Council, 29 March 2012

Law Commission consultation

Executive summary and recommendations

Introduction
On 1 March 2012, the Law Commission issued a consultation on provisional proposals which seek to simplify and modernise the legislation of the HPC and the other regulators.

A summary of the consultation proposals published by the Law Commission is attached. Tim Spencer-Lane from the Law Commission has agreed to present on the proposals at this meeting of Council.

The HPC's response to the consultation will be compiled by the Director of Fitness to Practise, Secretary to Council and Director of Policy and Standards and presented to the Council as a draft for discussion and approval at its meeting in May 2012.

Decision
This paper is to note; no decision is required.

Background information
The full consultation document is available here

http://lawcommission.justice.gov.uk/consultations/1755.htm

Resource implications
None

Financial implications
None

Appendices
Law Commission (2012). Regulation of Health and Social Care Professionals Summary.

Date of paper
19 March 2012

Law Commission
Reforming the law

Scottish Law Commission
promoting law reform

Northern Ireland Law Commission

Regulation of health care professionals

Regulation of social care professionals in England

Summary of Joint Consultation Paper

LCCP 202 / SLCDP 153 / NILC 12 (2012)

REGULATION OF HEALTH CARE PROFESSIONALS

REGULATION OF SOCIAL CARE PROFESSIONALS IN ENGLAND

SUMMARY OF CONSULTATION PAPER

Introduction

1. This is a summary of the joint consultation paper by the Law Commission, the Scottish Law Commission and the Northern Ireland Law Commission on the regulation of health care professionals in the UK and of social care professionals in England. This summary provides a brief overview of the main proposals and questions made in the consultation paper. More information and detail is available at http://www.lawcom.gov.uk/.

2. We emphasise that the provisional proposals put forward represent our preliminary view about how the law should be reformed. We welcome comments and feedback on the proposals and questions put forward. We will be reviewing every proposal on the basis of the responses made to the consultation paper.

3. The remit of our review extends to the legal frameworks for the following bodies:

    - Council for Healthcare Regulatory Excellence
    - General Chiropractic Council
    - General Dental Council
    - General Medical Council
    - General Optical Council
    - General Osteopathic Council
    - General Pharmaceutical Council
    - General Social Care Council
    - Health Professions Council
    - Nursing and Midwifery Council
    - Pharmaceutical Society of Northern Ireland

4. These bodies operate within a wide variety of legal frameworks which have been agreed and amended by Parliament in different ways and at different times over the past 150 years. A complex legislative landscape has evolved on a piecemeal basis resulting in a wide range of idiosyncrasies and inconsistency in the powers, duties and responsibilities of each of the regulators.

Structure of reform (Part 2 of the consultation paper)

5. Our proposed structure would consist of a single Act of Parliament to provide the legal framework for all the health and social care regulators listed. This would replace all the existing governing statutes and orders.

6. The statute would impose consistency across the regulators where this is necessary in the public interest. Otherwise the regulators would be given greater autonomy to adopt their own approach to regulation in the light of their circumstances and resources. This would include broad powers to make or amend rules concerning the exercise of their functions and governance without any direct oversight (including Privy Council approval and Government scrutiny). There would be a statutory duty on the regulators to consult whenever issuing or varying anything which is binding, anything which sets a benchmark or standard, and a competency.

7. Under our proposals, the formal role of the Privy Council in relation to health care regulation would be removed entirely. Instead, the Government would be given regulation-making powers on certain issues on matters that require a political policy decision to be made, including where there is sufficient public interest and matters that give rise to questions about the allocation of public resources. This would replace the order-making power in section 60 of the Health Act 1999 which would be repealed.

8. The Government would also be given default powers to intervene where a regulator has failed or is likely to fail to perform any of its functions. We also believe that the House of Commons Health Committee and the devolved assemblies should consider holding annual accountability hearings with the regulators.

9. There would be a duty on each regulator to provide information to the public and registrants about its work. Each regulator will be required to lay copies of their annual reports, statistical reports, strategic plans and accounts before Parliament and also, in all cases, the Scottish Parliament, the National Assembly for Wales and the Northern Ireland Assembly.

10. The Government would be given a regulation-making power to abolish or merge any of the existing regulators, or to establish a new regulatory body. This power would also enable the Government to add new professional groups to, or remove professional groups from, statutory regulation.

Devolved responsibilities

11. Our proposals would not affect the Scotland Act 1998, and accordingly the Scottish Parliament would continue to have legislative competence over certain professional groups regulated since devolution. If the Scotland Bill 2010 does not become law, any use of the proposed regulation-making power (see above) in respect of a profession for which the Scottish Parliament has legislative competence, must be consulted on by Scottish Ministers and laid before the Scottish Parliament as well as the UK Parliament.

12. We seek further views on whether the Pharmacy (Northern Ireland) Order 1976 should be retained as a separate standalone piece of legislation alongside the new legal framework or retained in the new statute as a separate Part. We also welcome views on whether the Government's proposed regulation-making powers should include a specific provision to allow for the incorporation of the Society in the main legal framework of the new statute at some point in the future (subject to the approval of the Northern Ireland Assembly) or to apply specific reforms to the Society.

Main duty of the regulators (Part 3 of the consultation paper)

13. We believe that the statute should set out a paramount duty which would apply to all the Regulators and the Council for Healthcare Regulatory Excellence. This would encourage a consistent approach to regulation, and provide registrants and the public with a clear statement of the purpose of professional regulation.

14. We have put forward for discussion two alternative main duties:

    - The paramount duty is to protect, promote and maintain the health, safety and well-being of the public by ensuring proper standards for safe and effective practice, or

    - The paramount duty is to protect, promote and maintain the health, safety and well-being of the public and maintain confidence in the profession, by ensuring proper standards for safe and effective practice.

Governance (Part 4 of the consultation paper)

15. All of the regulators are governed by General Councils that set policy and strategy and oversee operational matters. In terms of the over-arching structure of each Council, the paper seeks views on whether the statute should reform the existing structure to encourage Councils to become more board-like; whether a statutory executive board should be established consisting of the chief executive and senior directors; and/or whether there should be a unitary board structure which would move away from a two-tier approach based on a Council and officials.

16. Our proposed reforms would require that each Council must be constituted by rules issued by the regulators (including appointments, terms of office, quorums and appointment of chairs). On matters relating to the size of Councils and the proportion of lay and registrant members, we have put forward 3 options for reform:

    - The statute could specify a ceiling for the size of the Councils and the proportion of lay/registrant members

    - The government could be required to specify in regulations the size of the Councils and the proportion of lay/registrant members

    - The regulators could be given general powers to set the size and composition of their Councils and the Government given default powers to intervene if this is necessary in the public interest

17. Otherwise the regulators would be given broad powers to determine their own governance arrangements, including the ability to establish committees if they wish to do so.

Registers (Part 5 of the consultation paper)

18. A key statutory function of the regulators is to establish and maintain a register. The proposed statute would set out a core duty on all the regulators to undertake this function. In addition, the regulators would be empowered but not required to appoint a Registrar.

19. The statute itself would specify which separate parts of the register or specialist lists must be established by the regulators. The Government would be given a regulation-making power to add, remove or alter parts of the register and specialist lists – and to introduce compulsory student registration in relation to any of the regulators. We are also interested to hear views on whether the regulators should be given powers to introduce voluntary registers in relation to professions who are currently not regulated and on whether non-practising registers should be abolished.

20. The regulators will be required to register applicants on a full, conditional or temporary basis, and have powers to introduce provisional registration if they wish to do so. The statute will specify that in order to be registered on a full or temporary basis the applicant must:

    - Be appropriately qualified;
    - Be fit to practise;
    - Have adequate insurance or indemnity arrangements; and
    - Have paid a prescribed fee.

21. The regulators would be given broad rule-making powers to specify the precise detail under each of these requirements and in relation to the processing of registration applications. The statute would require the regulators to communicate expeditiously with registrants and potential registrants. The regulators would be empowered to establish separate criteria for the renewal of registration and for registrants proceeding from provisional to full registration.

22. The statute would require the regulators to establish an appeals process for when registration applications are refused, and an appeals process for where registration has been fraudulently procured or incorrectly made and in relation to restoration applications. The regulators would have broad powers to decide the precise process they want to introduce, but in all cases there would be a further right of appeal to the High Court in England and Wales, the Court of Session in Scotland, and the High Court in Northern Ireland. However, there will be a requirement that all applications for restoration to the register where a registrant's entry has been erased must be referred to a Fitness to Practise Panel.

23. The regulators would have broad powers to make rules concerning the content of the registers. However, there would be a requirement that all current fitness to practise sanctions must appear in the public register. In addition, the regulators would have discretion to include the details of undertakings, warnings and Interim Orders in the public register.

Protected titles and functions

24. All of the existing protected titles and functions that are contained currently in the regulators' governing statutes and orders would be specified on the face of the new statute. The Government would have powers to add to or remove any of these protected titles and functions. However, we are interested in views on how appropriate are the existing protected titles and functions and whether they should be reformed.

25. The regulators would continue to have powers to bring prosecutions to enforce the protection of professional titles and functions (except in Scotland) and will be required to set out in a publicly available document their policy on bringing prosecutions. However, our final recommendations will need to take into account the report of the Law Commission on criminal liability in a regulatory context, and whether, for example, separate offences should be removed when a general criminal offence would suffice.

Education, conduct and practice (Part 6 of the consultation paper)

26. All of the regulators currently have powers to oversee the quality of pre-registration and post-registration education and training in order to equip students with the skills and

knowledge they need for practice. The statute would require the regulators to make rules relating to approved qualifications, the approval of education institutions, programmes, courses and/or environments, rights of appeals against decisions to refuse or withdraw approval, and a system of inspection of education institutions. These rules would be supplemented by a duty on the regulators to establish and maintain a published list of approved institutions and/or courses, and publish information on any decisions regarding approvals.

27. The regulators also issue guidance such as codes of conduct, standards of proficiency and ethical guidelines which set out the values and principles on which good practice is founded. There would be a statutory duty on the regulators to issue guidance, but there would be discretion in how they implement this duty (for example, in relation to which forms of guidance are issued). The statute would provide for two types of guidance: *tier one guidance* which must be complied with unless there is good reason not to, and *tier two guidance* which must be taken into account and given due weight. The regulators would be required to state in any guidance produced whether it is tier one or tier two guidance.

28. In addition, the regulators require registrants to keep their knowledge and skills up to date throughout their working life and to maintain and improve their performance. The statute would place a duty on the regulators to ensure ongoing standards of conduct and practice through continuing professional development (including the ability to make rules on revalidation).

Fitness to Practise (Parts 7, 8 and 9 of the consultation paper)

29. Fitness to practise attracts a significant amount of public and media attention and is undoubtedly the most high profile aspect of the regulators' work. The cost of running a fitness to practise system also takes up a substantial proportion of the regulators' resources. Parts 7, 8 and 9 of the consultation paper consider the fitness to practise process, and how it should be provided for in the new statute.

Impairment (Part 7)

30. Part 7 considers how impaired fitness to practise is determined. Currently, the regulators are required to consider whether the facts alleged are proved to the requisite standard and if so, whether or not the practitioner's fitness to practise is impaired as a result. In deciding whether the facts are proven, the regulators must consider whether those facts amount to one or more of the statutory grounds for an impairment. The statutory grounds are legal categories of conduct which must form the basis of a finding of impaired fitness to practise.

31. The main statutory grounds are:

    - Misconduct
    - Deficient professional performance
    - Convictions and determinations by another regulator
    - Adverse health

32. The consultation paper puts forward three options for reform:

    - The statute could establish a single framework for determining impaired fitness to practise based on the existing legislative schemes. In effect, the statute would list the statutory grounds for an impairment (which would be as above) which would

apply to all the regulators. The statute would provide that if the allegation is proved to the requisite standard, the regulator must decide whether or not the practitioner's fitness to practise is impaired.

- The statute could adopt the approach to impaired fitness to practise recommended by the Shipman inquiry. Thus, the regulators would be required at the investigation stage to determine whether the allegations if proved might show that the practitioner has put a patient at risk of harm, brought the profession into disrepute, breached a fundamental tenet of the profession or acted (or is likely to act) dishonestly, and if so whether there is a realistic prospect of proving the allegation. At the adjudication stage the regulators must consider whether or not fitness to practise is impaired to such an extent justifying action.

- Finally, the statute could remove altogether the statutory grounds for a finding of impaired fitness to practise. Instead the regulators would be required to consider whether the facts alleged are proved and if so, whether they indicate that the practitioner is a risk to the health, safety and well-being of the public (and whether confidence in the profession has been or will be undermined). The evidence would not be limited to any predetermined categories. The regulator would then need to consider, on the basis of those facts, whether the practitioner's fitness to practise is impaired.

Investigation (Part 8)

33. The paper proposes that the statute should provide that the regulators should consider any information which comes to their attention as an allegation and not just formal complaints. Additionally, there would be no set format for allegations.

34. All the regulators would have the ability to establish a formal process for the initial consideration of allegations, such as screeners, as well as the power to establish referral criteria for an investigation and specify cases which must be referred directly to a Fitness to Practise Panel. Furthermore, the test for all referrals to a Fitness to Practise Panel across the regulators would be the real prospect test. Flexibility would be promoted by giving the regulators broad powers concerning how and by whom an investigation is carried out and the statute would not require the regulators to establish an Investigation Committee. The statute would give all the regulators a general power to require the disclosure of information where the fitness to practise of a registrant is in question, including by the registrant themselves. Further views are sought on whether any enforcement powers should be attached to the power to require information.

35. All of the regulators would have the same powers to dispose of cases at the investigation stage. Thus, the regulators would have powers to issue or agree:

    - Warnings

    - Interim orders

    - Undertakings

    - Voluntary erasure

    - Advice.

36. The regulators would be given broad powers to make rules governing the use of such powers. This would include rules governing which body can issue them and the

circumstances in which the powers can be agreed or imposed. The paper also seeks views on whether the regulators ability to dispose of cases at the investigation stage should be subject to approval by a formal committee or Fitness to Practise panel. Alternatively, the power of the Council for Healthcare Regulatory Excellence to refer cases to the High Court could be extended to cover consensual disposals.

37. All of the regulators would be given powers to introduce systems of mediation if they wish to do so.

38. The statute would require the regulators to review an investigation decision:

    - not to refer a case for an investigation following initial consideration
    - not to refer the case to a Fitness to Practise Panel
    - to issue a warning, or
    - to cease consideration of a case where undertakings are agreed.

39. The right to initiate a review would be available to anyone interested in the decision. The grounds for a review would be that new evidence has come to light which makes review necessary for the protection of the public or that the regulator has erred in its administrative handling of the case and a review is necessary in the public interest. The regulators would be given broad rule making powers on all other aspects of the process for the review of an investigation decision.

Adjudication (Part 9)

40. Further views are sought on how to ensure that fitness to practise procedures continue to be compatible with Article 6 of the European Convention on Human Rights. For example, the statute could require the regulators to ensure that they establish a structure which is compliant with Article 6 without taking into account the role of the higher courts. In addition, it is asked whether (and if so how) the new legal framework ensure the separation of investigation and adjudication, and whether the statute should allow for the option of the regulators' adjudication systems joining the Unified Tribunals Service.

41. Under our proposals, the regulators would have a broad power to establish rules for case management and, furthermore, the overriding objective of the Civil Procedure Rules – that cases must be dealt with justly – would be made part of the regulators' fitness to practise procedures.

42. The statute would require each regulator to establish Fitness to Practise Panels of at least three members for the purpose of adjudication. In addition, the statute would require that:

    - Panels must be appointed by a process which is separate from the Council,
    - Council members and investigators cannot be members of Panels, and
    - Each Panel must include a lay member.

43. However, other than these matters, the regulators should have broad powers to make rules on the constitution of their Fitness to Practise Panels.

44. Most procedural elements of adjudication would be subject to broad rule making powers. However, certain procedural aspects would be defined in our proposed statute. These are:

- the application of the civil rules of evidence and the civil standard of proof to hearings

- a requirement that all hearings must be held in public unless one or more of the exceptions in the Civil Procedure Rules apply

- a central definition of a vulnerable witness.

45. The statutory right of appeal against the decision of a Fitness to Practise Panel to the High Court in England and Wales, the Court of Session in Scotland and the High Court of Justice in Northern Ireland would be maintained.

46. The regulators would be required to establish a system for imposing and reviewing Interim Orders. The statute would require each regulator to establish panels of at least three members for such hearings (including a lay member). In addition, Interim Orders Panels must be appointed by a process which is separate from the Council, and there would be a prohibition on Council members and investigators from being members of panels. There would be a single test for imposing an order which would be that it is necessary to protect, promote and maintain the health, safety and well-being of the public (and maintain confidence in the profession). On most other procedural matters the regulators would have broad rule-making powers. The right of appeal against an Interim Order to the High Court in England and Wales, the Court of Session in Scotland and the High Court in Northern Ireland would be maintained.

47. There would be parity in the range of sanctions available to the regulators. All the regulators would be able to impose:

    - erasure from the register

    - suspension

    - conditions, and

    - warnings.

48. In addition, the Government would be given a regulation-making power to introduce systems of financial penalties and cost awards. All Fitness to Practise panels would have powers to agree undertakings and voluntary erasure. The regulators would have powers to introduce immediate orders (or use Interim Orders for this purpose).

49. The test for imposing any of the sanctions and agreeing consensual disposals would to protect, promote and maintain the health, safety and well-being of the public (and maintain confidence in the professions). The regulators would have broad powers to make rules in relation to the available sanctions and the Government would be given powers to add new sanctions and to remove any sanctions.

50. The consultation paper invites views on the appropriateness of the language used to describe the various sanctions and consensual forms of disposal available to the regulators.

51. The regulators would be required to have a system of review hearings for conditions and suspension orders. The regulators could also extend review hearings for warnings and undertakings if they wished to do so. The regulators would have broad powers to establish the procedures for hearings.

52. The paper seeks further views on whether the regulators should be given a limited power to quash or review decisions of Fitness to Practise panels where the regulator and the parties agree that the decision was unlawful.

Council for Healthcare Regulatory Excellence (Part 10 of the consultation paper)

53. The Council for Healthcare Regulatory Excellence currently oversees the work of the nine UK health care regulators by supervising and scrutinising the work of the regulators, sharing good practice and knowledge with the regulators, and advising the four UK government health departments on issues relating to the regulation of health professionals.

54. In our scheme the current powers and functions of the Council for Healthcare Regulatory Excellence (including those introduced by the Health and Social Care Bill 2011) would be maintained as far as possible. Appointments to the General Council would be made by the Government and by the devolved administrations.

55. In light of the proposed right of appeal for the General Medical Council from its proposed tribunal service, the consultation paper seeks further views on whether the Council for Healthcare Regulatory Excellence's power to refer cases to the higher courts should:

    - be retained and exercised alongside a regulator's right of appeal, in cases when the regulator's adjudication procedure is considered to be sufficiently independent,

    - be removed when a regulator's right of appeal is granted in such circumstances, or

    - be retained and rights of appeal should not be granted to regulators, although regulators should have a power to formally request the CHRE to exercise its power.

Business regulation (Part 11 of the consultation paper)

56. Some regulators have powers to regulate businesses with the aim of ensuring that the infrastructure supports proper standards of practice. Under our proposals, the statute would retain the existing premises regulation regimes of both the General Pharmaceutical Council and the Pharmaceutical Society of Northern Ireland. The consultation paper seeks views on whether the statute should retain the existing systems for the regulation of bodies corporate and whether the regulators should have powers to finance or establish a consumer complaints service.

57. The paper also proposes that the Government would be given powers to extend business regulation to any other regulator.

Overlap issues (Part 12 of the consultation paper)

58. The functions of the regulators frequently cross organisational and legal boundaries. Under our reforms, the statute would include a permissive statement to the effect that each regulator may carry out any of its functions in partnership with another organisation. Furthermore, the statute would enable formal partnership arrangements to be entered into between any regulator and one or more other organisations (including the other professional regulators) in relation to the exercise of their statutory functions. The statute would provide that any such arrangements do not affect the liability of the regulator for the exercise of any of its statutory functions.

59. Furthermore, there would be two concurrent duties to cooperate – a general duty and a specific duty. The general duty would require each regulator to make arrangements to

promote cooperation with other relevant organisations or other persons, including those concerned with:

- The employment of registrants
- The education and training of registrants
- The regulation of other health or social care professionals
- The regulation of health or social care services, and
- The provision/supervision/management of health or social care services.

60. The specific duty to cooperate would apply when a regulator in question is:

- considering registration applications and renewals
- undertaking the approval of education and training
- ensuring proper standards of practice and conduct, and
- undertaking an investigation into a registrant's fitness to practise.

61. The duty would apply to the same list provided for under the general duty above. The requested authority would be required to give due consideration to any such request made by the regulator, and if it refuses to co-operate, must give written reasons.

Cross border issues (Part 13 of the consultation paper)

62. In terms of overseas applicants, the statute would require the regulators to specify in rules which qualifications would entitle an applicant to be registered, including overseas qualifications. In terms of overseas applicants from the European Economic Area, the regulators would be given primary responsibility for ensuring compliance with the Qualifications Directive. However, there would also be default powers for the Government to allow for interventions in cases where there has been or is likely to be a failure to implement the Qualifications Directive properly. The statute would also give the regulators broad powers to register those applicants from beyond the European Economic Area, including powers to set requirements as to the language, practice and education requirements.

63. The paper also seeks further views on the interface between the regulatory systems in the UK and the Channel Islands and the Isle of Man.

64. The regulators would be given an express power to approve and accredit overseas education institutions and courses and issue rules and guidance for the purpose of such activity.

65. The paper also seeks views on the issues that arise from distance service provision.

How to respond

The Law Commission would be grateful for comments on the consultation paper before 31 May 2012. Comments may be sent either –

By email to: public@lawcommission.gsi.gov.uk

By post to: Tim Spencer-Lane
Law Commission
Steel House
11 Tothill Street
London SW1H 9LJ
Tel: 020 3334 0267 / Fax: 020 3334 0201

If comments are sent by post, it would be helpful if, where possible, they were also sent to us electronically (in any commonly used format).

We will treat all responses as public documents. We may attribute comments and publish a list of respondents' names. If you wish to submit a confidential response, you should contact us before sending the response. Please note – we will disregard automatic confidentiality statements generated by an IT system.

An analysis of consultation responses will be published on the Law Commissions' websites. The next stage will be to produce and submit a report and draft bill in 2014 to the Lord Chancellor and to the Scottish and Northern Ireland Ministers.