at an inquiry is the criminal standard, namely proof beyond reasonable doubt.

Where the Preliminary Proceedings Committee advises the Council that there is not sufficient cause for further action the complaint the Council must then decide whether to take further action. Section 54(2) provides:

“54.-(2) After being informed of the opinion and considering the matter, the Council may-

(a) decide that no further action is to be taken in relation to the complaint, or

(b) if it considers it necessary to do so, direct that further action be taken under section 56.”

Where the Preliminary Proceedings Committee is of the view that there is sufficient cause to warrant further action (or where the Council exercises its discretion under section 54(2)(b)), section 56(1) provides that:

“ ... the preliminary proceedings committee shall either –

(a) refer the complaint for resolution by mediation or other informal means, but only if it determines in accordance with guidelines under section 55 that the complaint is one that could be so resolved, or

(b) refer the complaint to whichever of the following committees of inquiry it considers appropriate:

(i) a professional conduct committee;

(ii) a health committee.”

Section 55 is concerned with the resolution of complaints by mediation or other informal means. The consent of the complainant and the registrant is required before any attempt can be made to resolve a complaint in this way. No statement made by either the complainant or registrant in the course of the attempted resolution of the complaint can be:

- (a) communicated to any person other than the persons participating in the attempt to resolve the complaint, or
- (b) used in used in any disciplinary, civil or criminal proceedings.

Note that under section 56(2) where a complaint that has been referred for resolution through mediation or other informal means cannot be so resolved the complaint must then be referred to a Committee of Inquiry. It follows that only serious matters that could result in a sanction of at least admonishment can be referred for mediation. This is a significant difference to the informal resolution procedure provided for under the Medical Practitioners Act 2007 and the Nurses and Midwives Act 2011 which also provide for the resolution of disputes through mediation or other informal means. Under those Acts where the Preliminary Proceedings Committee determines that there is not sufficient cause for further action in relation to a complaint it may refer the matter for mediation. If mediation fails then that is the end of the matter.

Interim suspensions

Where the Council is concerned that a registrant presents an immediate risk to the health and safety of the public it may make an application to the High Court for an order directing the Social Workers Registration Board to suspend that person's registration pending the outcome of any disciplinary proceedings. Section 60 of the Act provides:

“S60.-(1) The Council may make an ex parte application to the [High] Court for an order directing a registration board to suspend the registration of a registrant, whether or not the registrant is the subject of a complaint, if the Council considers that the suspension is necessary to protect the public until steps or further steps are taken under this Part.

(2) An application under this part shall be heard otherwise than in public unless the Court considers it necessary to hear the application in public.

(3) After hearing the application, the Court may, in relation to the registrant-

(a) make any order it considers appropriate, including an order directing the registration board concerned to suspend his or her registration for a period specified in the order, and

(b) give to the Council or the registration board concerned any direction that the Court considers appropriate.”

Where the Council has such a concern it will convene a meeting to consider whether to make an application to the High Court. While the application to Court can be made ex parte ordinarily the Council will invite the registrant, who may be legally represented, to attend at the Council meeting. The Council will hear submissions made on behalf of the CEO and on behalf of the registrant.³³ The Council will usually sit with a legal assessor who will advise on any legal issues that may arise.

³³ See *An Bord Altranais v O’Ceallaigh* [2010] JILL-HC 060901, Kearns P where he noted the registrant’s entitlement to natural justice in being given notice of the Board meeting, being furnished with relevant information and having the opportunity to make representations.

In *O’Ceallaigh v An Bord Altranais*³⁴ Barron J considered the factors that An Bord Altranais should take into account in deciding to make an application for such an interim order under similar provisions in the Nurses Act 1985:

*“The relevant matters to be considered by the Board to determine whether the matter is sufficiently urgent to apply to the Court under the procedure provided for by s.44 are: (1) the nature of the complaint upon which the application for an inquiry before the Fitness to Practise Committee is based; (2) the apparent strength of the case against the nurse; and (3) whether in the event of an adverse finding, the appropriate sanction would be to “strike off” the nurse either permanently or for a definite period.”*³⁵

³⁴ [2000] 4 IR 54, 96

³⁵ Repealed and replaced by Nurses and Midwives Act 2011.

Hearing before Committee of Inquiry

The Health and Social Care Professionals Act provides for two committees of inquiry, the Health Committee and the Professional Conduct Committee.

Hearings before the Professional Conduct Committee must be held in public unless:

- (a) the registrant or the complainant requests the committee to hold all or part of the hearing otherwise than in public, and
- (b) the committee is satisfied that it would be appropriate in the circumstances to hold the hearing or part of the hearing otherwise than in public.³⁶

Hearings before the Health Committee are held otherwise than in public, unless:

- (a) the registrant or the complainant requests that all or part of the hearing be held in public, and
- (b) the committee is satisfied that it would be appropriate in the circumstances to hold the hearing or part of the hearing in public.³⁷

The Health Committee sits with a medical practitioner who is not part of the committee and performs a role in relation to medical issues similar to that of the legal assessor. In all other respects the functions and procedures of the two committees are the same. Provision is made for inquiries commenced in one committee to be transferred to the other if it becomes apparent that the complaint is more suitable for a hearing before the other committee.³⁸

Once the complaint has been referred to a committee of inquiry the CEO will prepare a Notice of Inquiry setting out the allegations being made against the registrant and

³⁶ Section 58(2)

³⁷ Section 58(3)

³⁸ Section 58(6)

the nature of the evidence that will be led in support of those allegations.³⁹ The CEO will identify what documentation is necessary and what witnesses should be called. If necessary an expert opinion will be sought. The Professional Conduct Committee and the Health Committee may compel the attendance of witnesses and the production of documentation.⁴⁰

The registrant must be informed at least 30 days in advance of the date, time and place of the hearing.⁴¹

Evidence in support of the complaint is presented by the Registrar⁴² or any other person with the leave of the committee. Witnesses give evidence on oath and there is a full right to call evidence in defence and reply. Evidence may be taken orally or on affidavit. As with similar disciplinary bodies it is to be expected that a committee of inquiry will sit with legal assessor who will provide the committee with legal advice. The burden of proof is on the Registrar and the standard of proof is criminal standard, namely beyond reasonable doubt.

Having heard all evidence and submissions the committee must decide:

- (a) whether the facts of the allegations have been proven, and
- (b) whether the facts as proven amount to one of the grounds alleged, eg poor professional performance, professional misconduct etc.

Section 63 requires that the committee of inquiry prepare a written report on its findings to the Council:

³⁹ Section 57

⁴⁰ Section 59

⁴¹ Section 57(2)

⁴² Chief Executive Officer

“63.-(1) On completing an inquiry into a complaint, a committee of inquiry shall make a written report of its findings to the Council.

(2) The report of the committee of inquiry must specify the following:

- (a) the nature of the complaint that resulted in the inquiry;*
- (b) the evidence presented to the committee;*
- (c) the committee’s findings as to whether any allegation made by a complaint against the registrant is substantiated.*

(3) In addition to the matters specified under subsection (2), the report of the committee of inquiry may include such other matters relating to the registrant as the committee considers appropriate.”

The principles of natural justice require that the committee give reasons for its decision.

In the event that the committee finds that no allegation made by the complainant against the registrant the Council must dismiss the complaint. A copy of the committee’s report will be provided to the Social Workers Registration Board.⁴³

If the committee finds that any allegation made by the complainant against the registrant is substantiated the Council will refer the matter to the Social Workers Registration Board to recommend a sanction or sanctions to be imposed on the registrant.⁴⁴

⁴³ Section 64(1)(a)

⁴⁴ Section 64(1)(b)

Consensual Disposal:

Section 61 of the Act provides that the Professional Conduct Committee or the Health Committee may at any time after a complaint has been referred to it request the registrant to do one or more of the following:

- (a) undertake not to repeat the conduct to which the complaint relates;
- (b) undertake to take such educational course, training or other means of improving the registrant's competence to practise as may be specified by the registration board concerned;
- (c) consent to undergo medical treatment;
- (d) consent to being admonished or censured by the Council.

If a registrant refuses to give the undertaking or consent requested the committee may proceed as if the request had not been made.

Withdrawal of Complaint:

Section 62 of the Act provides that a complaint may be withdrawn by a complainant either while it is being considered by the Preliminary Proceedings Committee or by a committee of inquiry. In these circumstances the committee which is considering the complaint may, with the Council's agreement:

- (a) decide that no further action is to be taken in relation to the complaint, or
- (b) proceed as if the complaint had not been withdrawn.

Sanctions

Within 30 days of receiving the inquiry committee's report in which an allegation has been substantiated against the registrant, the Social Workers Registration Board must consider the report and recommend that one or more of the following sanctions be imposed on the registrant:

- (a) an admonishment or censure;
- (b) the attachment of conditions to his or her registration, including restrictions on the practice of social work by the registrant;
- (c) the suspension of his or her registration for a specified period;
- (d) the cancellation on his or her registration for a specified period;
- (e) a prohibition from applying for a specified period for restoration to the register.⁴⁵

The matter is then referred back to the Council which must consider the report of the committee of inquiry and the recommendation made by the Social Workers Registration Board. Having done so, the Council will issue a direction to the Registration Board that one or more of the above sanctions be imposed, although not necessarily that recommended by the Registration Board.

While not specified in the legislation it is usual for regulators to invite the registrant to attend such Council meeting and that the registrant be given the opportunity to make oral and/or written submissions in relation to sanction.

⁴⁵ Section 65

Noting the obligation to assist the practitioner with as much leniency as possible Finlay P in *Medical Council v Murphy*⁴⁶ set out the considerations relevant when deciding on sanction following an adverse fitness to practise finding:

*“First I have to have regard to the element of making it clear by the order ... to the medical practitioner concerned, the serious view taken of the extent and nature of his misconduct, so as to deter him from being likely, on resuming practice, to be guilty of like or similar conduct. Secondly, it seems to me to be an ingredient though not necessarily the only one that the order should point out to other members of the Medical profession the gravity of the offence of professional misconduct. And thirdly, and this must be to some extent material to all these considerations, there is the specific element of the protection of the public which arises where there is misconduct. I have as well an obligation to assist the medical practitioner with as much leniency as possible in the circumstances.”*⁴⁷

Sanctions other than admonishment or censure must be confirmed by the High Court before they can take effect.⁴⁸ Other than in the situation where the sanction is admonishment or censure, the registrant can apply, within 30 days of receipt of notification of the Council’s decision, to the High Court to cancel the Council’s direction as to sanction.⁴⁹ At the hearing of the application, the Court may consider any evidence adduced or argument made whether or not adduced or made to the committee of inquiry. The Court may make any order it considers appropriate including an order cancelling, confirming or modifying the direction made by the Council. The Court may give the Council or Registration Board any direction that the Court considers appropriate.

Where the registrant does not apply to the High Court for cancellation of the direction the Council must apply within 60 days of the date of notification of the direction to the registrant, for an order confirming the direction. Having heard the application the

⁴⁶ Unreported High Court 29 June 1984

⁴⁷ Note that poor professional performance was not a ground for complaint under the Medical Practitioners Act 1978

⁴⁸ Section 68

⁴⁹ Section 69

Court shall confirm the direction unless the Court sees good reason not to do so.⁵⁰ The decision of the High Court in relation to an application made under either section 69 or section 70 is final except that with the leave of the Court or the Supreme Court, the Council or the registrant may appeal to the Supreme Court on a specified point of law.

Restoration to Register/Removal of Conditions

A person whose registration has been cancelled or who has had conditions attached to their registration following disciplinary proceedings can request that the Council direct the Social Workers Registration Board to restore their name to the register⁵¹ or to have the conditions removed⁵². The person will have the opportunity to make oral or written submissions to the Council.

The Council will consider any submissions made, the criteria established by the by-law for restoration to the register (in the case of a request for restoration of registration) and will consult with the Registration Board. In relation to a request for the removal of conditions, the Council may consider any other relevant information that has come to its attention. If the Board decides to direct that the person's name be restored to the register, after consulting with the Registration Board, it may also direct the Registration Board to attach conditions to the person's registration. Where the Council decides to refuse the request it must as soon as possible notify the person/registrant of the decision, the date of the decision and the time for bringing an appeal to the High Court. Any appeal must be brought within 30 days of receiving notification of the Council's decision. The Court may make an order cancelling, confirming or modifying the Council decision. The Court may give the Council or the Registration Board any direction it considers appropriate.

⁵⁰ Section 70

⁵¹ Section 73

⁵² Section 74

Publication and Notifications

The Council may, if it is in the public interest to do so, advise the public of the imposition or removal of disciplinary sanctions under Part 6 (or where corresponding action taken in relation to the person in another jurisdiction).⁵³ The Council may, having consulted with the committee of inquiry concerned, publish a transcript of all or part of the proceedings before that committee.⁵⁴

The Council is required to notify the Minister for Health of the imposition or removal of a disciplinary sanction (or where corresponding action taken in relation to the person in another jurisdiction).⁵⁵

Where the Council knows the name of the person's employer it must also inform the person's employer of the imposition or removal of a sanction (or similar event in another jurisdiction).⁵⁶

⁵³ Section 77

⁵⁴ Section 78A

⁵⁵ Section 76(1) and (2)

⁵⁶ Section 73(3)

COMPLYING WITH THE PROFESSIONAL CODE OF CONDUCT

SPEAKER: BARRY O'DONNELL SC

Introduction

1. The process of regulation of professions by statutory interventions has accelerated enormously in recent decades. There are now very few professions that are not subject to regulation in some form or another. In many respects, the price to be paid for statutory recognition of a profession is independent regulation and a rejection of self-regulation.

2. For members of a profession it is easy to characterise the process of regulation as yet another layer of bureaucracy and an erosion of the independent character of the member's chosen profession. In addition, often professionals complain that the structures that have been put in place to regulate their profession appear hostile, or in some ways focussed on addressing apparent wrongdoing without a reciprocal focus on supporting the members of the profession to carry out their work in an often difficult environment.

3. In my view many of those views reflect genuine concerns. However, the reality is that regulation is unavoidable and, ultimately, operates for the clear benefit of the members of the professions and the public. In the case of CORU and the social work profession I believe that the process of regulation and the existence of the Code of Conduct manifestly operates to the benefit of the profession and has the real potential to benefit the public interest.

4. The professions regulated under the Health and Social Care Professionals Act 2005, as amended (which, for brevity, I refer to as the 2005 Act) all discharge functions for the benefit of service users and the public. There is a compelling and vital public interest in ensuring that when members of the public find themselves dealing with a social worker they can be assured that the social worker is properly

qualified and accessing continuing education. Moreover, members of the public are entitled to know and rely on the fact that social workers are subject to a code of conduct and ethics that is not aspirational or vague, but rooted in the reality of practice easily understood and capable of being enforced.

5. In this paper I have been asked to consider the Code of Professional Conduct and Ethics for Social Workers, which has been promulgated under the provisions of the 2005 Act, as amended.

6. In order to understand the origins of the Code and to predict how it will operate in practice I will look first at the general structure of the 2005 Act and the process of consultation that led to the Code of Conduct. After looking at the content of the Code of Conduct I will briefly consider the roughly equivalent English experience in order to identify some trends that can be discerned and which may help predict issues that will arise in the context of the Irish regulations.

7. At the outset it is also important to identify issues that are important but which fall outside the scope of this paper.

8. According to the 2015 Annual Report of the Social Workers Registration Board, as of 31 December 2015 a total of 3928 social workers had been registered. Social Workers constitute by a significant margin the largest profession regulated by CORU. The next nearest professions by size of regulated members are radiographers (1589 members) and optometrists (787 members).

9. The figures do not disclose a further, in my view, very important feature of the social work profession. It is very easy to identify the range of work that is carried out by opticians, radiographers and optometrists, for instance. Correspondingly, the

range of issues likely to arise on a day-to-day basis by those professionals is reasonably limited.

10. However, even a cursory consideration of the type and range of functions carried out by social workers and the situations faced by some social workers on a day to day basis show that the issues and challenges are very wide ranging.

11. Social workers operate in a large number of professional environments from hospitals to adult mental health and disability centres, to on the ground work with children and families. While each area of work will throw up its own dilemmas and issues, I think that a consideration of the work involving social workers in child and family practice demonstrates the significant variety and challenges that can be faced.

12. For instance a social worker dealing in child and family practice will face challenges presented by working in an environment that already is highly regulated – for instance by the Child Care Act 1991, the involvement of the Court system, and other regulations such as the Children First guidelines.

13. Social Workers in this area are required to interact with Gardaí, Child and Adolescent Mental Health Services, schools, lawyers, guardians ad litem, and other professionals and state agencies.

14. Social workers will have obligations to their employers who in turn may have their own clear understandings and requirements for the discharge of functions.

15. It almost goes without saying that social workers employed by the State will face enormous difficulties with resources, case loads and supports.

16. Social Workers fundamentally are required to assist and provide services to families who may not be equipped or predisposed to welcome the interventions and where the role of providing assistance can morph into a role of initiating proceedings to remove a child from its family to protect the child.

17. All of these issues – which are not any exhaustive description of the potential issues – make it clear that a social worker in 2016 is operating in an extremely complex field of work where the potential for hostility and misunderstanding is high.

18. Hence, on first view, the imposition of further obligations and the requirement to adhere to a code of conduct may seem like just another burden and potential complication.

19. However, on reflection I consider that the Code of Conduct equips social workers in practice with a valuable framework that can be referred to and that can be of considerable assistance in supporting and guiding day-to-day practice.

20. In my view one of the important potential consequences for the recognition of social work as a distinct profession that involves a distinctive process requiring the exercise of professional judgment is that employers will have to take account of the fact that social workers operate within the scope of a statutory code of conduct. There is a strong argument to be made that this will require employers to respect that clinical judgment and treat social work decision making as something more than simply the carrying out of an employment contract.

21. Finally from the point of view of introductory remarks it is important to note that CORU and the Social Workers Registration Board are in the very early days of their work. As matters progress it will be possible to access statistics and obtain

guidance from decisions on Fitness to Practice issues that in turn will inform how the Code of Conduct and regulatory and disciplinary matters should be approached.

The General Structure of the Act

22. My colleague Teresa Blake will have earlier explained the general structure of the system of regulation for social workers under the 2005 Act, as amended.

23. By way of a brief recap, it is clear that by virtue of section 4(1)(k) of the Act the profession of social worker is a designated profession. This constitutes a valuable recognition that social work is a profession with a particular skill set and approach that leads to the exercise of a professional clinical judgment.

24. The extent of that statutory recognition of the exercise of professional judgment is clear from section 4(3) which provides that a health or social care profession is any profession in which a person exercises skill or judgment relating to any of the following health or social care activities:

- a. The preservation or improvement of the health or wellbeing of others;
- b. The diagnosis, treatment or care of those who are injured, sick, disabled or infirm;
- c. The resolution, through guidance, counselling or otherwise, of personal, social or psychological problems;
- d. The care of those in need of protection, guidance or support.

25. Section 4(4) of the 2005 Act provides that for a profession to be considered for designation as a health and social care profession, the Minister has to have regard to the extent to which the profession has a defined scope of practice and applies a distinct body of knowledge and the existence of defined routes of entry into the profession and of independently assessed entry qualifications; the profession's

commitment to continuing professional development; and, significantly, the degree of risk to the health, safety or welfare of the public from incompetent, unethical or impaired practice of the professions.

26. This suggests to me that one of the principal objectives of the Act – and a factor that will inform the approach of the Courts to interpreting the 2005 Act - is very squarely the protection of the public from professional conduct by those who can present harm if their practice is incompetent, unethical or impaired.

27. Again as described earlier by section 7 of the Act the object of the Council established under the Act is to protect the public by promoting high standards of professional conduct and professional education, training and competence among registrants of the designated professions, and under section 8 the Council has the power to enforce standards of practice for registrants of the designated professions, including the codes of professional conduct and ethics adopted by the registration boards.

28. You will also be aware that the Social Workers Registration Board is established by virtue of section 26 of the Act to perform the functions and exercise the powers assigned under the Act to the registration board of a designated profession, and by section 27(1) of the Act the object of the registration board of a designated profession is to protect the public by fostering high standards of professional conduct and professional education, training and competence among registrants of that profession.

29. One of the specific functions under section 27(3)(c) of the Act is to give guidance to registrants concerning ethical conduct and give guidance and support to them concerning the practice of the designated profession and continuing professional development.

30. It seems clear that that function is not an aspirational function but in fact links very clearly with other functions that feed into the assessment of professional competence and conduct.

31. Hence, under section 31 a registration board of a designated profession may make a code of professional conduct and ethics adopted by the registration board of a designated profession, which must specify the standards of conduct, performance and ethics expected of the registrants of that profession.

32. The code of conduct again is not aspirational but in fact constitutes by section 32 of the Act a byelaw that is then published in the form of a Statutory Instrument.

33. Finally before we look to the Professional Code of Conduct it is worth noting that by section 45 of the Act the registrant is under a positive obligation “as soon as practicable” to notify the registration board concerned of any errors in the register of which the registrant is aware that relate to his or her registration; any change in the name or address of the registrant or any change of employer; any grant to the registrant by a body (other than the board) in or outside the State of a licence, certificate or registration relating to the practice of a profession; any change in the status of such licence, certificate or registration (including the attachment of conditions to it); and by subsection (1)(e) any matter likely to affect the registrant’s entitlement to such licence, certificate or registration and by (1)(f) any matter likely to affect the registrant’s entitlement to be registered under this Act.

34. Accordingly, it seems to me that this reinforces the very strong sense in the Act that not only is the registrant obliged to conduct him or herself in accordance with the code of practice and to adhere to the various standards set out, but there is also a positive legal obligation on a social worker to inform his or her registration board of any matter likely to affect the registrant’s entitlement to their continuing registration.

35. As we will discuss later, this also ties in with the concept that one of the factors the Council may take into account in considering disciplinary measures is the extent to which the social worker who is the subject of a complaint, particularly one which has been founded, has developed an insight into their behaviour such that the likelihood of the incident repeating itself is reduced and confidence of the public can be maintained in the profession.

36. As can be seen from some of the English case studies referred to in this paper, if the English experience is one which will – as I believe it will – be reflected in this jurisdiction, insight and the willingness of the social worker to be forthcoming if errors or difficulties have arisen are factors that will loom large in any enquiry as to whether the misconduct or impairment can be mitigated.

37. Again as Teresa Blake has set out, under Part 6 of the 2005 Act provision is made for complaints, enquiries and discipline. In that regard it is worth reminding ourselves that “poor professional performance” in relation to a registrant means “any failure of the registrant to meet the standards of competence that may reasonably be expected of registrants practising that profession.”

38. “Professional misconduct” is a related but different concept, and in relation to a registrant of a designated profession means:

“...any act, omission or pattern of conduct of the registrant that –

is a breach of the code of professional conduct and ethics adopted by the registration board of that profession, or

if the registrant has been granted by a body outside the State a licence, certificate or registration relating to the practise of that profession, is a breach of a standard of conduct, performance or ethics that applies to a person holding that licence, certificate of registration and that corresponds to a standard contained in the code referred to in paragraph (a)”.

The Code of Professional Conduct and Ethics for Social Workers

39. As you know, the Code of Professional Conduct and Ethics for social workers was made a bye-law by the Social Workers Registration Board through S.I. 143 of 2011. The bye-law came into operation on 29 March 2011 and the Code of Conduct forms part of the Bye-law.

40. Prior to the finalisation of the Code CORU conducted a public consultation process; and the consequent statement is available on their website.

41. The statement following the consultation paper states that certain definite themes were identifiable in the response to the consultation process:

- a. Conflict with employers;
- b. Record keeping and confidentiality;
- c. Supervision;
- d. Addressing health, conduct and competence; and
- e. Respecting the rights and dignity of people.

42. These themes reflect the types of predicable concerns that could arise if an individual social worker is faced with allegations of incompetence or misconduct. In relation to the conflict with employers theme, the concerns related to what was to occur if the professional view of the social worker conflicted with the requirements of their employer. So, for example, the requirement to advocate for a fair distribution of resources could conflict with an employer's views on the allocation of resources.

43. In response section 7 of the then draft Code was amended to accommodate a way in which social workers can advocate for a particular allocation of resources in accordance with their judgment and keep a record of that position on file. What is not

addressed is how that conflict is to be reconciled. Clearly CORU cannot arbitrate on disputes about how, for instance, a statutory body decides on the allocation of scarce resources and the overwhelming likelihood is that the social worker in employment will have to operate in accordance with the employer's final determination on how resources will be allocated. However the fact that the code anticipates that a social worker will document the particular views expressed will ensure that the professional judgment remains on the record.

44. It seems clear that the consultation process gave the Registration Board a valuable opportunity to consider the views expressed by affected social workers and it can be seen from the Statement that many of these views were reflected in amendments to the draft Code.

45. In the foreword to the published Code, Suzanne Quin, the Chairperson, reflects on the importance of fostering high standards of professional conduct and professional education, training and competence among registered social workers. The foreword also includes the following cautionary note which all social workers should consider as one of critical importance to the practice of their profession:-

“It is important that all registered social workers read, understand and meet the standards set out in this Code. Failure to do so could result in a complaint of professional misconduct being made about the registrant. Under the Health and Social Care Professionals Act 2005, professional misconduct is defined as any act, omission or pattern of conduct of the registrant which is a breach of this the Code.”

46. In the overview of the Code a series of 23 particular duties are listed. I will not be addressing each of the duties; rather it may be more helpful to consider some of the issues and duties that are likely to be most significant. Obviously every registered social worker should familiarise themselves thoroughly with the Code, which is framed in a very accessible and clear way.

47. It is also noteworthy that the Code is framed as a “principles based code”, and is not prescriptive in nature. Hence the Code does not operate a strict set of rules but instead ought to be seen as a set of guiding principles that assist social workers rather than a set of rules that provide a strict set of steps to be adhered to in all cases.

48. Some of the duties as can be seen are couched in very broad language, for example, “respecting the right to self determination”, while others are framed in quite specific ways, such as the requirement to treat information about service users as confidential. Nevertheless, the reality is that the obligation to adhere to the Code relates to each of the 23 duties identified.

49. At the outset it is important to reiterate that all professions in Ireland, particularly those that are closely linked to the public service operate under very considerable restraints and constraints and often in an environment where, to put it mildly, the resources, supports and backup for the professionals are not at their optimum within the system.

50. It is perhaps understandable when faced with the Code of Conduct to consider that these are directed towards a working environment that may be almost unrecognisable when compared to the working environment in practice.

51. Social workers may well express concerns that in many instances they are expected to perform in accordance with the Code of Conduct in an environment where they are not properly prepared for the jobs that they are asked to carry out, where their training on the job does not provide the level of assistance that should be expected, that their caseloads are not capped at a manageable or realistic level and perhaps that the increasing level of regulation and scrutiny leads to a diversion of time into bureaucratic administration and recordkeeping rather than carrying out the

social work profession that most social workers had in mind when they trained for and sought to enter the profession.

52. It seems to me that if on a legislative and governmental level there is a requirement that social workers working on the ground adhere to a strict and onerous code of conduct that there is a reciprocal obligation on the part of those that fund and manage the service to ensure that proper regular supervision, training and education is always available and that a working environment exists in which regular communication between social workers and their line management is encouraged and where issues encountered by social workers can be confidently communicated up the line without any concern that that may be seen as troublemaking or disloyalty.

53. To some extent the Code of Conduct takes account of some of the practical issues that can arise when social workers are working on the ground. For instance, under the heading of integrity of professional practice it is noted that practice should be benefit and not harm others but there is a recognition that:-

“Often difficult decisions must be made that may be perceived as harmful by a service user. If there is a conflict of interests between the service user and the safeguarding of children or other vulnerable people, safeguarding should take precedence.”

54. Again, the Code at section 12 refers to the keeping of accurate records. While there may be a generalised concern that the administrative and regulatory burden on social workers has an adverse impact on the amount of work that they are able to complete with individual clients, the reality is that in the current environment and particularly in areas that may involve an interaction with the court system or other systems (although not exclusively) the keeping of records operates not only as a valuable way to ensure that the system records what is done and why it has been done, which benefits both the system and the end users, but it is also a valuable form of protection for social workers and social work teams on the ground.

55. There will always be situations in which when faced with a particular set of circumstances there may not be a single clear answer apparent. In fact, in some respects this is the hallmark of the exercise of professional judgment by a professional.

56. By acting in accordance with established norms and adhering to established standards of practice – albeit never slavishly or automatically – a professional is able to exercise his or her professional or clinical judgment with a view to assessing what appears to be the best response to the situation that presents itself. That process is protected by recording the process and policy that it is being followed and ensuring that that is done in a reasonable contemporaneous manner with the events that are being recorded. It is far easier in that situation for other colleagues, management and service users as well as outside bodies such as the courts to understand how decisions were reached and to have a context in which the professional judgment can be valued and respected.

57. An important point to note is that every person in every job encounters health issues of varying degrees of seriousness that may impact on their ability to perform their functions properly.

58. As noted by section 19 in the Code of Conduct, it is important that health issues are addressed if they are harming fitness to practice. This ties in with the requirement under the 2005 Act that a registrant is under a positive obligation to bring certain matters to the attention of its registration body. Over and above any employment law requirements that there may be to ensure that an employer is aware of health difficulties that are arising, there is a common sense basis for ensuring that you do not work in circumstances in which your ability is seriously compromised and your conduct, performance or judgment is affected by health issues.

59. Similarly, at section 20 it is clear that there is a proactive obligation on all professionals to raise concerns with the appropriate authority if policy, systems, working conditions or the actions, professional performance or health of you or others compromise service user care or public safety.

60. In some ways this links in with the clear provision under the 2005 Act to ensure that social workers are proactive in reporting difficulties back to their registration board or the Council.

Confidentiality and Professional Practice

61. Section 21 of the Code of Conduct deals with treating information about service users as confidential and there are a number of issues arising under this. The precise quote from the Code is:-

“(a) You must treat information about service users as confidential and use it only for the purpose for which you obtained unless to do so would put the service user or others at risk.

(b) You must not knowingly release any personal or confidential information to anyone who is not entitled to it except if the law or your professional practice obligations require you to do so. You must also check that people who ask for information are entitled to it.

(c) You must only use information about a service user to provide service to that person or if the service user has given specific permission to do so.

(d) You should consult service users about their preferences regarding the use of information about them.

(e) You must keep to the conditions of any relevant data protection legislation and follow best practice and relevant agency guidelines for handling confidential information relating to individuals at all times. Best practice is likely to change over time, and you must stay up to date with developments.

Disclosure of information to other professionals

(f) Information may need to be shared with other relevant professionals to provide safe and effective care. If disclosure of a service user's information is necessary as part of their care, you should take reasonable steps to ensure that you make such a disclosure to an appropriate person who understands that the information must be kept confidential.”

62. Confidentiality is a difficult issue in practice because of the potential existence of multiple stakeholders in a social work context. The Code addresses this in a very sensible way. It recognises that personal information is inherently confidential; that sometimes information must be shared – for instance one immediately thinks of the requirements of Children First in the area of child protection. The Code makes it clear that one significant protection for the social worker is to make clear at the outset with a client that while information is confidential, the extent of the confidentiality is not absolute and that there are circumstances in which information can and must be shared with others.

63. One of the more difficult issues will be the sharing of confidential information on an informal basis. Often social workers will be contacted by other professionals – such as other social workers, Gardaí, schools or persons working in the voluntary sector – who seek a quiet word or heads up in respect of a client. This is an area that will need to be dealt with very carefully and the very informality of the process can present a danger to a social worker who is in possession of confidential information. While it is not possible to be comprehensive on this issue and certainly this should not be treated as definitive legal advice my general view is that requests for this type of information sharing ought to be dealt with in the manner suggested by the Code. This may introduce an unwelcome level of formality to the situation, but I would suggest that treating any request for information in a proper and documented way will provide significant protection if an issue later arises.

What the future is likely to hold

64. In terms of the working out of the Code and its role in fitness to practice matters it is really too early to form a definitive view. It will be important that CORU publish as much information as possible arising from fitness to practice matters as this will be an extremely valuable resource for social workers, employers and the public in understanding how particular situations are likely to be addressed.

65. It is perhaps helpful to consider the well established English equivalent regulations with a view to considering likely issues. Obviously this is a different statutory code in a different jurisdiction where social workers may be subject to different working requirements and expectations. Nevertheless there are some helpful pointers.

English Regulation

66. At present social workers are regulated from a professional conduct point of view by the Health and Care Professions Council (HCPC).

67. There appear to be plans afoot in the UK to bring about a change whereby social workers will be regulated by a new Government executive agency under Regulations made under the Child and Social Work Bill. The new agency is to be accountable to the Education Secretary and based in the Department of Education and will be supported by the Department of Education and Department of Health. The proposals seem to involve the Government introducing a new set of professional standards for social workers, more challenging CPD requirements and a tougher approval regime for social work degree programmes. The agency will also oversee the fitness to practice system and introduce post qualifying accreditation and career development pathways. The proposals would move the regulation of social workers

from the HCPC which is operationally and financially independent of Government to a form of regulation closer to Government.

68. However, as matters stand the HCPC provides the regulatory framework within which social workers conduct is managed in England.

69. In the HCPC Fitness to Practice Annual Report, which deals with the period 1 April 2014 to 31 March 2014, a number of interesting factors are identified.

70. The HCPC Fitness to Practice function describes fitness to practice as:

“When we say that a professional is “fit to practice” we mean that they have the skills, knowledge and character to practice their profession safely and effectively. However, fitness to practice is not just about professional performance. It also includes acts by a professional which may affect public protection or confidence in the profession. This may include matters not directly related to professional practice.”

71. The fitness to practice process is designed to protect the public from those who are not fit to practice. If a professional’s fitness to practice is “impaired”, it means that there are concerns about their ability to practice safely and effectively. This may mean that they should not practice at all, or that they should be limited in what they are allowed to do.

72. Sometimes professionals make mistakes that are unlikely to be repeated. This means that a person’s overall fitness to practice is unlikely to be “impaired”. People sometimes make mistakes or have once-off instances of unprofessional conduct or behaviour. The processes do not mean that every isolated or minor mistake will be pursued. However, if a professional is found to fall below acceptable standards action will be taken.

73. In its Fitness to Practice Annual Report, the HCPC outlines the type of cases that they consider in the following terms:

“We consider every case individually. However, a professional’s fitness to practice is likely to be impaired if the evidence showed that they:

- Were dishonest, committed fraud or abused someone’s trust;
- Exploited a vulnerable person;
- Failed to respect service users’ rights to make choices about their own care;
- Have health problems which they have not dealt with and which may affect the safety of service users;
- Hid mistakes or tried to block our investigation;
- Had an improper relationship with a service user;
- Carried out reckless or deliberately harmful acts;
- Seriously or persistently failed to meet standards;
- Were involved in sexual misconduct or indecency (including any involvement in child pornography);
- Have a substance abuse or misuse problem;
- Have been violent or displayed threatening behaviour; or
- Carried out other, equally serious, activities which affect public confidence in the profession.”

74. On the other hand, the HCPC Fitness to Practice Annual Report 2015 also outlines things that they HCPC cannot do:

“We are not able to:

- Consider cases about professionals who are not registered with us;
- Consider cases about organisations (we only deal with cases about individual professionals);

- Get involved in clinical or social care arrangements;
- Reverse decisions of other organisations or bodies;
- Deal with customer service issues;
- Arrange refunds or compensation;
- Fine a professional;
- Give legal advice; or
- Make a professional apologise.”

75. The HCPC Fitness to Practice statistics are dealt with in the Annual Report from page 10 onwards and in a series of graphs and tables they outline that perhaps unexpectedly 45.5% of all concerns raised and drawn to the attention of the HCPC came from members of the public. Next, 25.5% of concerns were raised by employers and, interestingly, 16.3% arrived at the HCPC by way of self referrals. The remainder of referrals came from anonymous sources, other registrants or professionals, professional bodies, the police.

76. In relation to social workers in England, there appear to have been a total of 1,251 complaints made. Of those complaints 696 came from members of the public; 295 came from employers and 135 were made in the form of self referrals.

77. In all, the HCPC dealt with 16 different professions but 57.65% of their complaints or total number of cases related to social workers in England. It has to be noted that social workers are by far the largest professional group represented by registration with the HCPC with 80,397 registrants in the 2015 Report, with the next highest groups being physiotherapists at 49,685 and occupational therapists at 36,128.

78. However, the statistics also show that out of the total number of registrants who are members of the social work profession in England 1.42% of the registrants were the subject matter of concerns reported to the HCPC, and this is the highest percentage given in their statistics.

79. In terms of outcomes of cases dealt with by the HCPC in the relevant period there were 155 outcomes in relation to social workers. 28 social workers were the subject of cautions, 12 were the subject of conditions imposed on their practice, 4 social workers were dealt with by no further action, 36 of the 155 had their complaints dealt with on a not well founded basis, 9 were disciplined, 1 was removed from the Register on the basis that their registration initially was incorrect or fraudulent, 23 were struck off, 33 suspended and 9 were removed from the Register by agreement or consent.

80. The HCPC give a number of case studies in the 2015 Annual Report. Under the heading "Lack of competence" one case study involves social workers. In that case a social worker was cautioned for a period of three years after a panel of the Conduct and Competence Committee found wide ranging failings in her recordkeeping and service user care. It was found that the registrant had failed to complete records on the electronic record system and had not conducted visits within the requirements specified by her employer.

81. The registrant attended the hearing and gave evidence. After considering all of the evidence, the panel was satisfied that the registrant was unaware of the standards to which she should adhere to. It noted that the registrant had encountered severe workload pressures and that there were difficulties with her induction. Taking these factors into account, the panel was of the view that the registrant had not been wilful or reckless and that the facts proved amounted to a lack of competence and not misconduct.

82. In considering whether the registrant's fitness to practice was currently impaired, the panel noted that the registrant did not fully appreciate the seriousness of her deficiencies. It found insufficient evidence to suggest that the registrant would be suitably assertive in requesting information about an employer's recordkeeping policies and procedures and supervision of her own records. Accordingly, the panel found the registrant's current fitness to practice to be impaired.

83. The panel went on to determine that the seriousness of the registrant's deficiencies were such that public confidence in the profession and the Regulator would be undermined if a sanction were not imposed. In determining the appropriate sanction, the panel took into account that the allegation had occurred while the registrant was working for one particular employer among a series of placements she had undertaken in her chosen and otherwise unblemished career as an agency worker. It noted that in a subsequent placement the registrant had specifically requested weekly supervision. The panel found this to be an indication of both remedial action and the registrant's growing insight into her deficiencies. The panel was therefore of the view that the likelihood of recurrence and risk to service users was low. In the circumstances the panel was satisfied that a caution order was the appropriate and proportionate sanction and that a period of three years was sufficient to reflect the seriousness of the case and the need to protect the public and its confidence in the profession (Fitness to Practice Annual Report 2015, pages 44 and 45).

84. The HCPC also provide a case study in relation to misconduct issues involving social workers on its website. In that case which is described as "Case Study 2" the social work registrant was made the subject of a conditions of practice order after a panel of the conduct and competence committee found that comments she had posted on a social media site in relation to a case she was managing were unprofessional and put the confidentiality of service users at risk.

85. The factual basis of the allegation was found proven and the panel decided the registrant's conduct amounted to misconduct and that her fitness to practice was impaired.

86. In reaching its decisions on the facts, the panel took account of the documentary evidence and the oral evidence of two witnesses, the registrant's manager and a member of the service user family involved.

87. At the misconduct stage the panel noted that the content of the registrant's posts were disrespectful and demonstrated poor judgment on her part. It was of the view that a member of the public reading the comments posted by the registrant would be likely to develop a very negative view of the social work profession, especially given their disrespectful and insensitive tone. It also noted that the member of the service user family involved had said she had lost all confidence in social workers due to the registrant's actions.

88. In reaching its decision that the registrant's fitness to practice was impaired, the panel took account of both personal factors (for example, the registrant's current behaviour) and public factors (for example, maintaining public confidence in the profession).

89. In relation to personal factors, the panel, while noting the registrant's misconduct was remediable, was not satisfied that the registrant was fully remediated. In her evidence she had sought to lay blame on a lack of managerial support and to lessen the impact of the potential breach of confidentiality by suggesting that there were a number of families in the area to whom the information would be applicable. Despite her assurances about future engagement with social media, the panel did not consider that she had demonstrated fully insight into her sole responsibility for it.

90. In relation to public factors, the panel considered maintenance of public confidence in the profession, as well as the need to uphold standards of conduct and behaviour within the profession would be undermined if a finding of impairment were not made in the case. The panel noted that the use of social media by professionals is common place. The ease and immediacy with which a person can communicate with large numbers of others means that great care needs to be taken by professionals to ensure that nothing is disseminated which might affect the public's opinion of a particular profession or which has even the potential to breach confidentiality. In this case the registrant did both.

91. The panel concluded the appropriate sanction was a 12 month conditions of practice order as it would maintain public confidence in the profession and would have a deterrent effect to other social work professionals. However, it would allow the registrant to continue to work (as the evidence demonstrated she was still working safely and effectively as a social worker) while remediating the concerns of the panel.

92. At a review hearing just under one year later, the panel conducted a comprehensive appraisal of the registrant's current abilities to establish whether she is now fit to return to unrestricted practice. The panel heard evidence from the registrant that on reflection she now fully appreciated the inappropriateness of her actions. It also considered evidence, documentary and from the registrant's employer, that the registrant had complied with the conditions of practice of the order. Taking this into account, the panel was of the view that the registrant had gained substantial and meaningful insight into her previous behaviour and that there was now little likelihood of repetition, thereby addressing the previous panel's main causes for concern. For these reasons, the panel was satisfied that in all the circumstances, the public interest would not be undermined by revoking the conditions of practice order. The order was therefore revoked and the registrant is now practising unrestricted.

Additional Factors

93. It will often be the case that depending on the matter or subject matter of the complaint, that a number of other considerations will have to be brought to bear and there are a number of potentially interlinked or overlapping issues or processes that can be engaged when considering professional misconduct or a failure to adhere to proper standards. For instance, there can be an overlap between the process under the Irish fitness to practice regime and criminal investigations and criminal cases, for example where it is suggested that the registrant has been convicted on an indictable offence and that as a consequence the registrant should be struck off.

94. Similarly, it may well be that the facts giving rise to the complaint on the fitness to practice side could also overlap with or be the subject of employment processes related to disciplinary proceedings depending on the stance of the employer. It is also conceivable that the conduct of the social worker which is the subject of the complaint could also be involved in proceedings brought by a person who claimed to be harmed by the actions of the social worker in claims for damages.

95. A further consideration that needs to be borne in mind is that while many areas of social work practice are uncontroversial often social workers can find themselves involved in extremely contentious issues, for example, proceedings brought pursuant to the provisions of the Child Care Act 1991 as amended in which the Child and Family Agency seek orders from the District Court placing a child who is at risk in the care of the Child and Family Agency.

96. All social workers who practice in this area of law, along with almost all professionals who practice in the area will appreciate that this is a fraught and at times highly contentious area of practice.

97. There is no doubt that many parents in particular can feel profoundly aggrieved by the interaction with the social work services. In some instances this is based on a misapprehension as to the role of the social worker and the social worker's required focus on the welfare of the child as a paramount consideration. So for instance, the same team of social workers who may have initially involved themselves in a family with a view to assisting and ameliorating difficulties that arise may later find themselves in a position where as a matter of their professional judgment it is necessary to initiate the process of taking a child into care or obtaining a supervision order.

98. Often with a view to defending proceedings in which children are sought to be taken into care the parents will seek to question the manner in which social work judgments have been reached and thereby to undermine the theory of the application before the District Court that the child is at risk and that a care order ought be made.

99. It is unfortunately entirely predictable that in a small proportion of those cases, aggrieved parents, some of whom present with significant difficulties of their own, will seek to make complaints against social workers which are closely linked to and related to the proceedings that occurred in court.

100. It is clear that there are certain protections both in general law and also in the practice of CORU to protect against this but clearly each case will have to be determined on its own merits and it cannot be ruled out that a social worker will find themselves having to answer for the manner in which they conducted themselves in or about child care litigation.

101. The Supreme Court in the context of professional conduct of solicitors has dealt with a similar issue in the case of O'Reilly v Lee [2008] 4 I.R. 269. In that case the appellant had made a complaint of misconduct to the Solicitors Disciplinary

Tribunal against the respondent solicitor who had represented the appellant's wife in matrimonial proceedings before the Circuit Court. The Solicitors Disciplinary Tribunal had found that there was no prima facie case of misconduct and that had been appealed to the High Court.

102. Ultimately the complaint focussed on the manner in which the matrimonial proceedings were conducted in the Circuit Court. It was stated that they were conducted in an oppressive manner and that there were numerous applications which were considered unnecessary and caused extensive or excessive expense to the parties; it was contended that reports were obtained on behalf of the appellant that were inappropriate; that the examination of his children was arranged without his knowledge and that he was repeatedly given short notice of applications to be made to Court; that witnesses were called at hearings without advance notice to him; that his resignation letter from a former employer may have been improperly obtained; that improper use was made of his laptop computer; that he was subjected to inappropriate applications for discovery and, in connection with the same, inappropriate enquiries were made of third parties; that his opponent's discovery was incomplete and claims made by her for maintenance lacked vouching; and that his discovery in relation to his shareholding in a company was not accepted and that too was inappropriate.

103. In the High Court, the President Mr. Justice Finnegan found that all the matters raised were matters which could and ought properly to have been canvassed in a forum other than the Disciplinary Tribunal. In the main these were matters for the Trial Judge to have determined by way of complaint or response to complaint in the course of hearings.

104. In the Supreme Court the judgment of the High Court was upheld and the general tenor of the Supreme Court's judgment was that it was not appropriate to raise in disciplinary proceedings matters which ought properly to have been raised in court proceedings and that a complaint to a professional tribunal should not be used

as a collateral challenge to the outcome of court proceedings by disappointed parties.

105. Nevertheless, the Supreme Court appear to have accepted (page 276) that there may be certain circumstances in which a complaint can be made in respect of matters arising in the course of proceedings, such as, for example, a solicitor misleading a court and that such an event is not outside the remit of the disciplinary tribunal.

106. The Court also noted that, and this is a point of more general significance, at paragraph 24 of the judgment (page 278) that it is not sufficient for a complainant to raise an allegation that the general code of conduct has been breached. As noted by Macken J. in the Supreme Court:-

“[24] ...it is always the case that a person making a complaint, such as the Appellant in this appeal, has the burden of establishing, at least on a prima facie basis, (1) that there are specific codes upon which he relies, invoking them with particularity, and (2) that an identifiable action allegedly constitutes a breach of that particular code or codes. It is not sufficient to argue that the conduct complained of is “unacceptable” or “atrocious” for example, as the Appellant did during the hearing, because these are subjective expressions having no clear or established significance in law. Neither is it either sufficient, as here, to make a general reference in affidavits to the existence of codes and contend that the judgment is deficient in failing to refer specifically to them.”

107. It seems to me that in general terms a similar concern has been anticipated and responded to by CORU, as in some of its public documents including information for the public regarding fitness to practice which is available on the CORU website, the following types of complaints are described as ones which could be considered by CORU:-

“CORU can only take action in respect of a registrant where the incidents complained of are serious and raise a concern about the registrant’s ability to practice his or her profession. CORU’s objective is to take action where necessary to protect service users, patients and the public interest. CORU’s role is not to resolve individual complaints.

Before making a complaint to CORU you may wish to consider whether it is better to make your complaint locally to the registrant directly or to the relevant employer.

The fitness to practise team in CORU can help with queries in relation to the types of complaints that can be considered by CORU. For information about the types of things that CORU cannot do please click here.”

108. In relation to court proceedings, CORU make the following observations on their website [http://www.CORU.ie/en/public/ftp_public_how_to_make_a_complaint]:-
“CORU’s fitness to practise process should not be used as a forum for retrying cases heard before the court. CORU cannot interfere with evidence given in court proceedings or overturn the decision of the court.

In acting as expert witnesses, registrants are generally not immune from fitness to practise proceedings. However, CORU must be careful not to interfere in matters which are within the remit of the relevant court or tribunal.

As general principle, the admission of evidence is a matter for the court or tribunal that is hearing the case. Complaints about a registrant who is acting as a witness should be raised with the court or tribunal that is hearing the case. This is particularly the case if the complaint is about dissatisfaction with the opinion expressed by the registrant giving expert evidence, which is properly a matter for the court or tribunal

which has heard the evidence. Complaints made on this basis will be closed by CORU if CORU is of the opinion that the complaint relates to matters that should be raised before the court.

CORU is unlikely to take action in respect of a complaint about a registrant giving evidence in court proceedings unless it can be demonstrated that (a) the registrant has made false claims of expertise or has given evidence outside of the registrant's expertise; (b) has breached the expert's duty to assist the court or tribunal; or (c) has breached the obligation to produce an objective, unbiased, independent report based upon all material facts.

Please note that if you do make a complaint related to court proceedings and you intend to provide CORU with a copy of any report that was ordered by the court, for example a social work report, you need to obtain the permission of the court to provide the report to CORU. CORU will only deal with the complaint once the permission of the court to release the report to CORU has been obtained.”

109. This last point is significant and social workers who are the subject matter of a complaint that arises from child care proceedings, or indeed from family law proceedings will have to consider very carefully and in all likelihood take legal advice regarding the extent to which communications can be made with CORU without breaching any of the legal requirements that go with proceedings either under the Child Care Act 1991 or under the various Family Law Acts, most of which impose a general obligation that nothing can be reported or disclosed that arose in the course of the proceedings and that obviously would include reports or witness statements provided for the purpose of those proceedings.

110. My understanding is that CORU has considered the question of how complaints relating to in camera proceedings are to be dealt with and I suggest that in each instance guidance must be sought before there is any disclosure of in camera type material or material that may be covered by those rules. Indeed, in every situation in which a complaint is made about a social worker advice ought to

be obtained at an early stage to ensure that the interests of the social worker are protected.

COMPLAINTS, INQUIRIES AND DISCIPLINE UNDER THE HEALTH AND SOCIAL CARE PROFESSIONALS ACT 2005

SPEAKER: MARK DE BLACAM SC

1. BODIES ESTABLISHED UNDER THE ACT

The 2005 Act establishes the bodies which deal with complaints, inquiries and discipline relating to “registrants” under the Act. These bodies are the Health and Social Care Professionals Council, the registration boards and disciplinary committees.

(“Coru” is a name which is collectively attached to the Council and the registration boards.)

The Health and Social Care Professionals Council

Part 2 of the Act deals with the Health and Social Care Professionals Council.

The object of the Council is to protect the public by promoting high standards of professional conduct and professional education, training and competence among registrants of the designated professions: s 7.

In order to further this object, the Council exercises statutory powers and functions: s 8. These include the following.

- The enforcement of standards of practice for registrants, including the codes of professional conduct and ethics established by their registration boards.
- The establishment of committees of inquiry into complaints under Part 6 of the Act.
- Making decisions and giving directions under Part 6 (see below) relating to the imposition of disciplinary sanctions.
- The performance of functions assigned to it by the Minister relating to
 - the education and training of registrants and the practice of the profession, or

- the implementation of any directive or regulation of the EU Council concerning the practice of, and persons engaged in, health care or social care.

Registration boards

Part 3 of the Act deals with registration boards.

The object of a registration board is to protect the public by fostering high standards of professional conduct and professional education, training and competence among registrants. A board's statutory functions include the following.

- The establishment and maintenance of a register of members.
- The issuance of certificates of registration.
- Giving guidance to registrants concerning ethical conduct and guidance and support concerning the practice of the profession and continuing professional development.
- Making recommendations with respect to sanctions to be imposed on registrants under Part 6 (see below): s 27.

2. THE REGULATION OF COMPLAINTS, DISCIPLINE AND INQUIRIES UNDER THE PART 6 2005 ACT

The regulation of complaints, inquiries and discipline concerning health and social care professionals is dealt with in Part 6 of the 2005 Act. In broad terms, Part 6 deals with the making of complaints and the initial disposal of them before "disciplinary committees".

Disciplinary committees

For the purpose of dealing with complaints the Act provides for disciplinary committees. Section 51 requires the Council to establish the following committees.

- A preliminary proceedings committee;
- A professional conduct committee;
- A health committee.

Each committee consists of a chairman and such other members as are appointed by the Council: s 51(2).

A majority of the members of each committee must be registrants of the designated professions. At least one third of members of each committee must be persons other than registrants, at least one of whom is to be representative of the general public interest: s 51(4).

For each case that comes before a committee, the majority must include at least one member who is a registrant of the same designated profession as the registrant to whom the case relates, and at least one member who is a registrant of another designated profession: s 51(5).

Making a complaint

Section 52: A complaint may be made to the Council concerning a registrant on the grounds of

- professional misconduct,
- poor professional performance,
- impairment of the registrant's ability to practise the profession concerned because of a physical or mental ailment, an emotional disturbance or an addiction to alcohol or drugs,
- a failure to comply with a term or condition of registration imposed under Part 6,
- a contravention of the Act, the rules or bye-laws,
- a conviction for an offence in the State triable on indictment or a conviction outside the State for an offence consisting of acts or omissions that, if done or made in the State, would constitute an offence triable on indictment.

A complaint must be made in writing or in any other form acceptable to the Council and it may be made by or on behalf of any person or by a registration board: s 52(3).

The preliminary proceedings committee

After receiving a complaint, the Council must refer it to a preliminary proceedings committee for an opinion as to whether there is sufficient cause to warrant further action being taken in relation to it: s 53(1).

In practice, a preliminary proceedings committee is made up of seven people.

The preliminary proceedings committee may, by written notice

- require the complainant to verify, by affidavit or otherwise, anything contained in the complaint;
- request the complainant to supply more information relating to the matter raised by the complaint;
- require that information requested by supplied by means of a statutory declaration: s 53(2).

The preliminary proceedings committee must notify the registrant of the complaint, its nature and the name of the complainant: s 53(3).

The registrant may supply the preliminary proceedings committee with any information he or she believes should be considered by it or by a committee of inquiry: s 53(4).

If requested by the preliminary proceedings committee to supply any information relating to the complaint, the registrant must supply the information within such reasonable time as may be specified by the committee: s 53(5).

Before forming an opinion on whether there is sufficient cause to warrant further action being taken in relation to the complaint, the preliminary proceedings committee must consider

- any information supplied under s 53 concerning the complaint, and
- whether the matter is trivial or vexatious or the complaint is without substance or made in bad faith.

If the preliminary proceedings committee is of the opinion that there is not sufficient cause to warrant further action in relation to a complaint, it must inform the Council of that opinion: s 54(1).

At that point the Council may

- decide to take no further action in relation to the complaint, or
- if it considers it necessary, it may direct that further action be taken under s 56.

On the other hand, if a preliminary proceedings committee is of the opinion that there is sufficient cause to warrant further action being taken, or if the Council decides that such action is necessary, the preliminary proceedings committee must either

- refer the complaint for resolution by mediation or other informal means, but only if it determines in accordance with guidelines that the complaint is one that could be so resolved,
- refer the complaint to either of the following committees of inquiry
 - a professional conduct committee, or
 - a health committee: s 56(1).

Where it is informed that a complaint referred for resolution by mediation or other informal means cannot be so resolved, a preliminary proceedings committee must refer the complaint to a committee of inquiry: s 56(2).

Proceedings before a committee of inquiry

As we have seen, there are two types of committee of inquiry, a professional conduct committee and a health committee. The former type of committee is used to examine a registrant's conduct or competence. The latter is used to determine whether an alleged disability affects a registrant's ability to work.

A professional conduct committee is made up of three people (one registrant from the same profession, one registrant from a different profession and one non-registrant). This committee sits with a legal assessor whose function is to provide independent legal advice to the committee.

A health committee has a similar composition as a professional conduct committee and sits with both a legal assessor and a registered medical practitioner.

Where the complaint is referred to a committee of inquiry, the registrar must notify the registrant concerned of

- the referral of the complaint and the name of the committee;
- the nature of the subject-matter of the inquiry, including the particulars of any evidence in support of the complaint;
- the opportunity of the registrant, or his or her representative, to be present and to defend the registrant at the hearing: s 57(1).

The registrar must notify the registrant of the date, time and place of the hearing not later than 30 days before the hearing date: s 57(2).

A hearing before a professional conduct committee must be in public, unless

- the registrant or the complainant requests the committee to hold all or part of the hearing otherwise than in public; and
- the committee is satisfied that it would be appropriate to hold the hearing or part of it otherwise than in public: s 58(2).

On the other hand, a hearing before a health committee must be held otherwise than in public, unless

- the registrant or the complainant requests that all or part of the hearing be held in public, and
- the committee is satisfied that it would be appropriate to hold the hearing or part of it in public: s 58(3).

At the hearing,

- the registrar, or any other person with the leave of the committee, presents the evidence in support of the complaint
- testimony is to be given on oath, and
- there is a full right to cross-examine witnesses and call evidence in defence and reply: s 58(4).

A committee of inquiry has all the powers, rights and privileges that are vested in a High Court judge relating to

- enforcing the attendance of witnesses,
- examining witnesses on oath, and
- compelling the production of records: s 59(1).

A committee of inquiry, subject to any rules made by the Council and the requirements of fair procedures, may receive evidence given

- orally before the committee,
- by affidavit, or
- as otherwise allowed by the rules, including by means of a video-link or video recording: s 59(4).

A witness before a committee of inquiry is entitled to the same immunities and privileges as a witness before the High Court: s 59(5).

On completing an inquiry, a committee of inquiry must make a written report on its findings to the Council: s 63(1).

The report must specify

- the nature of the complaint that resulted in the inquiry;
- the evidence presented to the committee;
- the committee's findings as to whether any allegation made by a complainant against the registrant is substantiated: s 63(2).

The report may also include such other matters relating to the registrant as the committee considers appropriate: s 63(3).

Steps for the Council on receiving the committee of inquiry's report

On receiving the report of a committee of inquiry, the Council must

- if the committee finds that no allegation made against the registrant is substantiated, dismiss the complaint;

- if an allegation is substantiated, request the registration board concerned to recommend, under s 65, one or more disciplinary sanction to be imposed on the registrant: s 64(1).

Where a sanction is requested, a registration board must, within 30 days after receiving a copy of the report, recommend one or more of the following disciplinary sanctions to the Council

- an admonishment or a censure;
- the attachment of conditions to the registration, including restrictions on the practice of the designated profession;
- the suspension of registration for a specified period;
- the cancellation of the registration;
- a prohibition from applying for restoration to the register for a specified period: s 65(1).

Before making its recommendation, the registration board concerned must consider the findings in the committee of inquiry's report: s 65(2).

The Council, after considering the committee of inquiry's report and any recommendation made by the registration board concerned, must direct the board to impose on the registrant any one or more of the disciplinary sanctions specified in its direction: s 66(1).

After directing a registration board under s 66 to impose a disciplinary sanction, the Council must notify the registrant and the complainant of

- the nature of the disciplinary sanction;
- the date on which the direction was given;
- the reasons for the imposition of the sanction: s 67(1).
-

The High Court's role in the process

A direction to impose a disciplinary sanction (other than an admonishment or a censure) on a registrant does not take effect unless the direction is confirmed by the High Court: s 68.

Other than in the case of an admonishment or censure, a registrant affected by a direction to impose a disciplinary sanction may apply to the Court for an order cancelling the direction: s 69(1).

An application under s 69 must be made within 30 days after the registrant receives notification of the direction: s 69(2).

On hearing the application, the Court may consider any evidence adduced or argument made, whether or not adduced or made to the committee of inquiry: s 69(3).

After the hearing, the Court may

- make any order that it considers appropriate, including an order cancelling, confirming or modifying the direction, and
- give to the Council or the registration board concerned any direction that it considers appropriate: s 69(4).

If a registrant does not apply to the Court for an order cancelling a direction within the time allowed under s 69, the Council must apply for an order confirming the direction: s 70(1).

This application must be made within 60 days after the registrant receives notification of the direction: s 70 (2).

After hearing the application, the Court must confirm the Council's direction, unless it sees good reason not to do so: s 70(3).

The High Court's decision is final except where leave is granted for an appeal on a specified question of law: s 71(2).

Notification to the registrant

On complying with a direction confirmed or given by the Court to attach conditions to a registration, the registration board must notify the registrant of the conditions: s 72(1).

Likewise on complying with a direction confirmed or given by the Court to suspend or cancel a registration, the registration board concerned must notify the registrant of

- the suspension or cancellation, and
- in the case of a suspension, the period during which the registration is to be suspended: s 72(2).

3. WHAT IS PROFESSIONAL MISCONDUCT OR POOR PROFESSIONAL PERFORMANCE?

Most of the grounds of complaint set out in s 52 are relatively specific, eg, impairment of the ability to practice because of a physical ailment. Two of the grounds – and probably the two most important – are somewhat vague. These are the complaints of professional misconduct and of poor professional performance.

Both terms are defined in s 50 of the 2005 Act. “Poor professional performance” means “any failure of the registrant to meet the standards of competence that may reasonably be expected of registrants practising that profession”.

“Professional misconduct” means “any act, omission or pattern of conduct ... that –

- (a) is a breach of the code of professional conduct and ethics adopted by the registration board of that profession”, or
- (b) if the registrant has been granted by a body outside the State a licence, certificate or registration relating to the practice of that profession is a breach of a standard that applies to a person holding that licence, certificate or registration and which corresponds to a standard contained in an Irish code.

Our understanding of the meaning of these terms and difference between them has been enhanced by the Supreme Court decision in *Corbally v Medical Council* [2015] IESC 9. Although this case was decided in the context of the Medical Practitioners

Act 2007, it is important to note that this Act is comparable to the 2005 Act. Critically, the 2007 Act, like the 2005 Act, provides for disciplinary proceedings in respect of “professional misconduct” and “poor professional performance”.

Prof Corbally was a consultant paediatric surgeon in Our Lady’s Hospital for Sick Children, Crumlin. In 2010 a 2½ child was referred to his private clinic in Crumlin with a history that the frenulum (a fold of tissue) under her top lip was catching, causing an ulcer under the lip and contributing to a gap in her front teeth. Prof Corbally recommended that the child undergo a simple procedure, dividing the upper frenulum. In his notes of his examination, Prof Corbally described the procedure as an excision of the “upper lingual frenulum”. There is, however, no upper lingual frenulum; Prof Corbally should instead have referred to the “upper labial frenulum”.

In any event, Prof Corbally booked the child in for a procedure, which in the admissions form he correctly described as a “tongue tie (upper frenulum)”. This form was sent to the hospital’s admissions department where, however, the reference to the upper frenulum was not inputted into the hospital’s system. (The form completed for the purpose of consenting to the procedure did, however, describe it as a “tongue tie (upper frenulum) release”.)

Prof Corbally intended to perform the surgery himself, but was called away to another patient in the intensive care unit. He delegated a registrar to perform the procedure. Unfortunately, the registrar divided the wrong frenulum (he divided the lingual frenulum, and not the upper frenulum). The error was discovered the same day, and the child was brought back to theatre and the upper frenulum was released. The child made a full recovery after a short period of pain and discomfort from the unnecessary operation. Her parents lodged a complaint of poor professional performance against Prof Corbally.

It was initially alleged against Prof Corbally that he had been guilty of both professional misconduct and of poor professional performance under the provisions of the Medical Practitioners Act 2007. The allegations of professional misconduct were withdrawn before the Fitness to Practice Committee, and so the case proceeded as an allegation of poor professional performance. Findings were made

against Prof Corbally, and the Medical Council imposed the sanction of an admonishment on him. The High Court, however, quashed this decision on a judicial review application, and its decision to quash was upheld on appeal by the Supreme Court.

In these circumstances, the Supreme Court considered the meaning of “professional misconduct” and “poor professional performance” for the purpose of s 57 of the Medical Practitioners Act 2007. (But as McKechnie J pointed out in his concurring judgment, the *Corbally* case has ramifications beyond the medical profession since many regulatory statutes nowadays utilize these concepts.)

The leading judgment in *Corbally* was given by Hardiman J. In his judgment he approved an earlier judgment of Keane J in *Ó Laoire v Medical Council* (unreported, 27 January 1995), where the latter had considered the meaning of “professional misconduct” within the meaning of the then current Medical Practitioners Act 1997. Keane J had said:

“(1) Conduct which is ‘infamous’ or ‘disgraceful’ in a professional respect is ‘professional misconduct’ within the meaning of s 46(1) of the [1977] Act.

(2) Conduct which would not be ‘infamous’ or ‘disgraceful’ in any other person, if done by a medical practitioner in relation to his profession, that is, with regard either to his patients or his colleagues, may be regarded as ‘infamous’ or ‘disgraceful’ in a professional respect.

(3) ‘Infamous’ or ‘disgraceful’ conduct is conduct involving some degree of moral turpitude, fraud or dishonesty.

(4) The fact that a person wrongly but honestly forms a particular opinion cannot of itself amount to infamous or disgraceful conduct in a professional sense.

(5) Conduct which could not properly be characterised as infamous or disgraceful, and which does not involve any degree of moral turpitude, fraud

or dishonesty, may still constitute 'professional misconduct' if it is conduct connected with his profession in which the medical practitioner concerned has seriously fallen short, by omission or commission, of the standards of conduct expected amongst medical practitioners.

(6) I do not attach any significance to the fact that the adjective 'serious' does not appear before 'professional misconduct' in s 46 ... Only conduct with seriously falls short of the accepted standards of the profession could justify a finding by the professional colleagues of a doctor of 'professional misconduct' on his part.

(7) In considering how these principles should be applied to the facts of the present case, the standards applicable in the medical profession in this country, as laid down in official publications ... are clearly of importance ..."

Commenting on Keane J's seven principles, Hardiman J pointed out that it was "clear that conduct alleged to constitute 'professional misconduct' must meet a threshold of 'seriousness'". The question, however, was whether this threshold of seriousness applied not just to an allegation of professional misconduct, but also to an allegation of "poor professional performance". The Supreme Court decided that it did.

Two major reasons were offered for this decision. First, Hardiman J pointed out that, under the 2007 Act (as is the case under the 2005 Act), the sanctions applicable to a finding of poor professional performance are the same as those applicable to a finding of professional misconduct. It follows, he said, that: "There is ... no sense in which the offence of 'poor professional performance' is intrinsically less serious than 'professional misconduct'."

Secondly, Hardiman J observed that if there were no threshold in the case of "poor professional performance", the result was the "creation of a harsh or even ruthless regime, making the practice of medicine over one's career almost hazardous to the point of virtual folly: it would be few who could navigate that journey without having to berth at some point at the port of the FPC [Fitness to Practice Committee]". In

other words, since all professionals make mistakes, the court was not prepared to accept that every such mistake renders the professional open to the prospect of discipline. Only a mistake which reaches a “threshold of seriousness” can have that effect.

We all make mistakes. *Corbally* is important because it establishes – thankfully – that not all of our professional mistakes render us liable to professional discipline. While a single mistake may expose a person to a finding of “poor performance”, that mistake must reach the “threshold of seriousness”. What that means, I think, is that the mistake in question must be one which is in some sense out of the ordinary or which carries consequences are not readily remediable.

4. FAIRNESS BEFORE A COMMITTEE OF INQUIRY

There is no doubt that a committee of inquiry must conduct its business in a way which respects a registrant’s constitutional right to “fair procedures”. The notion of fair procedures stems from a famous case from 1971, *In re Haughey* [1971] IR 217, which arose out of accusations made by a garda officer against Padraic Haughey during the course of a hearing before the Dáil Committee on Public Accounts investigating the expenditure of a grant-in-aid for Northern Ireland relief. In these circumstances, the Supreme Court held that Mr Haughey’s position became that of a party whose conduct was the subject of the committee’s inquiry. Ó Dálaigh CJ described the protections, to which Mr Haughey was entitled as follows:

“(a) that he should be furnished with a copy of the evidence which reflected on his good name; (b) that he should be allowed to cross-examine, by counsel, his accuser or accusers; (c) that he should be allowed to give rebutting evidence; and (d) that he should be permitted to address, again by counsel, the Committee in his own defence.”

The 2005 Act provides, in statutory form, for most if not all of these protections. Thus, as we have seen, s 57(1) provides that, where a complaint is referred to a committee of inquiry, the registrar must notify the registrant concerned of

- the referral of the complaint and the name of the committee;

- the nature of the subject-matter of the inquiry, including the particulars of any evidence in support of the complaint;
- the opportunity of the registrant, or his or her representative, to be present and to defend the registrant at the hearing: s 57(1).

At the hearing,

- the registrar, or any other person with the leave of the committee, presents the evidence in support of the complaint
- testimony is to be given on oath, and
- there is a full right to cross-examine witnesses and call evidence in defence and reply: s 58(4).

Finally, on completing an inquiry, a committee of inquiry must make a written report on its findings to the Council, which must specify

- the nature of the complaint that resulted in the inquiry;
- the evidence presented to the committee;
- the committee's findings as to whether any allegation made by a complainant against the registrant is substantiated: s 63(2).

Should a committee fail in any of these statutory obligations, it would be open to the person affect to apply to the High Court to apply for a judicial review. The court might either prohibit the committee (make an order preventing it from proceeding with its inquiry) or, if it has in fact completed the inquiry, the court may grant an order of *certiorari*, which quashes the committee's report.

Apart from the specific statutory obligations relating to fair procedures, there is no question but that a committee of inquiry, like other bodies exercising quasi-judicial functions, must observe a general obligation to treat persons fairly. Broadly speaking, this fairness entails allowing proper and uninhibited scope to each party to make his case, affording so far as possible equal treatment to both, refraining from the taking of an unfair advantage and the avoidance of excessive intervention on the part of the decision-maker himself.

Gill v Connellan [1987] IR 541 offers a good example of the application of these principles. The case arose out of a drunken driving prosecution. In the District Court the applicant's solicitor cross-examined the arresting garda as to the manner in which the blood sample had been taken, suggesting that the garda had squeezed the applicant's arm to enable the doctor to take blood from it. During the course of this cross-examination the trial judge intervened to enquire as to its relevance. The solicitor said that he was trying to establish that the proper procedure had not been complied with for taking the sample whereupon the judge said: 'It does not matter what you say, the Act was complied with.' When the solicitor submitted that the sample had not been obtained in the usual or proper manner, the judge replied: 'You are wasting time.' The solicitor submitted that he was entitled to make his argument to which the judge replied: 'You can go on and on for all the good it will do you. I am not interested in it.' The solicitor read an extract from a textbook which the judge again interrupted. He submitted that the manner in which the sample had been taken was illegal as it involved a technical assault to which the judge said: 'I do not care: I am not interested: Do you want to call any witnesses?' In view of the judge's attitude the solicitor decided there was no point in calling witnesses. The subsequent conviction was quashed on an application for *certiorari*. Although Lynch J in the High Court acknowledged that an applicant is ordinarily bound to exhaust any remedies by way of appeal before obtaining judicial review, he pointed out that in this case:

'Neither the facts nor the law have been adequately heard in the District Court. On appeal to the Circuit Court, therefore, the appeal could hardly be said to be by way of rehearing - the case would more truly be heard for the first time. The applicant and his solicitor would be deprived of the possible advantages of having gone over the whole facts and law and of having heard the submissions and cross-examination by the prosecuting Superintendent in the District Court.'