

UKCC, Democracy and Accountability

a review of “The Regulation of Nurses, Midwives and Health Visitors”, a document prepared by JM Consulting, Ltd.

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Background

This review offers comments and observations on the Report¹ on the state of regulation of nurses, midwives and health visitors in the UK. It is always timely to be reassured that existing regulatory machinery is well-designed for its purpose and that it is achieving its regulatory objectives. This review focuses more specifically on issues of accountability and democracy, specifically to the public, and whether this issue has been adequately addressed in the Report.

The extent to which professions have resisted having lay members and other health professionals on their governing bodies is often seen as an indication of autonomy and common features of self-regulation. For instance, the doctors’ governing body, the General Medical Council, comprises some 104 people, all doctors, though non-doctors can be appointed, they are there only in their individual capacity.² The UKCC may be seen as even more “successful” in this respect, having no provision for lay or other membership at all. In principle, though, the Secretary of State has tended to appoint lay people or doctors to fill the 20 public appointments available in addition to the elected membership.

In the past, society held different assumptions about whether the public could understand the complex issues of professional regulation, and these were bound up in elitist notions of professional responsibility, as well as concerns about public knowledge of medicine – “better they not know too much, for the sake of their health”. But today, we expect greater openness, greater participation, and greater accountability, and people generally have greater access to more informed independent information about health and well-being, besides enjoying a far higher general level of education and understanding. Indeed, one would expect at least the same level of openness outlined in the government’s white paper on Freedom of Information, **Your Right to Know**.

The origins of the present UKCC can be charted briefly in the Table 1, which shows the current regulatory situation is relatively recent.

¹ “The Regulation of Nurses, Midwives and Health Visitors”, a document prepared by JM Consulting, Ltd., 1997.

² M. Stacey, **Regulating British Medicine: The General Medical Council** (Chichester: Wiley, 1992) pp 69-85.

Table 1: History of Regulation

Year	Act of Parliament	Comments
1902	Midwives Act	
1919		earliest nurse registration
1962	Health Visiting and Social Work Training Act	prior to this act, health visiting was restricted to qualified nurses
1979	Nurses, Midwives and Health Visitors Act	brought professions together under UKCC, implemented in 1983
1993		National Boards assume executive responsibility for education and cease to undertake preliminary investigations of misconduct, a role assumed in full by UKCC

It is important to realise that the principle of regulation adopted in the UK is self-regulation, rather than accountability to external bodies, e.g. Parliament. The disciplinary process, and assessment of professional conduct is, therefore, an internally focused process of professionals assessing professionals. The public, as largely formally absent from the UKCC through membership, and through the rules governing the conduct of disciplinary proceedings, has few avenues to participate in proceedings.³

Conclusion

The Report does not advance our understanding of democratic accountability in the regulation of professional conduct as it does not provide us with new insights into the UKCC's democratic responsibilities. The Report is right to note a lack of focus for the UKCC, but fails to address the wider public interest in the UKCC's regulatory brief in the first place.

- It is surprising that, while the report addresses main issues of the conduct of regulatory matters by the UKCC, it comments lightly on how that conduct is made accountable within the wider social context, and in particular the composition of the UKCC itself as an institution discharging a social function of considerable importance to the public at large.
- Naturally, the issue of accountability also has an impact on the statements concerning whether there should be a single regulatory authority, or four, and what the relationship should be with the different national boards. The Report is uncomfortable with devolved forms of regulation; however, such an approach may offer greater accountability, and move regulation closer to local issues and concerns. This remark may have more to do with a general lack of comfort with decentralised and devolved systems of regulation, than inherent problems with the approach.

³ Jonathan Montgomery, **Health Care Law**, (Oxford UP, 1997), page163.

While beyond the specific brief of this review, it appears that the Report has some difficulty with important differences between training issues (structure of courses, awarding of degrees, selection of candidates), further professional development (added competencies, overlaps with other regulated professions, new professions), and licensure (fitness to practice, conduct and competency). To the extent that these issues remain unclear, it is difficult to imagine the public being assured that all is well and in hand with respect to effective regulation.

The report is silent about the wider responsibilities of the UKCC, under European law, and thus fails to address extra-territorial responsibility of regulation, licensure and right of establishment. The UKCC is the competent UK body under European law, and it has corresponding duties in this regard, which would impact some of the reports comments.

Finally, I was surprised at the lack of some international comparison of regulatory practice, especially with other European Union countries, mindful of the UKCC's role here. The cited Ontario Health Disciplines Act is an omnibus act creating broad regulatory principles. There are lessons here, and elsewhere, which might prove useful in this context of the Report.

Assessment of democracy and accountability in the working of the UKCC

Key elements

Let me begin the analysis with the assertion that the purpose of the UKCC is to advance the public interest with respect to the conduct and competency of nurses and midwives, not meet the needs of nurses and midwives for a system of professional regulation.

This means that we should begin and end with the public interest objective, and structure the activities of the UKCC accordingly. In that respect, it is clearly in the interests of the public that public safety be assured and that people placed on UKCC registers be qualified and competent to practice, in a way that is beyond the assurances that professional education and training offers. The public should be reassured if the UKCC focuses on conduct and competency. How they are reassured rests in part on ensuring the UKCC functions democratically.

The simplest test is that if the average person cannot determine whether their rights or interests have been violated (not protected by a body so-charged with this duty) then that body has fundamentally failed to meet its public interest obligations, even if those regulated think the body is doing a good job!

This then suggests that while it is not essential that a body reflect broad social composition, it is usually easier to establish fundamental public accountability when that is the case. Professionals often question the ability of lay people to judge professional competency, but of course, it is a mainstay of openness in society that people can come to understand these complexities. Obvious examples include juries (including the concept of citizen juries to assess pressing social concerns), and Parliament, itself, which draws its members from a democratic not meritocratic process.

So, is the UKCC democratic, and would the proposed changes improve matters?

The report notes that the UKCC has "inadequate representation from lay members and employers". The suggestion is for a better balance of elected and appointed members. As it stands,

the only vehicle for lay participation is through the Secretary of State appointments. These could and probably should be advertised and people with a direct interest in the UKCC (e.g. nurses, midwives) prohibited from applying. Staggered appointments is always a good idea to ensure continuity. There are established methods for reviewing candidates for public posts, and these are available to the UKCC to enhance its democratic credentials.

The Report's suggestion to avoid a constituency approach to membership is very important to ensure that members do not represent specific interests, since the purpose of the UKCC is to meet public interest obligations, not the needs of special interest groups. However, the Report is somewhat imprecise in this respect, when it refers to various interests not being represented, suggesting a preference for some sort of constituency or special-interest model.

The Report asks, should the Council "be a smaller, more strategic body with more expert membership". This is difficult to reconcile with the above comments. The risk with expert membership is *professional capture*, whereby procedures, methods and results are designed purely to meet the needs of the regulated, and not the public. Certainly there is merit in being more focused and size is not really important when there are effective procedures. It is unclear what being strategic would mean, except that such a comment is a common, usually undefined (as in this case) expectation; the UKCC is about protecting the public and that seems fairly straight-forward as a *mission statement to drive a strategy* (as they say in the jargon).

The Report asks, should the Council "retain an elected membership"? Clearly, an open system is required. The real issue, though, is what are the criteria for election or appointment. In this respect, a balance of election from within the profession, and selection from the public by the Secretary of State (in an open manner) would enhance democracy. The greatest risk, though, of an elected membership lies in potential conflicts of interest, people holding prejudicial views independently of the facts, or people receiving private communications about conduct outside hearings. This requires strict accountability and integrity by members to disclose potential conflicts.

Table 2 identifies specific criteria⁴ to determine whether a body is democratic or not. As a contribution to the debate, these various items are offered to help assess democracy and accountability by UKCC. A suggested interpretation is offered; regretfully, I was unable to assess these criteria using the Report on the UKCC.

⁴ M. Tremblay, **The Reduction of the Democratic Deficit in the Rebalancing of Power in Community Decision-making**, MA in European Law, University of Leicester Law School, 1996.

Table 2: Criteria of adequacy of democratic and accountable organisations

	democratic institution	undemocratic institution	a profession regulator
1	the delegation, or transfer, of power to act by the body derives from a more democratic body – usually the state acting in the public interest	the body is created by those regulated and gives itself a mandate to act, without seeking a formal mandate from the public	public mandate is clear and does not conflict or overlap with other bodies (mandate is neither vague nor ambiguous)
2	the public understands the nature of the democratic accountability of the body and can determine when it is not acting in their, the public, interest	the body does not tell the public how it protects their interests	clear statements of how the public interest is protected
3	decision-making procedures are clear and readily understandable by the average person, and do not require one to be a specialist in procedure to understand them	decision-making procedures are secret, coded, complex, require specialist or legal knowledge, or are informal and inconsistent	elegant simplicity in procedures, methods, language employed and documentation, including access and disclosure
4	normal methods and standards of democratic control (open and transparent, subject to review and scrutiny), are present and met	there is no forum for appeal, review, or effort to publish decisions	open and transparent working, appeal and review procedures
5	accountability is structured such that reporting on actions or decisions taken is reported to those on whose behalf they are acting (the public)	accountability is structured such that reporting on actions or decisions taken is not reported to the public	public reporting on actions taken in the public interest; no secrets (except 6 below)
6	the protected rights of others are not violated by the actions of bodies or people acting in the public interest. ⁵	the protected rights of others are routinely violated (e.g. common law violations of conflict of interest, failing to disclose information, procedural irregularities)	acts properly with respect to the protected rights of those subject to regulation; no violations of common law right of due process
7	participation in these bodies is equally available to all; effective methods to recall members	participation is based on select membership criteria	wide membership, selected in a public manner; appointment from public at large by application

⁵ Nozick, R. **Anarchy, State and Utopia**. New York: Basic Books, 1974.