# SOCIAL WORK ENGLAND: FITNESS TO PRACTICE AND THE RIGHT TO A FAIR HEARING.

On 8 February 2018, the Department for Education and the Department of Health and Social Care published a consultation on the draft regulations which are proposed, for the new body which is to take over the regulation of the social work profession. Social Work England is repeatedly described as independent of central government. What is quite apparent, to anyone who takes the time to actually read the underlying primary legislation in the Children and Social Work Act 2017, is that there is a huge potential for active political control of Social Work England by the Secretary of State for the time being.

This must be of concern. I am quite sure that the current incumbent of that office wishes to see nothing more than an efficient, child-focussed social work profession. That may not, however, always be the case. For all any of us know, the future may, one day, bring us a Secretary of State with views on children and families which most of us today would find repugnant. Any risk of future social engineering, based on extreme political doctrines must give pause for thought.

Part of the regulator's task is to control who can enter into the profession and to exclude those who have shown themselves unfit to practice and from whom the public must therefore be protected. There is a careful balance to be struck here. Particularly in the field of child-protection, social workers are often called upon to make decisions which make others unhappy and angry. Their actions may provoke strong feelings and often their will be no single 'right' answer, because we are making forecasts about the future and what individuals will, or will fail, to do.

Obviously then, a system which excluded any social worker who was the subject of adverse comment, would be unacceptable, since it would fail to protect the vulnerable people who should be assisted by social workers, as it laid waste to an entire profession. There must be a judicial process by which those who are the subject of allegations are informed of the case against them, given the opportunity to answer and a balanced decision is reached by an impartial tribunal. That is the irreducible minimum required by article 6 ECHR. It is also something which has been a foundation of our common law since at least Saxon times. The right to a fair trial has deep roots which draw upon ancient, classical rules from Greece and Rome, such as that no man shall be a judge in his own case.

Paragraph 47 of the consultation document tells us that 'the PSA has argued that the existing fitness to practice systems are expensive and overly adversarial'. The last four words send a shiver down the spine of anyone concerned with fairness. It is a short and slippery step from there to 'shut up and don't argue'.

The fears are well-founded. The proposal, at paragraph 54, is that 'case examiners', which in this case effectively means the prosecutor, will be able to impose interim orders 'where necessary to protect the public'. There is more detail to be found in the draft regulations themselves. Part 2 of Schedule 3 to the draft regulations deals with the *investigation* stage of a fitness to practice enquiry. Paragraph 12 allows the case examiner, at any time before formal charges have been brought, therefore before it has even been decided that there is a case to answer, to make any interim order considered necessary. We are told, at paragraph 22, that an interim order may suspend the social worker from practice for up to 18 months or impose conditions or restrictions on their practice.

There is limited protection for the practitioner against the imposition of excessive, unjust, or just plain wrong, interim orders. Paragraph 12(2) requires the case examiner to give the social worker the opportunity to make written or oral submissions before the order is made. Once the order has been made, the only redress will be for the social worker to appeal to the High Court, with all the attendant costs to be borne by someone who is now unable to work and for whom legal aid will not be available.

Trying to put this into context, if the government were to suggest that the police or Crown Prosecution Service should be able to send people to prison for up to 18 months whilst their case was under investigation, there would be outrage. That, for all practical purposes, is the same as this proposal. Ask why, and you need look no further than paragraph 47 of the consultation document; it is because cheapness trumps fairness and justice. If someone has their life and career destroyed by the imposition of an interim order, based on allegations which turn out to be baseless, then that is (apparently) acceptable, so long as it saves money. If someone loses their job and their home unjustly, there is no redress. You will seek in vain for compensation.

Article six of the Convention for the Protection of Human Rights and Fundamental Freedoms says:

*'In the determination of his civil rights and obligations … everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.'*

The ability of a person to pursue his or her profession must be a matter of their civil rights. In these proposals there is no public hearing (fair or otherwise) and far from being independent and impartial, the tribunal is the prosecutor. The draft makes a mockery of the UK's participation in the ECHR.

The issue of whether a tribunal can be considered 'independent' has been considered on several occasions by the European Court of Human Rights. In *Campbell and Fell v UK,* 7 EHRR 165 and in *Belilos v Switzerland,* 10 EHRR 466,

the court laid down that the independence of a tribunal was to be assessed by looking at, *inter alia,* the existence of guarantees of freedom from outside pressures and whether the body gives an appearance of independence. The case examiner, sitting in secret, to decide the outcome of his own case, falls at both of these hurdles.

The other requirement, for a Human Rights Act compliant tribunal, is that it must be impartial. There are subjective and objective elements to this and the case examiner at Social Work England would fail both tests. Since they are the prosecutor bringing the case they clearly come to the task of considering interim sanctions with a position already established in their own mind and so the subjective test cannot be passed. On the objective test, the European Court in *Piersack v Belgium* 5 EHRR 169, has said very clearly that;

*'Any judge in respect of whom there is a legitimate reason to fear a lack of impartiality must withdraw. What is at stake is the confidence which the courts must inspire in the public in a democratic society'*

Any system of regulation must have the confidence, not only of the public, but also of the members of the profession to be regulated. It cannot and must not be viewed as a political tool to control and oppress. Social workers are members of the public too.

The Family Court and the Court of Protection have been the subjects of considerable criticism from politicians and the press for 'secret' courts. Despite this, the government proposes a system where someone may lose their job, on the basis of either no hearing, or a meeting behind closed doors, and blithely ignores the fundamental right to a public hearing.

Further provisions, to save time and expense at the cost of fairness and justice, appear in paragraph 55 of the consultation. This is euphemistically described as 'accepted disposal'. It puts forward a mechanism whereby the person, who is the subject of the complaint, can accept that their fitness to practice is impaired and accept the sanction proposed. In that case the agreed outcome will be implemented without any hearing before an adjudicator.

These provisions are not without precedent. The Solicitors Regulation Authority can reach an agreement with a solicitor against whom allegations of misconduct are made as to how the matter should be dealt with, but with one very important difference. The case must still be presented to the Solicitors Disciplinary Tribunal for approval and that approval is by no means guaranteed.

No such protection is proposed here. Saving cost is the paramount consideration, it would seem. The proposals fail to acknowledge that the social worker and the regulator are not on a level playing field. There is no equality of arms. All of the

resources and the expertise are in the hands of the case examiner who brings the prosecution. The social worker may well be unrepresented. There is huge potential for people to be bullied out of the profession, without any kind of fair assessment of their behaviour and with no proper redress. If I were seeking to create a cowed and politically-compliant profession, this is exactly the approach I would take.

Such a system can never earn confidence from either the public, the press or the profession. Social workers will say that they were bullied and put under financial pressure to agree outcomes which were unwarranted. If the agreed outcome fails to satisfy the press, they will complain of hugger-mugger deals, put together to protect the guilty.

What is astonishing, is that it still should be necessary for us to have these arguments. This is taking place in a country with a 1500-year tradition of public justice and whose lawyers wrote the European Convention on Human Rights.

**Rodney Noon**
**Editor, *Seen and Heard***

**March 2018**