Law Commission
Reforming the law

Scottish Law Commission
promoting law reform

Northern Ireland Law Commission
promoting law reform in Northern Ireland

Regulation of Health Care Professionals
Regulation of Social Care Professionals in England

A Joint Report (Summary)

Law Com No 345 / Scot Law Com No 237 / NILC 18 (2014) – Summary
2 April 2014

REGULATION OF HEALTH CARE PROFESSIONALS

REGULATION OF SOCIAL CARE PROFESSIONALS IN ENGLAND

SUMMARY

INTRODUCTION

1.1 The remit of the project was to review the UK law relating to the regulation of health care professionals and, in England only, the regulation of social workers. There are nine regulatory bodies within the remit of the project. These bodies are responsible for regulating 32 professions in the UK – consisting of approximately 1.44 million professionals. The regulatory bodies are:

(1) General Chiropractic Council

(2) General Dental Council

(3) General Medical Council

(4) General Optical Council

(5) General Osteopathic Council

(6) General Pharmaceutical Council

(7) Health and Care Professions Council

(8) Nursing and Midwifery Council

(9) Pharmaceutical Society of Northern Ireland

1.2 The project was referred to the Law Commission by the Secretary of State for Health in September 2010 and announced in the White Paper *Enabling Excellence*. Owing to the UK-wide nature of the review, this has been a joint project between the Law Commission of England and Wales, the Scottish Law Commission and the Northern Ireland Law Commission.

THE FINAL REPORT AND DRAFT BILL

1.3 The following is a summary of the main recommendations contained in the final report and draft Bill which were published on 2 April 2014. The recommendations set out in the Law Commissions' final report and draft Bill aim to create a clear, modern and effective legal framework for the regulation of health and social care professionals.

The structure of reform (Part 2 of the Report)

1.4 The draft Bill creates a single legal framework for all the regulators of health and social care professionals. The regulators' existing governing legislation (such as the Medical Act 1983, Dentists Act 1984 and Nursing and Midwifery Order 2001) would be repealed, and replaced with a single Act of Parliament to provide the legal framework for all regulated professionals.

1.5 In many areas, the draft Bill consolidates and simplifies the existing legal framework. The draft Bill also imposes greater consistency across the regulators in some areas where this is necessary in the public interest (such as the conduct of fitness to practise hearings). Otherwise the regulators would be given greater autonomy to be able to deliver its functions in a way that is suited to the profession concerned.

1.6 We recommend that the regulators should be given powers to make or amend rules concerning issues such as registration and renewals and education, standards and continuing professional development – which will no longer be subject to approval by Government or any Parliamentary procedure. The requirement of Privy Council approval of rules under the current legislation has led to significant delays in delivering regulatory change and improvements, and prevented the regulators from evolving. There would be a requirement on the regulators to consult when considering changes to their rules and a requirement that each regulator must provide information to the public and registrants about its work. The procedures for making new rules would also be subject to oversight by the Professional Standards Authority.

1.7 We also recommend reforms to the role of Government in professionals regulation. Currently, the Government plays an active role in overseeing all aspects of the regulators' functions, mainly through in its capacity as Privy Council adviser. This is not only at odds with the need to ensure the operational independence of the regulators, but Government no longer has the capacity to operate in the same way that it has to date. The draft Bill therefore targets Government oversight on key areas where there is sufficient public interest and matters that give rise to questions about the allocation of public resources (for example, the extension of statutory regulation to new professions or extending revalidation). The Government is also given default powers to intervene in cases of regulatory failure.

General objectives (Part 3 of the Report)

1.8 The draft Bill establishes a single set of overarching objectives for all the regulators and the Professional Standards Authority when exercising their functions. This is intended to encourage a consistent approach to decision-making, and provide registrants and the public with a clear statement of the purpose of professionals regulation.

1.9 The main objective of each regulator and the Professional Standards Authority will be to protect, promote and maintain the health, safety and well-being of the public. The regulators and the Authority will also have the following general objectives:

(1) to promote and maintain public confidence in the profession; and

(2) to promote and maintain proper professional standards and conduct for individual registrants.

Governance (Part 4 of the Report)

1.10 The draft Bill encourages the regulatory bodies – who are responsible for running the regulators – to become more board-like in their operation. The regulatory bodies are required to ensure that, as far as possible, members concentrate on strategic or policy matters rather than operational delivery. The draft Bill specifies that most functions could be delegated to staff, and others.

1.11 The Government will be empowered to make regulations to provide for the constitution of the regulatory bodies. The draft Bill specifies that a majority of members cannot be registrants, and provides a new definition of registrant and lay members. Concurrent membership of the regulatory bodies will also be prohibited.

Registers and registration (Part 5 of the Report)

1.12 A key statutory function of the regulators is to establish and maintain a register of professionals. Registration refers to the compilation of a list of individuals (and sometimes businesses) who have satisfied a regulator that they are qualified and fit to practise.

1.13 The draft Bill will require each regulator to keep a register for each profession it regulates, and to continue to appoint a Registrar. The Government would be given a regulation-making power to add, remove or alter parts of the register, and to introduce other registration systems (such as provisional and student registration) for any profession. Under the new legal framework the regulators will lose their powers to establish voluntary registers, but the Professional Standards Authority will retain its power to accredit voluntary registers kept by other organisations.

1.14 Under our scheme the Government would have the ability to introduce barring schemes through regulations. Rather than providing a list of those who are qualified and fit to practise, a barring scheme lists those who are prohibited from practising. The draft Bill provides that a barring scheme can be introduced by a regulatory body in respect of a profession prescribed in the regulations, a specified field of activity and/or a specified occupational group.

1.15 The draft Bill requires the regulators to communicate expeditiously with registrants and potential registrants. Otherwise, they would be given broad rule-making powers concerning the processing of registration applications. There would be a requirement to establish a formal appeals process. These processes would be supplemented by 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.

1.16 There would be minimum requirements as to the content of the register, such as a requirement that all current and many past fitness to practise sanctions must appear in the public register. In order to annotate the register (for example by listing additional professional qualifications) the regulators would need to

demonstrate that such information was necessary in order to protect the public and undertake full consultation.

Education, conduct and practice (Part 6 of the Report)

1.17 Our new system would impose duties on regulators to determine professional and education standards. We recommend giving the regulators powers to approve, and withdraw approval of, a range of matters relating to education, such as courses, institutions, placements and the environment in which education is delivered. There would also be powers to make rules on rights of appeal, and systems of inspectors. These rules would be supplemented by associated publication requirements (for example a duty to publish lists of all approved courses and education providers and where approval has been withdrawn).

1.18 We think that there should be a requirement on the regulators to set standards for the profession or professions they regulate. However, the regulators should have flexibility over how to carry out this duty. Those standards may include matters such as proficiency, professional performance, conduct and ethics with which a person practising the profession is expected to comply. The draft Bill will therefore confirm that a failure to comply with the standards may be taken into account in fitness to practise proceedings. The regulators would also have powers to issue guidance on these matters as they see fit.

1.19 The regulators will also be required to determine standards of continuing professional development. These standards could relate to matters such as the amount and type of training and education required, and what information must be provided by registrants to demonstrate compliance. The regulators should have power to remove registrants from the register if they fail to comply. In addition the Government is given regulation-making powers to introduce systems of revalidation, where registrants must demonstrate their continuing fitness to practise in their chosen fields.

Fitness to practise - Impairment (Part 7 of the Report)

1.20 The concept of impaired fitness to practise is of central importance to regulation. The law provides that a person's fitness to practise is to be regarded as impaired by reason only of one or more statutory grounds. We recommend that the existing statutory ground should be reformed. In the draft Bill, the grounds are:

(1) deficient professional performance

(2) disgraceful misconduct

(3) inclusion of the person on a barred list

(4) a determination by another regulator to the effect that fitness to practise is impaired

(5) adverse physical or mental health

(6) insufficient proficiency in the knowledge and use of the English language

(7) convictions or cautions

(8) certain other court disposals

Fitness to practise - Investigation (Part 8 of the Report)

1.21 We recommend that the regulators should refer any case for preliminary consideration where an allegation is made that a professional's fitness to practise is impaired or the regulator otherwise has reason to believe that the professional's fitness to practise is impaired. The draft Bill specifies that certain cases cannot proceed beyond preliminary consideration (such as vexatious allegations or where 5 years has passed since the incident or allegation – unless it is in the public interest to proceed). Regulators would be required to refer certain cases directly to a fitness to practise panel (for example, certain criminal convictions), and the draft Bill also creates a presumption of removal in respect of the most serious criminal convictions (such as murder and rape).

1.22 The regulators would be given flexibility as to how to investigate allegations. There is no requirement in the draft Bill to establish statutory investigation committees. The regulators would all have the same powers to for example establish systems of case examiners or formal panel hearings. The draft Bill gives all the regulators a general power to require the disclosure of information where the fitness to practise of a registrant is in question.

1.23 The test for all referrals to a fitness to practise panel across the regulators would be the realistic prospect test. The draft Bill requires that all cases must be referred if there is a realistic prospect of a finding of impairment, except where it is not in the public interest to make a referral. The draft Bill expands the range of disposals available at the investigation stage. For example, the regulators will be able to issue advice and warnings and agree undertakings or voluntary removal following an investigation. The draft Bill also enables each regulator to initiate a review of certain investigation decisions where the case has not been referred to a fitness to practise panel.

Fitness to practise - Adjudication (Part 9 of the Report)

1.24 The draft Bill specifies certain procedural elements that we consider necessary to ensure compliance with article 6 of the European Convention on Human Rights. All fitness to practise hearings will be required to be conducted by at least 3 members (including at least one lay member). The regulators will have rule making powers to decide some cases without formal panel hearings. The draft Bill also requires the regulators to establish a body or person responsible for appointments, appraisal and continued development of panellists.

1.25 The regulators would have a broad power to establish rules for pre-hearing case management. Each fitness to practise panel will be given the general objective of dealing fairly and justly with cases (as well as the general objectives in clause 3). There would be a duty on regulators to comply with a request that a hearing takes place in the UK country where the registrant resides or incident took place, unless there are reasons that justify refusing the request. The civil rules of evidence, and the civil standard of proof are applied to hearings. The draft Bill provides that most hearings will be in public except for interim order and health cases. There will be a single consistent definition of witnesses who are eligible for special measures.

1.26 Certain procedural matters will be imposed on all fitness to practise hearings, such as the right to representation, witness summons and powers to join cases. In addition, The Government will be given a power to give guidance about fitness to practise procedures, including in the form of model rules.

1.27 All fitness to practise panels will have the same powers to impose sanctions or otherwise dispose of cases. The sanctions would be advice, warnings, conditions, suspension and removal from the register. All panels would be able to agree undertakings and voluntary removal, and issue immediate orders pending the outcome of any appeal to the higher courts. The statutory right of appeal against a panel 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.

1.28 The regulators would be required to establish a system for imposing and reviewing Interim Orders .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 of Justice in Northern Ireland would be maintained. The regulators would be required to have a system for reviewing certain sanctions.

1.29 In addition, the Government should have regulation-making powers to introduce a new adjudication system for any of the regulators, based on the Medical Practitioners Tribunal Service. This would include the power for the regulator to appeal panel decisions which do not, in its view, achieve sufficient protection of the public and a requirement that the body must report annually to Parliament.

Overlap issues (Part 10 of the Report)

1.30 The draft Bill provides that any two or more regulators should be able to arrange for any of their respective functions to be exercised jointly. The Professional Standards Authority will be required to promote such co-operation. Each regulator will have express powers to delegate most of their functions to another regulator or any other person. Furthermore, there would be two concurrent duties to co-operate – a general duty and a specific duty. The regulators will be required to co-operate with each other, the Professional Standards Authority and specified "relevant authorities". When a regulator requests the co-operation of a relevant authority (or when such an authority makes a similar request of a regulator), the requested body would be required to comply unless doing so would be incompatible with its duties or have an adverse impact.

Premises and business regulation (Part 11 of the Report)

1.31 Our system would maintain the existing provisions for premises and body corporate regulation applicable to the General Pharmaceutical Council and General Optical Council. The Government would be given powers to reform these systems and extend business and premises regulation to any other regulator. We also recommend that the regulators would be able, subject to the Professional Standards Authority's approval, to allocate funds to another organisation to investigate and resolve consumer complaints about registrants.

Professional Standards Authority (Part 12 of the Report)

1.32 We recommend that the general powers and functions of the Professional Standards Authority should be extended to include promoting economic efficiency and cost effectiveness by the regulators. The Authority's power to give directions to the regulators will be enacted in the draft Bill. It would also continue to be able to accredit voluntary registers maintained and operated by bodies other than the regulators, and would continue to provide advice or undertake investigations on when requested to do so by the UK government and devolved administrations. We also recommend that the Government would have the power to make regulations enabling the Authority to investigate complaints made to it about the way in which a regulator has exercised any of its functions. The Authority's power to refer fitness to practise cases to the higher courts would be retained.

Other issues (Part 13 of the Report)

1.33 The Nursing and Midwifery Council would retain its obligations to make rules regulating the practice of midwifery. The current schemes of protected titles and functions would be maintained, and subject to amendment only by the Government. The regulators would continue to have powers to bring private prosecutions to enforce the protection of professional titles and functions.

Devolution

1.34 The general position is that professionals regulation is UK wide, subject to some exceptions. The exceptions are the Pharmacy Order 2010 which extends to Great Britain, and the Pharmacy (Northern Ireland) Order 1976 which extends to Northern Ireland. The draft Bill does not interfere with the legislative competence of the devolved assemblies. The new legal framework will proceed on the basis of a Legislative Consent Motion.

1.35 We have concluded that the Pharmaceutical Society of Northern Ireland as currently constituted should not be incorporated into the draft Bill. However, it is important that the option should be left open for the Northern Ireland Assembly to incorporate the Society into the new legal framework either as a separate regulator for Northern Ireland or through merger with the General Pharmaceutical Council.

1.36 We have also built into our reforms mechanisms to ensure that all four devolved administrations are consulted over future changes to UK professional regulation.