



**Regulation Matters:
a CLEAR conversation**

Episode 43: UK Regulatory Reform Proposals and Influence in Other Jurisdictions

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Line Dempsey: Welcome back to our podcast, Regulation Matters: a CLEAR Conversation. I'm your host, Line Dempsey. I am currently the Chief Compliance Officer with Riccobene Associates Family Dentistry here in North Carolina, and I'm also the Chair of the CLEAR National Certified Investigator Training Committee.

As many of you are aware, the Council on Licensure, Enforcement, and Regulation, or CLEAR, is an association of individuals, agencies, and organizations that comprise the international community of professional and occupational regulation. This podcast is a chance for you to hear about important topics in our regulatory community, and our guests today are Richard Steinecke, with Steinecke, Maciura, and LeBlanc in Toronto, Ontario, and Mark Stobbs, who is with the Professional Standards Authority in the UK. We're glad to have you both with us here today. Welcome.

Richard Steinecke: Thank you for having us and it's nice to present again with Mark.

Mark Stobbs: Thank you. It's lovely to be here, too. And good to see, Richard and Line.

Line: Absolutely, I was going to say, you know, for our listeners, they don't get the privilege of actually getting to see us, since this is an audio podcast, but because we've got technology and can do this, it's so wonderful to actually put eyes on both of you. It's been too long.

So we're glad to have you guys here, and we're certainly glad to have our listeners joining us, as well. So, the UK Department of Health and Social Care has published proposed changes to health care regulation, and that's entitled Regulating Health Care Professionals, Protecting the Public. Now, the proposed reform covers four key areas: Governance and Operating Framework, Education and Training, Registration, and Fitness to Practice.

So, we'd like to hear some details about the proposal and how it might influence regulatory reform in Canada as well. But, first, let's talk about some background on the PSA, and how that model has influenced professional regulation in Canada.

So, for us to start off, Mark, let's start with you. Can you tell us a little bit about what the Professional Standards Authority, or the PSA as we know it is, and kind of, what does it do?

Mark: OK, well, we were first founded in 2004. And it arose out of a number of scandals in health care where the regulators, in particular the General Medical Council and others, weren't perceived to act fairly or in the public interest. And we were set up to report to Parliament on how they were working in their duties to protect the public. And also, we had a power to appeal fitness to practice decisions by those regulators which weren't sufficient to protect the public. So, the regulators themselves didn't have that right to appeal. We did, and we also had a remit to do a lot of policy thinking around good regulation--what it looked like, how the public should be protected.

I think it's fair to say that within the last 18 or 19 years, things have changed a lot. The regulators are much more professional than they were. We're still appealing a number of decisions. We managed, I think, 20 in the year before the pandemic. It went down slightly during the pandemic because there were fewer hearings to appeal, but we're still there and we did a great deal of thinking which led towards the review and the government's proposals. And I think they've taken a lot of our proposals on board. Though, that doesn't necessarily mean we're happy with them all.

Line: Well, that's interesting. So, Mark, how does the PSA interact with the health and social work regulators in the UK?

Mark: OK, so we begin by doing an annual report on them to Parliament. So that means that we look at their performance, their timeliness. We look at their systems. And we do this by addressing our now 18 standards of good regulation, which cover all the main aspects of a regulator's work. So, registration, training, standards, fitness to practice, which many listeners may think of as professional discipline. It's the same. It's the same concept.

We also now have some general standards around transparency, openness, good governance, and equality and diversity. So, we do an annual assessment of those. Some of them we can look at very swiftly because they're doing a decent job, and we know about that. Others, where we have particular concerns, we can look directly at those concerns and go in and audit if we need to. So, we try and keep a close relationship with them so that we understand what's going on, what their work is, but also keep closely in touch with patient groups, registrant groups, so that we can get a proper view about how they're working. We also occasionally produce some guidance.

So, there was a particular issue last year around holding fitness to practice hearings remotely. And there were concerns from registrants about privacy, about how actually you could have a fair trial over the Internet. And we produced some guidance for regulators which are around ensuring a fair hearing, but also making sure that where practical such hearings could take place. And I think that's actually quite an important role for us in getting some consistency between the regulators.

Line: Yeah, that is certainly one of those things that I think everybody has had to deal with. It's been a really kind of crazy time. So, I guess, from the authority perspective, what are some of the achievements that you have had?

Mark: Oh, well, achievements, I think, include that the regulators actually are better than they were. They now have better systems. They are more focused on patient protection than they were, to the extent that government feels that, actually, it can trust them more. They've become more mature organizations. They have lay majorities. Their panel members, their committees are much more professional than they were. And overall, they themselves are better.

I think we've made a huge contribution to the law on fitness to practice, particularly around dishonesty and around maintaining the public interest, sanctions there. A lot of our cases are cited pretty much in every single panel's decision that you look at. So, we've achieved a lot of guidance there. And I hope also we've done a lot of work internationally as well and provided some influence there.

Line: Well, that's a perfect segue, international-wise. Let's turn now to Richard. So how has the Professional Standards Authority influenced professional regulation in Canada?

Richard: Thank you, Line. I did not hear about the Professional Standards Authority for some time. Maybe about a little over a decade ago, I heard a rumor that some of the innovation in the United Kingdom was causing a lot of interest in our government.

And the most distinctive feature that I was hearing about was that it was the end of self-regulation, at least for the health professions. And I must confess, at first, I saw the PSA models more of a threat than an opportunity. But time has moved on. And the PSA has transitioned from being an innovative idea in Canada to a voice of influence. First, through conferences like CLEAR, and later, as the PSA did external reviews of individual regulators across the country in Canada. That PSA has done, I don't know, maybe close to 10 such reviews in recent years. Many of them have been voluntary, and some of them have been imposed by government.

A couple of years ago, Sir Harry Cayton and the PSA did a major nonvoluntary review of the British Columbia Health Professions, for a government that was intent on making changes. And that review is fundamentally altering the approach to professional regulation in Canada in that the PSA model is being seen, really, as the way to go in the future by many policymakers and governments.

Line: You mentioned British Columbia. So how are they following the PSA model?

Richard: Well, there's been an evolution. Perhaps, first was the regulation of the real estate professionals in that province, where a loss of public confidence in self-regulation resulted in a government-appointed board of directors in, really, what was a government agency. And so, that model was chosen in 2018, along with the concept of oversight of that regulatory body by a superintendent.

Then, earlier this year, after a period of review and consultation, the Professional Governance Act was implemented, providing a uniform framework for the regulation of the professions related to natural resources in British Columbia. And there is a governing board of only 11 people, four of whom are non-practitioners. And even the professional members, while elected, go through a competency-based nomination process. And there is a superintendent overseeing, monitoring, assessing, evaluating, and guiding them. And that's just really started officially in February of this year.

Next step will be the health professions. And while the legislation has not yet been enacted, detailed proposals have been published. And it will likely result in a competency-based appointment of all board members, professional and public, with smaller boards. I'm not quite sure of exactly the size, but I think the 11 you saw for the natural resources profession is probably in the ballpark; with 50% professional members and 50% public members on the board. And an amalgamation of the regulators from current 20 health professional regulators to about six, with an oversight body that will probably have a mandate fairly similar to the PSA in the United Kingdom. And there's also a unified and centralized discipline tribunal that will be separate from the regulator. So, this model, if implemented, will look very familiar to Mark.

Line: Now, for areas of Canada that maybe the PSA model has not been adopted as of yet, is the Professional Standards Authority influencing oversight of professional regulation?

Richard: Definitely.

The province of Alberta has made some preliminary changes, separating regulatory bodies from professional advocacy groups, and they're consulting on more radical proposals, including a stronger policy role for the government and possibly combining regulatory bodies.

In Ontario, we are currently having a consultation process on governance changes with our Ministry of Health, and that's partially self-initiated. The College of Nurses of Ontario, a few years back, was proposing a similar governance model to British Columbia, except that there would not be an oversight body; there would be perhaps an external review every three years. And that governance model has already been enacted in Ontario for the Ontario College of Teachers, the regulatory body for teachers.

And I think, rather than an oversight body for the health professions, the government has introduced a college performance measurement framework that requires detailed reporting on various evaluation criteria. The criteria are similar, but not identical, to what the PSA uses in the United Kingdom, including how, even within the electoral system for professional members, competency-based selection can be incorporated into that model.

Quebec has had an oversight body for decades.

Going east, Nova Scotia has combined the nursing professions into one regulatory body with more modern legislation, all albeit still wasn't self-regulation approach. So, yes, the PSA has significantly

affected policy makers outside of British Columbia across the country, and I think it's fair to say that the rest of Canada is watching developments in BC with a keen interest.

Line: Yes, that's quite interesting. So, I guess going back to Mark, so maybe overview of the reforms that are being proposed in the UK. I guess, can you tell us about the consultation process that is currently going on?

Mark: Yes, this has been actually going on for many years. We've recognized that we currently have 10 different health and social care regulators, which are recognized by statute. There are also any number of other bodies dealing with counselors and other healthcare-related professions who are not regulated.

We have a register, which allows us to accredit the registers which have a strong public interest role, and which meet our standards there.

And the legislation which governs those professions is myriad. You have the Medical Act, which originally dates back to the 19th century governing the General Medical Council, though it's been amended significantly in-between, down to the Social Workers Act, which came into effect in 2017.

And in-between that, you have a series of different regulators all with slightly different powers, many with different vocabulary. So, we can't even decide whether we talk about misconduct or unprofessional conduct, as a trivial example.

They're all based on individual professions, in a world where actually health care is now team-based and you see many cases where you have a doctor, a social worker, a nurse, a psychiatrist involved. And when things go wrong, it's very easy to see how a patient can slip through the cracks, both in terms of the professionals themselves and then in the regulatory solution afterwards. So, we've been arguing certainly since about 2012 for a much more joined-up approach for uniform concepts among the regulators.

Think about whether we should amalgamate some regulators, whether some professions actually need to be regulated statutorily in that there are some professions such as art therapists for example, which you might think are relatively low-risk and which are regulated by statute compared with counselors, who are not, and who, arguably could do substantially more damage to an individual. So, we've been arguing for some time that that should be dealt with and that there should be a rationalization of the rules.

And we had a Law Commission look at this in 2012 and make some recommendations, which weren't taken forward. Government then consulted, I think, around 2016, on some overarching principles. And now, it's come forward with actual proposals for, not primary legislation, but secondary legislation, which will at least address some of our concerns. And the aim of those is to provide all the regulators with a consistent legislative footing, which is an absolutely great start. It will also give them much more freedom and flexibility.

You have rules which, for example, at the moment, the size of one regulators' Fitness to Practice Committee is set out in statutes, which gives them no flexibility, for example, to appoint more members if they have a high caseload.

We have others where particular interest committees are in statute, so our General Optical Council has to have a Companies Committee which, again, is a relic from a bygone age in our view.

So, it will give them a lot more flexibility. There will be much less black-letter law there, and they'll be empowered to make rules governing particular parts of their work and enabling them to deal with that.

It's also, I think, most interestingly, proposing a thing called Accepted Outcomes in Fitness to Practice, where, rather than go to a panel for a hearing, as you would normally, registrants can accept that they're impaired and accept a sanction proposed by the regulator. And in principle, you could even agree to be erased or struck off the register under these proposals. And, again, in principle, this is something we support considerably because fitness to practice takes a huge amount of time. It takes a disproportionate amount of regulators' resources. It's not efficient. It puts patients and witnesses under immense pressure if they're cross-examined. And it also makes it really difficult for registrants as well who may have 2 to 3 years, four years of these proceedings hanging over them with their lives on hold. And this could be a great improvement for them.

Line: Well, certainly you mentioned some concerns that they have a possibility of a remedy through these proposals. Are there any concerns from these proposals that keep you up at night, that you have concern over?

Mark: Well, I think part of our concern is about oversight, where if you have 10 regulatory bodies, each with their own rules and their own rulemaking abilities, you can imagine that after 3 or 4 years, suddenly they're all looking very different again. While you have the equivalent powers, your actual processes could be all over the place.

And doubtless, there will have been extremely good reasons for each of the individual bodies changing. But what you will get is something which is just as confusing, if you're not careful, to patients and to the public. So, we're not sure that it's quite got the balance between flexibility and consistency right. And there's a tension between the two. And one of the things we've argued for in our response is some sort of oversight by the PSA. A fairly light touch, but which enables us to say, "Actually, this is going too far towards flexibility and you're missing patient protection here," or "This doesn't work well with the other regulators' work."

And the second is, again, around accepted outcomes where there's no oversight of those outcomes. And what you could be looking at are some extremely serious cases essentially being settled on the papers behind closed doors with just the outcome published. And I don't think we're saying that

regulators are incapable of making those decisions. You know, they're mature bodies, but everybody makes mistakes.

And it's interesting; our social workers, our newest body, has this power now, and we did a study of their first year's experience there. What we found was that it was excellent for the easy cases; for the convictions, for the health cases, for the ones where for clinical or practice problems that the registrant accepts that their solution's obvious conditions or some sort of suspension or a caution. And there's really no reason at all to object that.

Your problem comes where it's complex, where the registrant isn't accepting all the facts. So, we saw one where we had a registrant saying, "Yes, I was there," but was denying the fact that she was dragging the children into the car and banging on windows and saying, "I'm a social worker, I can get you put in prison" --which you might think were the more serious points.

And so, you have the case examiners who were looking at this saying, "Yes, we think she agrees. We think she has some insight, and therefore we can just put an unrestrictive sanction on her."

Which, to do them justice, I think even Social Work England accepted that this was not a suitable case to have been sorted by case examiners because you needed the panel to work out actually what the facts were, to assess the registrant's insights and remediation and then reach sanctioning on that basis. You can't do that just on the patents.

And so, our response is that you probably need some sort of clearer guidelines about what is suitable for this sort of decision. And, you might say, actually, you have to agree on the facts. You have to have some basis for saying that there's insight.

But even then, that was an example of something which the regulator itself says it shouldn't have happened. But there isn't an oversight power to put that right. And the idea is that you could refer it to the registrar for the registrar to ask for another look at it, which, again, might well work in many cases. But if the regulator itself is made a mess up of the prosecution so it's not included papers, if it's not charged particular things, I have some worries about a regulator having two bites of a cherry there. The opportunity to put its previous mistakes right; that doesn't quite feel fair.

Line: I understand that.

Mark: The positives are, at least something is happening. We've been on about this for years, and there are, and much of this will be positive.

Line: Absolutely. Well, Richard, let's finish up with you. So, I guess, what impact do you see this proposal having on the reform of professional regulation in Canada?

Richard: It's interesting that some of the proposals, maybe the less significant ones, would not be a surprise to Canadian regulators.

So, some of the reforms about increased collaboration and sharing of information with other stakeholders, such as other regulators, and in the health care sector, hospitals, and long-term care homes--that's been authorized priority for some time for many regulators in Canada, even if it's sometimes more of an aspiration than a day-to-day reality. For some professions in Canada, not all for sure, open board meetings and published minutes of board minutes already exist. Regulators in Canada often set their own annual registration fees. And most regulators in Canada have no limitation period for complaints and can consider historical complaints, especially for things like sexual abuse. Whereas, as I understand it, some of the regulators in the UK have a five-year limitation period on that.

So, I think of most interest to Canadian regulators will be some of the following things.

A requirement that regulators explicitly describe the impact of any changes to their rules or processes, before implementing them. Impact on the practitioner, impact on costing, that's probably challenging, but a good part to have in the policymaking process.

Of interest, also, is that it seems that there's going to be a maximum of 50% of professional members on the board, which means that it could be less than 50%. And so that would be a change.

There's also some interesting proposals about regulators voluntarily delegating to other regulators some of their activities, such as, you know, perhaps having a regulator with a great data system operating a public register on their behalf, or providing practice advice, or perhaps doing administrative components of the complaints and discipline process for other regulators. So that could be interesting.

In the UK, regulators seem to have a much larger role than Canadian regulators in overseeing the educational programs. Here, it's typically a different ministry that operates the educational programs. And so here, regulators sometimes are only able to influence educational programs by the content of their registration exams, which indirectly forces the educational programs to teach those competencies. So, I found that kind of curious to see that extent of influence.

There's also a proposal to be able to administratively remove practitioners who obtain their registration through fraud. And while there are few Canadian regulators with that provision, it's usually not in the legislation itself. And so, there's some doubt or hesitation about using that. And so that would be nice to avoid, having to have a full discipline hearing in that context. And if I'm reading it correctly, there's also the ability to administratively remove practitioners for incapacity issues or language fluency issues without a full discipline hearing. And, Mark, I'm not sure you're accepting that.

Mark: I think that's a really complex question. And, yes, we have a lot of doubts about that.

One of the interesting things is that there is a proposal in the paper that you subsume English language competence and health into lack of competence, which is one of our grounds of imposing a

sanction. I think you can argue about English language there. I think health is really difficult because, in our jurisdiction to demonstrate lack of competence, you have to show a substantial body of work that is not competent. Now if you have a registrant who is actually a danger, for example with a serious, relapsing mental health condition that may not be demonstrated yet. But it seems to me absolutely wrong that you should wait for her to damage somebody before you can bring that sort of action. And I think, to be fair, our government's maybe having some other thoughts about that.

Richard: OK, well, that'll be interesting to see, because that was a bit surprising from my perspective. And then your major point was about the accepted outcomes approach, where serious sanctions could be imposed without a hearing, if the practitioner agrees. And so, a formal structure for that, I think, would be innovative. I mean, certainly we have agreements and resolutions, but typically they are presented to the Discipline Committee first. So, I think we're going to be watching that structure to see if the concerns of the PSA are implemented there. So, I think there's lots of interesting things in this to be watching and to see if it happens, and if it does, how it works out.

Line: Well, excellent. Well, I think this has been a fantastic conversation. I do want to thank both Mark and Richard for speaking with us today.

Mark: It's great to see you. Thank you very much for inviting me.

Richard: Yes, same here.

Line: And it has certainly been a pleasure. So, I also want to thank our listeners for tuning in for this episode. We invite you to continue the conversation through our CLEAR discussion forum. This podcast will be posted in CLEAR Communities and members can reply to the post with your comments or reactions to proposed changes.

Do you think these regulatory reform proposals in the UK might influence changes to professional regulation in your jurisdiction?

We'd love to continue this conversation, so that's just one question to pose to the community.

We'll be back with another episode of Regulation Matters: a CLEAR conversation very soon.

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Finally, I'd like to thank our CLEAR staff, specifically Stephanie Thompson. She is our content coordinator and editor for our program. Once again, I'm Line Dempsey, and I hope to be speaking again to you very soon.

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