Council, 10 May 2012

Law Commission consultation response

Executive summary and recommendations

Introduction

On 1 March 2012 the Law Commission, Scottish Law Commission and Northern Ireland Law Commission issued a joint consultation on the regulation of healthcare professionals in the UK and the regulation of social care professionals in England.

A summary of the consultation proposals was included in the papers at the Council's meeting in March 2012. Tim Spencer-Lane from the Law Commission also presented to the Council on the consultation proposals at that meeting.

A draft response to the questions and provisional proposals outlined in the consultation document is attached. A copy of the Law Commissions' summary of the consultation proposals is appended. A link to the full consultation document is provided below.

The draft response has been compiled by the Director of Fitness to Practise, Secretary to Council and Director of Policy and Standards.

Decision

The Council is invited to:

- discuss the attached draft consultation response; and
- approve the text of the consultation response for submission, subject to amendments agreed at the meeting and minor editing amendments.

Background information

- The full consultation document is available here

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

- In the attached draft, 'DN' denotes a drafting note.

Resource implications

None at this time

Financial implications

None at this time

Appendices

Law Commission, Scottish Law Commission and Northern Ireland Law Commission (2012). Regulation of Health and Social Care Professionals. Summary.

Date of paper

30 April 2012

31 May 2012

Health Professions Council response to the Law Commissions' consultation on the 'Regulation of health care professionals' and the 'Regulation of social care professionals in England'

Introduction

The Health Professions Council welcomes the opportunity to respond to the joint consultation of the Law Commission, Scottish Law Commission and Northern Ireland Law Commission on the regulation of health care professionals in the UK and the regulation of social care professionals in England.

The Health Professions Council is a statutory UK wide regulator of health care professionals governed by the Health Professions Order 2001. We regulate the members of 15 professions. From 1 August 2012, we will be renamed the 'Health and Care Professions Council' and will become responsible for regulating social workers in England.

We maintain a register of professionals, set standards for entry to our register, approve education and training programmes for registration and deal with concerns where a professional may not be fit to practise. Our main role is to protect the health and wellbeing of those who use or need to use our registrants' services.

Overall comments

We consider that overall the consultation proposals have a struck an appropriate balance between flexibility for the regulators, consistency and accessibility of statutory regulation and appropriate scrutiny and oversight. We particularly welcome the proposal to increase the parliamentary accountability of the regulators.

We consider that whilst the proposals overall will appropriately modernise and simplify the legislative framework, they may in places lead to unhelpful divergence of approach across the regulators. We have highlighted in our response those areas important for public protection and public confidence in statutory regulation where we consider it is important for the statute to be prescriptive and for the regulators to be permitted less discretion than that proposed.

About our response

We have approached responding to the consultation document in the following way:

- We have answered each question outlined in the document.

- We have also addressed each provisional proposal outlined in the document (not all of which have a corresponding consultation question). Where we have substantive comments to make, these are outlined. Where we are in broad agreement with the provisional proposal this is indicated.

- In our response the Health Professions Order 2001 (our governing legislation) is referred to as 'the Order'. 'We' and 'our' are references to the HPC.

Part 2: The Structure of Reform and Accountability

Provisional proposal 2-1: All the existing governing legislation should be repealed and a single Act of Parliament introduced which would provide the legal framework for all the professional regulators.

Provisional proposal 2-2: The new legal framework should impose consistency across the regulators where it is necessary in order to establish the same core functions, guarantee certain minimum procedural requirements and establish certain core requirements in the public interest. But otherwise the regulators should be given greater autonomy in the exercise of their statutory responsibilities and to adopt their own approach to regulation in the light of their circumstances and resources.

We agree in principle with the approach outlined in these proposals.

Provisional Proposal 2-3: The regulators should be given 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 (subject to certain safeguards).

We agree with this proposal.

Question 2-4: Would the perceived status of legal rules be less clear or certain without Parliamentary approval? Should the CHRE be given an active role in scrutinising new rules, or should a limited number of the rules be subject to Secretary of State approval and contained in a statutory instrument?

We do not consider that the perceived status of legal rules would be less clear or certain without direct parliamentary approval. Further, the consultation document proposes other measures to increase the accountability of the regulators, including oversight by the Health Committee, and, taken together with the CHRE's on-going annual performance review of the regulators, this builds-in appropriate oversight.

There is the potential in these proposals that there will be increased inconsistency in the detail of the procedures operated by each of the regulators. The consultation document also notes the potential for errors in the absence of effective oversight (paragraph 2.28). Whilst it should be for the regulators, following consultation, to determine the best arrangements for administering their core functions as set-out in legislation, we would support some kind of scrutiny role for the CHRE.

However, effective oversight could be ensured without the statute needing to provide an additional role for the CHRE in scrutinising new rules. The CHRE would be able to report on this area in any event as part of its annual performance review of the regulators. Whatever form it takes, oversight from the CHRE should be focused on ensuring that each regulator follows a transparent consultation process and is able to justify the rules it is proposing or has implemented.

Provisional Proposal 2-5: The power of the regulators to issue standing orders should be abolished.

We agree with this proposal.

Provisional proposal 2-6: The regulators should have the ability to implement their statutory powers by making rules, instead of a mixture of rules and regulations.

We agree with this proposal.

Provisional Proposal 2-7: The statute should require the regulators to consult whenever issuing or varying anything which is binding, anything which sets a benchmark or standard, and a competency. The regulators should be required to consult such persons as it considers appropriate…'

We agree in principle with this proposal.

The proposal is broadly in keeping with the requirements outlined in Article 3(14) of the Health Professions Order 2001. However, we would suggest that it is unhelpful to differentiate between standards, such as a code of conduct, and standards such as standards of proficiency. In our view the simplest way of articulating the relevant areas is that a consultation should be required before making or amending rules; setting or amending standards; and setting or amending guidance. Please see our response to provisional proposal 6-10.

The proposed list of categories of people and organisations to consult is appropriate overall. One significant omission, however, are educators and education providers who have a significant interest in the role of the regulators in approving education and training programmes and in registering those who pass them.

Provisional Proposal 2-8: The formal role of the Privy Council in relation to health and social care professional regulation should be removed entirely.

We agree with this proposal.

Provisional Proposal 2-9: The House of Commons Health Committee should consider holding annual accountability hearings with the regulators which should be coordinated with the Council for Healthcare Regulatory Excellence's performance reviews. The Scottish Parliament, National Assembly for Wales and Northern Ireland Assembly should also consider instituting similar forms of accountability.

We agree with this proposal.

We welcome any measures to increase the accountability of the HPC and the scrutiny of how we deliver our regulatory functions. However, we acknowledge that it is matter for the Committee itself to set its own priorities and agenda.

Provisional Proposal 2-10: The Secretary of State should be given formal powers to make decisions on matters that require a political policy decision to be made, including matters where there is a sufficient public interest and matters that that give rise to questions about the allocation of public resources.

We agree with this proposal.

We understand that such matters would appropriately include decisions to establish new regulators, to regulate new groups and to extend protected titles, functions or sanctions available to the regulators.

Provisional Proposal 2-11: The statute should place a duty on each regulator to provide information to the public and registrants about its work.

We agree with this proposal.

Provisional Proposal 2-12: Each regulator and the CHRE should 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.

We agree with this proposal.

Provisional Proposal 2-13: The statute should not require the regulators to send a copy of their accounts to the Comptroller and Auditor General or to the Auditor General for Scotland.

We agree with this proposal.

Provisional Proposal 2-14: The order making power in section 60 of the Health Act 1999 should be repealed and instead the Government should be given regulation-making powers on certain issues.

We agree with this proposal.

Provisional Proposal 2-15: The Government should be given a regulation-making power to abolish or merge any existing regulator, 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.

We agree with this proposal.

We note that any such regulations would be subject to the affirmative resolution procedure, requiring approval by both Houses of Parliament (paragraph 2.98).

Question 2-16: Should the CHRE be given a power to recommend a profession for statutory regulation, or the removal of a profession from statutory regulation? If the Government decided not to comply, it would be required to issue a report setting out its reasons.

The consultation document notes the HPC's existing powers under Article 3(17)(a) of the Health Professions Order 2001 to make recommendations to the Secretary of State for Health and to Scottish Ministers concerning 'any profession which in its opinion should be regulated pursuant to section 60(1)(b) of the Health Act 1999'.

We agree with the proposal that the CHRE should have a power to recommend statutory regulation. The CHRE's oversight role independent of the regulators and of Government means that it is in a better position than the individual regulators to make such a recommendation. Further, its forthcoming role in quality assuring voluntary registers means that it may be able to draw on this experience to identify where voluntary registration may be insufficient and statutory regulation may be merited.

We do not support the proposal that the CHRE should be given a power to recommend the removal of a profession from statutory regulation. The rationale for this proposed power is insufficiently explained in the consultation document. Any decisions relevant to de-regulating a profession should rest solely with Government and Parliament.

Provisional Proposal 2-17: The Government should be given powers to issue a direction in circumstances where the regulator has failed to perform any of its functions, and if the regulator fails to comply with the direction, the Government may itself give effect to the direction.

Provisional Proposal 2-18: The Government should be given powers to take over a regulator which is failing to carry out its functions.

We agree with these proposals.

Such powers would appropriately provide the Government with a 'power of last resort' to intervene if a regulator is failing to meet its statutory duties.

Provisional Proposal 2-19: The Government should not have express powers in the statute to initiate a public inquiry. This would continue to be provided for under other existing Government powers.

We agree with this proposal.

Provisional Proposal 2-20: If the Scotland Bill 2010 does not become law, any use of the proposed regulation-making power set-out in the provisional proposal 2-14 in respect of a profession 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.

We understand that the Scottish Parliament will continue to have legislative competence for those professions regulated post the devolution agreement.

Question 2-21: Should the Pharmacy (Northern Ireland) Order 1976 be reconstituted and retained as a separate part of the new statute?

We agree with this suggestion.

Question 2-22: Should the proposed regulation-making power set-out in provisional proposal 2-15 include a general provision to incorporate the Pharmaceutical Society of Northern Ireland (PSNI) into the main legal framework of the new statute (following approval by the Northern Ireland Assembly)?

We agree with this suggestion.

Question 2.23: Which, if any, of the specific proposals which follow in this consultation paper should be applied to the Pharmaceutical Society of Northern Ireland (PSNI)?

This question is best answered by the PSNI, its stakeholders, and the Northern Ireland Executive. However, in general we are supportive of consistency of approach in the regulation of health and social care professionals across the UK.

Question 2-24: How should the new legal framework deal with cases left over from the previous legal regimes? What practical difficulties are likely to arise from the repeal of existing legislation and rules?

We consider that the new legal framework should provide enabling powers to allow the regulators to act in a 'just' manner and to adapt their procedures where necessary to meet the specific needs of the case in question. This would allow for a fair and flexible approach to dealing with any practical difficulties that might arise.

Part 3: Main Duty and General Functions of the Regulators

Question 3-1: Should the statute specify the paramount duty of the regulators and the Council for Healthcare Regulatory Excellence is to: (1) protect, promote and maintain the health, safety and well-being of the public by ensuring proper standards for safe and effective practice; or (2) 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?

We support the focus on public protection in both suggestions.

For those regulators who have a function to 'develop' the professions they regulate (paragraph 3.3) this new wording would appropriately emphasise the regulators' public protection role, in contrast to the separate role of professional representative organisations in promoting or developing the profession.

We consider that whilst upholding the reputation of the profession is not a direct regulatory goal, maintaining public faith and confidence in the services provided by practitioners and, by extension, in their profession and in the regulatory process, is a valid aim. However, the suggested wording in b) does infer that the regulators are regulators of single professions, a notion which is particularly inapplicable in our case.

We would suggest that the wording in a) might be reworded to read: 'protect, promote and maintain the health, safety, well-being *and confidence* [emphasis added] of the public by ensuring proper standards for safe and effective practice'. In our view this would rightly emphasise the role of regulation in protecting, promoting and maintaining public confidence in the services offered by regulated professionals.

Provisional Proposal 3-2: The statute should not include a statement setting the general or principal functions of the regulators.

We agree with this proposal.

We support the rationale given in the consultation document, that such statements are unnecessary and duplicate the functions of the regulators set-out elsewhere in statute.

Question 3-3: Should the statute include guiding principles which would apply to all decisions made by the regulators, and if so what should they be?

The proposal of 'guiding principles' for decision making is an interesting one.

However, the statute should not attempt to describe or prescribe the complex factors that might be taken into consideration in each regulator's decision making. Further, any guiding principles would be likely to duplicate the proposal for the main duty of the regulators.

Question 3-4: Should the statute include a general power for the regulators to do anything which facilitates the proper discharge of their functions?

We support the suggestion of a general power. As noted in the document, this might 'help to resolve uncertainty where the necessary legal powers already exist but are not clear' (paragraph 3.40).

Part 4: Governance

Question 4-1: Should the statute: (1) reform the existing structure to encourage Councils to become more board-like; and/or (2) reform the existing structure by establishing a statutory executive board consisting of the chief executive and senior directors; and/or (3)establish a unitary board structure which would move away from a two-tier approach based on a Council and officials?

The Department of Health (DH) has stated that it agrees with the CHRE's advice on Board size and effectiveness , and its recommendations for appointed chairs and smaller councils. The HPC Chair is already appointed. We anticipate legislation to reform of the size of the HPC Council in the summer of 2013.

We are broadly supportive of the proposals to reduce the size of the HPC Council to between eight and twelve members in order that the Council operates with a more 'board-like' approach, although this will be subject to a DH consultation. This will further ensure that the Council continues to focus on the strategy and effective oversight of the organisation, which we consider to be fundamental to ensuring good governance.

The form a governing body takes, whether it be a statutory executive board, a unitary board or a smaller 'board-like' Council is not so important as achieving and maintaining good governance within the organisation. This depends upon having a strong, values driven Board, recruited against competencies with strong allegiance to the Nolan principles of public life. However, as the complexity of managing a statutory regulator increases, we consider that having members of the Executive on the Board may have some merit and that this warrants further consideration.

Provisional Proposal 4-2: The statute should establish each Council as a body corporate. The regulators should continue to be able to apply to become registered with the Charity Commission if they wish to do so.

We agree with the proposal that the existing status of the regulators as bodies corporate should be continued in the new legal framework.

We have previously considered the possibility of seeking charitable status but, after some preliminary investigation, decided not to explore this further as we consider that we do not perform any charitable functions.

Provisional Proposal 4-3: The statute should require that each Council must be constituted by rules issued by the regulators.

Provisional Proposal 4-4: Each regulator should be required to issue rules on the appointment of Council members and chairs, terms of office, duration of membership, grounds for disqualification, quorum for meetings, circumstances in which members (including chairs) cease to hold office, are removed or suspended, education and training of Council members, and attendance requirements of Council members.

We agree with the proposal for the regulators to issue rules in this area, but only in relation to specific components of their constitutions. These include rules on the following:

- appointment of Council member and chairs;
- terms of office;
- duration of membership;
- quorum for meetings;
- education and training of Council members; and
- attendance requirements.

The existing constitution of the HPC Council is derived from the Health Professions Council (Constitution) Order 2009 and the remaining provisions of Part 1 of Schedule 1 to the Order. The Order sets out the definition of a 'registrant' and 'lay' member, prohibits the creation of a lay majority and requires the Privy Council to ensure that at least one member of the Council lives or works wholly or mainly in each of England, Scotland, Wales and Northern Ireland.

The constitution of Council is fundamental in underpinning good corporate governance within the organisation. Should the constitution of councils be left entirely at the discretion of each regulator, we would be concerned by the potential risk that organisations may expose themselves to in terms of conflicts of interest and pressure from stakeholder groups such as professional bodies to amend the constitution.

In addition, the Health Professions Council (Constitution) Order 2009 sets out those circumstances when a member of Council would be disqualified. These provisions contain numerous references to other Acts, such as the Insolvency Act 1986 and the Company Directors Disqualification Act 1986. Our concern would be that allowing the regulators to individually issue rules in relation to disqualification, removal or suspension of members would create a reliance on each regulator to ensure that references to legislation within rules are kept up to date in the event that an enactment is repealed or amended. This increases the likelihood of inconsistency.

In order to maintain public confidence in a governing body, and to ensure important consistency between the regulatory bodies, we therefore advocate retaining some of the existing elements of the constitution of Council within legislation. This includes the following:

- the size of Council;
- the requirement for parity between registrant and lay members;
- the requirement for Council members to be appointed from the four countries of the United Kingdom; and
- provisions for the disqualification, suspension and removal of members.

Question 4-5: Is an additional form of oversight required over the appointment of the General Council members? For example, should the Government have powers to remove members in certain circumstances?

The consultation document proposes removing the formal role of the Privy Council in appointments to the regulatory bodies' councils and we are asked whether Council appointments should be subject to additional external oversight.

We agree with the conclusion outlined in the consultation document, that the regulators should be given overall responsibility for appointments, with oversight from the CHRE to ensure that the recruitment and appointment process is fair and transparent.

We do not consider that any additional oversight of appointments is required. The Government's powers to issue Directions and to intervene in cases of regulatory failure outlined in provisional proposals 2-17 and 2-18 are sufficient.

Question 4-6: Should: (1) the statute specify a ceiling for the size of the Councils and the proportion of lay/registrant members; or (2) the Government be required to specify in regulations the size of Councils and the proportion of lay/registrant members; or (3) the regulators be given general powers to set the size and composition of their Councils and the Government be given default powers to intervene if this is necessary in the public interest?

As set-out under provisional proposals 4-3 and 4-4 we consider that the size of Council and the proportion of registrant and lay members should remain in legislation and therefore agree with the approach under (2).

We believe that the statute should be prescriptive about size of governing bodies and the requirement for parity of membership, as opposed to proposing a ceiling or providing for flexibility. This is important in maintaining the public confidence in regulation and to avoid any possible perception that regulators make decisions in the interests of the professions as opposed to upholding the public interest.

Provisional Proposal 4-7: The statute should define a lay member of the Council as any person who is not and has not been registered in the register of that particular regulatory body, and a registrant member as any person who is entered in the register of that particular body.

We agree in principle with this proposal but consider that the proposed definition of a lay member should be more restrictive.

We agree that a lay member must be fully independent of the registered professions. However, we additionally consider that any lay person needs to fall within the reasonable expectations that most members of the public would have of a lay member. The definition needs to be more stringent to ensure that a true lay perspective is achieved. For example, under the proposed definition, a doctor registered with the General Medical Council (GMC) could be a lay member of the HPC. We would not consider this to be a lay appointment. Therefore to ensure public confidence, we would propose that a lay member is someone who 'is not or never has been on the register of a health or social care regulatory body'. We do not agree that this would reduce the pool of candidates to the detriment of attracting those with the relevant experience to be a lay member.

We agree with the proposal that there should be consistency in terms of the definition of lay membership, although we consider that this cannot be achieved by allowing individual regulators through rules to set additional requirements above and beyond the legal definition of a lay member.

We support the proposed definition of a registrant member.

Question 4-8: Should Council members be prohibited from concurrent membership of another Council?

We consider that concurrent membership of another Council reflects negatively on the image of the regulators and should be prohibited.

The consultation document emphasises that experience of council membership is an important attribute. However, we consider that concurrent council membership concentrates the power of regulators in the hands of a few and could also lead to potential conflicts of interest in relation to certain policies that may be adopted by councils. We have never experienced difficulties in attracting a high calibre of Council members such that it would precipitate concurrent membership.

Provisional Proposal 4-9: The regulators should be given broad rule-making powers to determine their own governance arrangements, including the ability to establish Committees if they wish to do so.

We agree with this proposal.

Giving regulators rule-making powers in this area will permit increased flexibility for each regulator to determine the governance arrangements which they consider would be the most effective in assisting them to perform their functions.

Provisional Proposal 4-10: The regulators should be able to make rules for committees or any other internal groups it establishes, including their size and membership.

We agree with this proposal.

The HPC currently has one statutory Committee (excluding those Committees established to adjudicate fitness to practise hearings) - the Education and Training Committee.

The composition of the Education and Training Committee is set down in rules made by the Council. The composition of our non-statutory Committees, including their size, the frequency of meetings, quoracy and so on, is set down in standing orders agreed by the Council. To move towards a system whereby regulators make rules for those committees would be a modest change and is one which we support.

Provisional Proposal 4-11: Each council should be given powers to delegate any of its functions to any Council member, officer or internal body. Any delegations must be recorded in a publicly available scheme of delegation. There should continue to be a prohibition on delegating any power to make rules.

We agree with this proposal.

The Council has a scheme of delegation in place. The scheme sets out those matters reserved for Council (including rule-making), those delegated to the Education and Training Committee, those delegated to the Chief Executive and those delegated to other members of the Executive.

Part 5: Registers

Provisional Proposal 5-1: The statute should set-out a core duty on all the regulators to establish and maintain a professional register.

We agree with this proposal.

Provisional Proposal 5-2: The regulators should have the ability but not a duty to appoint a Registrar.

We agree with this proposal.

Provisional Proposal 5-3: The statute should specify which registers must be established by the regulators, including any different parts and specialist lists. The Government would be given a regulation power to add, remove or alter the parts of the register and specialist lists.

We agree with this proposal.

Provisional Proposal 5-4: The Government should be given a regulation making power to introduce compulsory student registration in relation to any of the regulated professions.

Question 5-5: Should student registration be retained in the new legal framework, and/or how can the legal framework help to ensure that the principles and practices of professionalism are embedded in pre-registration training?

The consultation document accurately summarises the arguments that have been made for and against the setting-up of student registers. We support the proposal that any extension of 'compulsory' student registration (i.e. required in law) should be within the gift of Government as part of a regulation-making power. This would be consistent with the proposal for regulation-making powers for the compulsory registration for other groups (provisional proposal 2-10).

Question 5-6 asks about voluntary registers. Should this discretionary power be maintained in terms similar to that outlined in the Health and Social Care Bill 2011, the regulators would in any event retain the ability to establish voluntary registers of students, subject to an impact assessment and consultation.

There are no further changes we would suggest to the legal framework in order to embed the principles and practices of professionalism in pre-registration education and training. The proposals outlined in this document provide sufficient powers and flexibility to address this, for example, through standards, guidance and the approval of pre-registration education and training programmes.

[DN: This response has been put together on the basis of the HPC's existing practices and in light of the consultation on student fitness to practise and registration. The Council's decisions as a result of the consultation at this meeting of Council may necessitate changes to this response.]

Question 5-6: Should the regulators be given powers to introduce voluntary registers?

The Health Professions Social Care Act 2012 for the first time gives the regulators powers to set up voluntary registers.

We would be supportive of the statute providing discretionary powers which would allow the regulators to establish voluntary registers. We consider that voluntary registers held by statutory regulators may have the potential to contribute to public protection, particularly where for a given group a voluntary register does not already exist and where arrangements can be put in place to encourage or compel registration. This might include links to arrangements for institutional inspection.

There are considerable challenges to any regulator establishing a voluntary register including financial challenges (in our view the set-up and on-going costs of a voluntary arrangement should not and cannot be funded using the regulators' 'statutory income'). However, these are questions of implementation rather than matters for statute.

Question 5-7: If the regulators are given powers to introduce voluntary registers, should the CHRE be given a formal power to recommend to the regulator in question that a group should become or cease to be voluntarily registered? If the regulator decided not to comply, it would be required to issue a report setting out its reasons.

We do not agree with this suggestion.

We consider that this is unnecessary for a number of reasons. Firstly, these proposed powers may conflict with the CHRE's other function of quality assuring and accrediting voluntary registers, particularly those held by professional bodies, and it is unclear in what circumstances, if any, the CHRE would consider it more appropriate for a voluntary register to be held by one of the statutory regulators.

Secondly, it is unnecessary for the CHRE to have formal powers to recommend to the regulators, given that it monitors the performance of the regulators as part of its annual performance review, and makes recommendations for actions and improvements in its annual performance review report. Progress towards meeting those actions and recommendations is then monitored and outlined in the following year's report.

Question 5-8: Should non-practising registers be retained or abolished?

We consider that non-practising registers should be abolished and are supportive of the General Pharmaceutical Council's recent decision in that regard.

Registration exists to protect the public and it is important that registers are a reflection of those professionals who continue to meet the regulators' standards. An individual who remains registered with any of the regulators should continue to meet the relevant standards for practise including meeting any continuing professional development requirements.

Provisional Proposal 5-9: The regulators will be required to register applicants on a full, conditional or temporary basis. In addition, the regulators will be given powers to introduce provisional registration if they wish to do so.

We agree with this proposal.

However, we anticipate that it may be unlikely that we would wish to exercise discretionary powers to establish provisional registration. Any regulator considering doing so would need to carefully consider the financial and non-financial costs and benefits of doing so.

Provisional Proposal 5-10: The statute will provide that if the Secretary of State advises that an emergency has occurred, a regulator can make certain temporary changes to the register.

We agree with this proposal.

Provisional Proposal 5-11: The statute should specify that in order to be registered on a full or temporary basis the applicant must be appropriately qualified, fit to practise, have adequate insurance or indemnity arrangements (except social workers) and have paid a prescribed fee. The regulators should have broad rule-making powers to specify the precise detail under each of these requirements.

We agree with this proposal.

Provisional Proposal 5-12: The regulators should be given powers to establish separate criteria for the renewal of registration and for registrants proceeding from provisional to full registration.

We agree with this proposal.

Question 5-13: Should the statute provide that in order to be registered an applicant must demonstrate that they are a "fit and proper person" to exercise the responsibilities of their profession?

We do not consider that such a provision is necessary.

The consultation document sets out the preferred approach that the statute should require an applicant to be 'fit to practise'. A person's health and character 'would only be relevant if this impairs their fitness to practise' (paragraph 5.61). Alternatively an additional criterion could be added that an applicant is a 'fit and proper person'.

The former approach outlined above mirrors our existing approach to health and character – an applicant's character (for example, a criminal conviction) or their health are only relevant in so far as they affect that individual's fitness to practise. In 2011 we removed the routine requirement for a health reference completed by a General Practitioner (GP) for entry to the Register and support an end to the requirement of such reports for registration (paragraph 5.61).

The approach set-out in paragraph 5.64 in which an applicant must be appropriately qualified; fit to practise; have adequate indemnity arrangements; and have paid a prescribed fee, is in our view sufficient. A separate provision to the effect that the applicant is a 'fit and proper person' is unnecessary and would not add to public protection.

Question 5-14: Should the legislation state that applicants are entitled to be registered provided that they satisfy the relevant criteria or that the regulator must register the applicant provided that they satisfy the relevant criteria? Does either formulation make any difference in practice?

We consider that in practice there is no real difference between these formulations. However, on balance we consider that it is preferable to avoid the inference of phrases such as 'entitlement' and therefore we prefer the latter formulation.

Provisional Proposal 5-15: The statute should require the regulators to communicate expeditiously with registrants and potential registrants. The regulators would be given broad rule-making powers concerning the processing of registration applications.

We agree with this proposal.

Provisional Proposal 5-16: The statute should require each regulator to establish an appeals process for when registration applications are refused. The regulator would have broad powers to decide the precise process it wants to introduce.

We agree with this proposal.

Provisional Proposal 5-17: The statute should provide a right of appeal when registration applications are refused, to the High Court in England and Wales, the Court of Session in Scotland, and the High Court in Northern Ireland.

We agree with this proposal.

Provisional Proposal 5-18: The regulators should have broad powers to establish rules concerning the upkeep and publication of the register.

We agree with this proposal.

Provisional Proposal 5-19: The statute should require each regulator to establish a process for dealing with fraudulently procured or incorrectly made entries. The regulators would have broad powers to decide the precise process it wishes to introduce.

We agree with this proposal.

Provisional Proposal 5-20: The statute should provide a right to appeal against registration decisions relating to fraudulently procured or incorrectly made entries, to the High Court in England and Wales, the Court of Session in Scotland, and the High Court in Northern Ireland.

We agree with this proposal.

Provisional Proposal 5-21: The statute should provide that applications for restoration in cases where a registrant's entry has been erased following fitness to practise proceedings must be referred to a Fitness to Practise Panel or similar committee.

We agree with this proposal.

Provisional Proposal 5-22: The statute should provide a right to appeal against restoration decisions by a Fitness to Practise Panel to the High Court in England and Wales, the Court of Session in Scotland, and the High Court in Northern Ireland.

We agree with this proposal.

Question 5-23: Should the statute set a consistent time period before which applications for restoration cannot be made (in cases where a registrant's entry has been erased following fitness to practise proceedings), or should this matter be left to the regulators to determine?

The statute should set a consistent time period before which applications for restoration after striking off cannot be made. This is crucially important for public protection and for public faith and confidence in the regulatory process. This is a matter on which the regulators should not have any discretion.

We agree with the suggestion made in paragraph 5.100 – that an application for restoration following a striking-off order cannot be made until a period of at least five years have elapsed, and in any period of twelve months in which an application has already been made. This mirrors the provisions outlined in Article 33 of the Order and in our practice note on restoration.

Provisional Proposal 5-24: The statute should require each regulator to establish in rules a process for considering applications for restoration in cases which are not related to fitness to practise proceedings. The regulators would be given broad discretion to determine the precise process they wish to adopt.

We support this proposal.

We use the term 'readmission' to differentiate registrants returning to the register, having previously lapsed or voluntarily removed themselves from the Register, from those struck-off through fitness to practise proceedings.

Provisional Proposal 5-25: The regulators should have broad powers to make rules concerning the content of the registers. The only exception to this approach would be that set-out in 5-27.

We agree with this proposal.

Question 5-26: Should the regulators be given broad powers to annotate their registers to indicate additional qualifications or should this power be subject to certain restrictions?

We consider that the regulators should have discretionary powers to annotate their registers.

The consultation document notes our consultation on this topic and reflects our own debate about the value of annotation in the absence of a protected title or function associated with that annotation. We have recently agreed a clear statement of policy on this topic. We will only consider annotation in exceptional circumstances where:

- there is a clear risk to the public if the Register is not annotated and the risk could not be mitigated through other systems;
- annotation is a proportionate and cost-effective response to the risks posed;
- the qualification annotated on the Register is necessary in order to carry out a particular role or function safely and effectively; and, preferably
- where there is a link between the qualification and a particular title or function which is protected by law.

Our approach recognises the importance of clarity about the purpose and meaning of any annotation and that a title or function associated with annotation is preferable. However, annotation might still be beneficial in the absence of a protected title or function – allowing the regulator to set standards; quality assure training; and provide information to assist members of the public in making informed decisions about the services they receive.

Provisional Proposal 5-27: The statute should require all current fitness to practise sanctions to appear in the public register.

We agree with this proposal.

Provisional Proposal 5-28: The regulators should have discretion to include details of undertakings, warnings and Interim Orders in the public register (subject to the main duty of the regulators to protect the public by ensuring proper standards).

We do not agree with this proposal with respect to Interim Orders.

We understand from the consultation document that the proposal is that the regulator might have discretion in publishing details about sanctions reached 'without a finding of fitness to practise' (paragraph 5.112).

We consider that the regulators should be required to publish in the public register details of interim suspension and interim conditions of practice orders and therefore that these interim sanctions should fall within the scope of 'current fitness to practise sanctions' outlined in provisional proposal 5-27.

We are content with the proposal with respect to warnings and undertakings reached without a finding of impaired fitness to practise, subject to our views on these measures outlined elsewhere in this document.

Question 5-29: Should the regulators be required to publish information about professionals who have been struck-off, for at least 5 years after they have been struck-off?

We do not agree with the proposition that the regulators should include information about professionals who have been struck-off in their registers.

Someone who is struck-off is no longer registered and is therefore no longer entitled to practise using the relevant protected title. Including the names of such former registrants in the regulators' public facing registers would be contrary to the purpose of those registers and increase the likelihood of confusion for members of the public.

It has been suggested that including struck-off registrants in the public facing registers would 'help the public to identify individuals who have been struck-off the register, but continue to provide similar services under a different, unregulated title' (paragraph 5.113). Whilst the evasion of regulation through change of title is a genuine concern for all of the regulators, we have yet to hear a persuasive argument to demonstrate how including the names of struck-off registrants in the Register would mitigate against this concern.

Question 5-30: Should the regulators be required to include in their registers details of all previous sanctions?

The regulators should not be required to include details of previous sanctions in their registers, such as cautions and conditions of practice orders, which are no longer in place.

We share the concerns outlined in paragraph 5.114 of the consultation document, that this would send confusing messages about the fitness to practise of a registrant who is no longer subject to sanction. To do so would be punitive and contrary to the public protection purpose of fitness to practise proceedings.

Question 5-33: How appropriate are the existing protected titles and functions?

We consider that the existing protected titles and functions for the groups we regulate are appropriate, within the constraints of this approach outlined in paragraphs 5.120 to 5.123 of the consultation document.

Provisional Proposal 5-34: The regulators will have powers to bring prosecutions and will be required to set-out in a publicly available document their policy on bringing prosecutions (except in Scotland).

We agree with this proposal.

Part 6: Education, Conduct and Practice

Question 6-1: Should our proposals go further in encouraging a more streamlined and coordinated approach to regulation in the areas of education, conduct and practice?

The proposals are sufficient in encouraging a more streamlined and co-ordinated approach to regulation. The proposed legislative framework provides for more flexibility in this area, including provisions which would allow the regulators to work jointly or co-ordinate their activities with others.

Provisional Proposal 6-2: The statute should require the regulators to make rules on:

(1) which qualifications are approved qualifications for the purposes of pre-registration and post-registration qualifications;

(2) the approval of education institutions, courses, programmes and/or environments leading to an award of approved qualifications and the withdrawal of approval;

(3) rights of appeals to an individual or a panel against the decision of the regulator to refuse to withdraw approval from an institution, course or programme;

(4) the quality assurance, monitoring and review of institutions, courses, programmes and/or environments; and

(5) the appointment of visitors and establishment of a system of inspection of all relevant education institutions.

We agree with this proposal.

Paragraph 6.44 of the consultation document further proposes that the regulators should be given discretionary powers to issue rules on other matters including 'the use of special measures for struggling institutions' and 'establishing schemes to recognise excellence in professional education'. However, this does not seem to be reflected in any of the provisional proposals.

We would question the purpose, meaning and added value of arrangements for 'special measures'. The use of formal warnings and conditions for approval should be sufficient.

The regulators should not be able to introduce 'excellence schemes'. The primary purpose of regulation is public protection and not the promotion or development of the professions. The suggestion that the regulators might operate such schemes appears to stray into the role of professional bodies in developing, as opposed to regulating, the professions.

Provisional Proposal 6-3: The statute should require the regulators to establish and maintain a published list of approved institutions and/or courses and programmes, and publish information on any decisions regarding approvals.

We agree with this proposal.

Provisional Proposal 6-4: The statute should require education institutions to pass on to the regulator in question information about student fitness to practise sanctions.

We disagree with this proposal.

We consider that a blanket requirement on this matter would be unhelpful. Requiring education providers to inform the regulators of every student fitness to practise outcome is unnecessary and disproportionate. Our standards of education and training and approval process ensure that education providers have robust procedures in place to deal with concerns about the conduct of students. Where an education provider has 'disciplined' a student but taken action short of removal from the programme, and that student has subsequently passed their programme, and therefore met the regulator's standards, it is highly unlikely that the regulator would be justified in making the serious decision not to register them. Our concern therefore is that regulators would routinely receive information on which they would be highly unlikely to take any meaningful action.

This should be a discretionary matter that the regulator may wish to address in rules, or in standards or guidance for education providers but should not be an express matter for statute.

[DN: This response has been put together on the basis of the HPC's existing practices and in light of the consultation on student fitness to practise and registration. The Council's decisions as a result of the consultation at this meeting of Council may necessitate changes to this response.]

Question 6-5: Should the powers of the regulators extend to matters such as a national assessment of students?

The powers of the regulators should not extend to matters such as national assessment of students.

The consultation document provides no persuasive rationale to clarify what such powers might mean in practice, or to describe why such measures might be necessary. A functioning system for approving education and training programmes against clear standards would mean that such measures were unnecessary.

Question 6-6: Should the regulators be given powers over the selection of those entering education?

The regulators should not be given powers over the selection of those entering education. No rationale is provided in the consultation document as to why this might be necessary or helpful.

The regulators all set standards for education and training and have processes for monitoring education providers' compliance against those standards. The regulator can therefore have oversight of the processes put in place by education providers to select students, ensuring the robustness of those processes, without the need to directly intervene in selection decisions.

Question 6-7: Could our proposals go further in providing a framework for the approval of multi-disciplinary education and training, and if so how?

We consider that the framework outlined in the document is sufficient, allowing the regulators to co-operate with others in this area.

We already produce standards of education and training which are applicable across 15 professional groups, which help to facilitate multi-disciplinary education and training, and the approval of multiple programmes at multi-professional approval visits.

Question 6-8: Is too much guidance being issued by the regulators and how useful is the guidance in practice?

Overall, we consider that perhaps too much guidance is being issued by the regulators. 'Top down' regulatory guidance can sometimes be of less assistance to professionals than profession-led or employer-specific guidance.

However, the level and volume of guidance published will inevitably vary from regulator to regulator – dependent on factors such as how developed the 'professional infrastructure' in each profession is (e.g. the existence of professional bodies and colleges) and whether the regulator regulates a single profession or a number of professions.

This is, however, an area that is monitored by the CHRE in its performance review of the regulators and is not a matter which needs to be addressed in the statute.

Question 6-9: The statute should require the regulators to issue guidance for professional conduct and practice.

We support this proposal in principle.

Please see our detailed response to provisional proposal 6-10 and question 6-11 overleaf.

Provisional Proposal 6-10: The statute should provide for two separate types of guidance: tier one guidance which must be complied with unless there are good reasons for not doing so, and tier two guidance which must be taken into account and given due weight. The regulators would be required to state in the document whether it is tier one guidance or tier two guidance.

Question 6-11: How should the legal framework deal with the regulators' responsibilities in relation to professional ethics?

The consultation document proposes that the statute should 'require the regulators to produce guidance for professional conduct and practice' (paragraph 6.68) but with the discretion to 'decide on how they will implement this duty' (paragraph 6.69). This would mean that the statute would not specify which documents should be produced, allowing the regulator 'to issue codes of conduct, standards of proficiency, ethical guidelines and/or other guidance' (paragraph 6.69).

In general, we are supportive of the approach outlined in the consultation document and précised above, which would give the regulators some flexibility to produce the standards and guidance they consider necessary in performing their functions. We have successfully published 'standards of conduct, performance and ethics' for a number of years and do not consider there is any case in the statute for explicitly separating matters of conduct and performance from matters of ethics. As the document notes, the distinction is not always clear-cut.

We consider that it is unfortunate that the clarity in our legislation about the distinction between standards and guidance is lost in these proposals. Standards set a requirement which must be met by a registrant or an education provider. Guidance sets out ways in which those standards might be met.

In relation to provisional proposal 6-10, we consider that it would be much simpler if the statute provided powers to the effect that the regulators had a duty to set standards for education and training; proficiency; and conduct, performance and ethics; and were able to publish guidance on meeting those standards where they consider it would be appropriate to do so.

Provisional Proposal 6-12: The statute will require the regulators to ensure on-going standards of conduct and practice through continuing professional development (including the ability to make rules on revalidation).

We agree with this proposal.

In general we consider that the areas for rules outlined in paragraph 6.88 of the consultation document are sufficiently broad to allow flexibility in the design of a revalidation system, where this can be shown to be necessary and proportionate.

However, we consider that there is a continuing lack of clarity, which is underlined by these proposals, about the distinction between CPD requirements and revalidation requirements. This has consequences for the level of regulatory burden involved in a revalidation system. The legislation should set-out a clear definition of what is meant by the term 'revalidation'.

The introduction of any revalidation system should be subject to a formal impact assessment and public consultation. The arrangements for scrutiny outlined in the consultation document, including parliamentary accountability and the role of the CHRE, should be sufficient to cover this area.

Additional comments: Impact and risk assessment

Paragraph 6.87 notes the potential impact upon the NHS of CPD requirements placed on registrants, concluding that it is 'important for the regulators to undertake an impact assessment and consult widely before introducing new requirements'. Paragraph 6.88 similarly notes the impact of any revalidation proposals, concluding that the regulators should be able to introduce such systems based on a 'full risk assessment and public consultation'.

The expectations outlined in the paragraphs referred to above lack clarity. One relates to 'impact assessment', and other to 'risk assessment'. However, there is no specific proposal in the consultation document relating to the need for regulators to carry out these kinds of formal assessments. The regulators will consider impact and risk as a standard part of their policy development and consultation processes. However, unlike Government departments and non-departmental public bodies, they may not routinely produce formal impact assessments. If it is considered that there are certain subjects on which a formal impact assessment is required, this should be clearly stated in the statute.

We are particularly supportive of an express requirement to publish an impact assessment before implementing revalidation or establishing a voluntary register (a current requirement in the relevant legislation).

Part 7: Fitness to Practise: Impairment

Question 7-1: Should the statute: (1) retain the existing two-stage approach for determining impaired fitness to practise; *or* (2) implement the recommendations of the Shipman report; *or* (3) remove the current statutory grounds which form the basis of an impairment and introduce a new test of impaired fitness to practise based on whether the registrant poses a risk to the public (and that confidence in the profession has been or will be undermined)?

We support option (3) outlined above.

Part V of the Order enables the HPC to consider fitness to practise allegations to the effect that a registrant's fitness to practise is impaired by reason of:

- misconduct;
- lack of competence;
- conviction or caution for a criminal offence;
- physical or mental health;
- a fitness to practise or similar determination by another health or social care regulatory or licensing body; or being included in a 'barring' list under the Safeguarding Vulnerable Groups Act 2006, the Safeguarding Vulnerable Groups (Northern Ireland) Order 2007 or the Protection of Vulnerable Groups (Scotland) Act 2007).

Fitness to practise allegations are currently comprised of three elements:

- the facts upon which the allegation is based;
- the 'statutory ground' (e.g. misconduct, lack of competence, etc.) which it is alleged those facts constitute; and
- the proposition that based upon that statutory ground, the registrant's fitness to practise is impaired.

In 2010, the HPC Council approved a policy statement on the meaning of fitness to practise. That policy statement now informs all of our work in this area. It is important to recognise that fitness to practise is not just about professional performance; it also includes acts by a registrant which have an impact on public protection or confidence in the profession or the regulatory process. This may include matters not directly related to professional performance.

One practical difficulty with our current legislative framework is that in cases where the allegation is that the registrant's fitness to practise is impaired by reason of their physical or mental health the case is dealt with by the Health Committee. In all other cases the matter is dealt with by the Conduct and Competence Committee. The existing approach for determining fitness to practise causes no other practical difficulties for us but, as the consultation document notes, it is a system that is difficult to understand for complainants and the public. We have gone some way to

try and resolve this lack of understanding through commissioning research on the expectations of the fitness to practise process. A range of activities were undertaken following that research in an endeavour to improve understanding of the purpose of the fitness to practise process amongst registrants, complainants and other stakeholders.

The statute should remove the statutory grounds and introduce a new test of impaired fitness to practise based on whether the registrant poses a risk to the public and whether confidence in the profession has been or will be undermined. As the consultation document argues, this option for reform is clearer, much more straightforward and aligns with what is suggested to be the paramount duty of professional regulation.

The consultation document highlights that one of the concerns arising from this approach would be to reduce the threshold for allegations. This may lead to an increase in the number of cases which are referred to formal fitness to practise proceedings. We consider that this concern could be addressed by the regulators setting out a 'standard of acceptance for allegations' which makes it clear what the regulator considers to be a fitness to practise issue and ensuring that consideration is given to whether the allegation meets the realistic prospect test before referral to formal fitness to practise proceedings. This remains a key stage in the regulatory process.

Question 7-2: If a list of statutory grounds of impaired fitness to practise is retained, should it refer to a broader range of non-conviction disposals?

We are already able to handle effectively a range of non-conviction disposals.

Our practice note on conviction and caution allegations sets out how panels and those appearing before them should deal with binding over and discharge. That practice note provides for the following:

'The powers available to certain criminal courts include the power to 'bind over' offenders or to discharge them absolutely or subject to conditions. These methods of disposal do not constitute a 'conviction' for the purposes of Article 22(1) of the Order.

Binding over is a preventative measure which, even though it may impose a penalty, is not regarded as a criminal conviction. Similarly, the Powers of Criminal Courts (Sentencing) Act 2000 provides that 'absolute discharge' and 'conditional discharge' orders are not to be treated as a conviction for the purposes of any enactment (such as the Order) which authorises the imposition of any disqualification or disability upon convicted persons'.

Consequently, in cases where a registrant is bound over or receives an absolute or conditional discharge, a conviction allegation cannot be made against the registrant, but the HPC will investigate the circumstances which led to that action being taken,

in order to determine whether an allegation of misconduct should be made against the registrant.'

We do not consider that there is a need to refer to a broader range of non-conviction disposals if a list of statutory grounds of fitness to practise is retained, given that it is possible to allege a non-conviction disposal in the way described here.

Panels are still required, as they are with all types of allegation, to determine whether the statutory ground is enough to determine that a registrant's fitness to practise is impaired. For example, they would have to determine whether the receipt of a fixed penalty notice for theft and public disorder offences amounted to misconduct.

The consultation document further invites views on whether the same list of statutory grounds of impaired fitness to practise should apply to all regulators. The current list of statutory grounds of impaired fitness to practise as outlined in our response to question 7-1 is sufficiently comprehensive to cover matters that could bring into question a registrant's fitness to practise and should therefore be retained. There would be no need for regulators to have different statutory grounds nor should regulators have powers to vary the statutory grounds. This would ensure consistency across the different regulators.

Question 7-3: How adequate are the powers of the regulators to require disclosures from the Independent Safeguarding Authority and Disclosure Scotland? What practical difficulties, if any, arise as a result of differences between the protection of vulnerable groups schemes in England, Wales, Northern Ireland and Scotland?

We have found that there are some practical difficulties in administering the process of making referrals and dealing with barring allegations. These issues may be resolved with the planned changes to the scheme in England, Wales and Northern Ireland.

Firstly, when dealing with an allegation on the basis of a barring decision, information about the reason for barring the individual is not disclosed to the regulator by the Independent Safeguarding Authority (ISA). This has not prevented us from taking these cases forward, although none have to date reached consideration at a final hearing. No cases of this nature have yet been received from Disclosure Scotland.

Secondly, where the ISA has considered information but has reached a decision not to bar the individual, there is no way for the HPC to know this unless we had made the referral in the first place. The ISA may hold information that is relevant to fitness to practise which does not reach the threshold to bar the individual, but this is not disclosed to the regulator. It is hoped that with the planned changes to the scheme, the exchange of information, including reasons for barring decisions being made, will become easier and more transparent.

The differences between the schemes results in having different guidance appropriate to each, and requires training for those members of the team dealing with referrals under the schemes. This will need to be reviewed further once the planned changes are made and the schemes will hopefully become more streamlined. It may be of interest to this review to consider for comparative purposes, other legal mechanisms for prohibiting individuals from working in the care sector, such as the 'Negative Licensing' scheme operating in New South Wales, Australia.

Part 8: Fitness to Practise: Investigation

Question 8-1: Should the new legal framework remove the concept of an allegation entirely and instead give the regulators broad powers to deal with all information and complaints in such manner as they consider just (subject to a requirement that cases where there are reasonable prospects of proving impairment must be referred for fitness to practise proceedings)?

We agree with this proposal.

This is the approach that is going to be taken in dealing with cases transferred to the HPC by the General Social Care Council (GSCC). The proposal also accords with the approach we have taken in looking at alternative mechanisms to resolve disputes and in our research on mediation as a regulatory tool. It also aligns with the approach we have taken in the issuing of learning points at the Investigating Committee Panel stage and ensures that only cases where there is a reasonable prospect of finding a registrant's fitness to practise is impaired are referred to a full hearing. Such a process effectively balances the rights of the registrant with public protection.

In addition, given some confusion about the purpose of fitness to practise proceedings, this means that regulators can, as the consultation document suggests, have flexibility in dealing with matters that fall short of finding that a registrant's fitness to practise is impaired, but which nonetheless raise concerns about the practice of a registrant.

Provisional Proposal 8-2: The statute should provide that all the regulators will be able to consider information which comes to their attention as an allegation and not just formal complaints.

We agree with this proposal.

Article 22(6) of the Order already provides an important procedural and public protection safeguard, allowing the HPC to deal with matters which raise fitness to practise concerns but which have not been brought to its attention in the usual way, including anonymous allegations.

Provisional Proposal 8-3: The statute should contain a clear statement that there is no set format for allegations.

We do not agree with this proposal.

The consultation document suggests that it is important that the legal framework does not adopt a restrictive approach to the making of allegations and that it instead ensures that a wide range of information can be considered by the regulators. We consider this is best achieved by the regulator setting out in policy a clear statement on the 'standard of acceptance for allegations'.

Article 22(5) of the Order requires that an allegation must be made in the form required by Council. To support that provision, we have published a 'standard of acceptance for allegations'. That sets out what the appropriate format is and allows allegations to be taken via other means – for instance through the taking of a statement of complaint. The standard is reviewed on a regular basis and ensures we are able to keep pace with the needs of different individuals in terms of accessibility of information, as well as with changing societal expectations and technological advances.

Question 8-4: Should the statute prohibit the regulators from setting a time limit for bringing an allegation against a registrant or should there be a consistent time limit for allegations across the regulators (and if so, what should it be)?

We consider that the statute should not prohibit the regulators from setting such a time limit, nor prescribe this limit.

Article 22 (3) of the Order allows the HPC to investigate allegations relating to events which occurred at any time, even at a point before the person concerned was a registrant. However, as the 'standard of acceptance for allegations' we have published recognises, significant practical difficulties may arise when allegations are not reported to the HPC (and to other regulators) in a timely manner. The standard provides that allegations will not normally be regarded as meeting the standard of acceptance if they are made more than five years after the events given rise to them.

Nevertheless, that standard does provide a caveat to that five year rule. The time limit does not apply to the following:

- An allegation based upon a criminal conviction or caution or regulatory determinations (as there is no need to 'go behind' the decision of the court or tribunal which imposed the conviction).
- An allegation which, in the opinion of the Director of Fitness to Practise, appears to be serious and in respect of which the time limit should be waived in the public interest in order to protect the public or the registrant concerned.

Such an arrangement balances maintaining public protection and ensuring fairness to the registrant. It would be unnecessary therefore to provide for a time limit for bringing allegations against a registrant in the statute.

Provisional Proposal 8-5: All the regulators should have the power to establish a formal process for the initial consideration of allegations (such as screeners).

We agree with this proposal.

The consultation document notes that the HPC has the most developed screening method with dedicated rules on the matter. Those rules (the Health Professions Council (Screeners) Rules Order of Council 2003) give screeners the function of:

- considering the allegation and establishing whether the Order provides power to deal with the allegation if it is proven to be well founded;
- referring the matter to a Practice committees;
- closing the case if it is felt the Order does not provide power to deal with the allegation; and
- where requested to do so by a Practice committees, of mediating the case without referral to either the Health or Conduct and Competence Committee.

We do not currently use our power to refer cases to screeners. In our view, such a process adds unnecessary delay to the fitness to practise process. Allowing allegations to be referred directly to a final hearing also creates unfairness to the registrant. At present, HPC fitness to practise allegations may be considered by three Practice committeess. The Investigating Committee considers all allegations to determine whether there is a 'case to answer'. Where it answers that question in the affirmative, allegations are then referred to the Conduct and Competence Committee or, if they are based upon the registrant's physical or mental health, the Health Committee. The HPC regard this two-stage process, in which an Investigating Committee Panel reviews the HPC's investigative efforts and determines whether there is a 'case to answer', to be an important procedural safeguard. It allows an independent panel to provide oversight and profession-specific expertise in a transparent manner, a valuable input which would not be available if case to answer decisions were simply made administratively.

We consider that it would be unacceptable to vest in the Executive powers to refer cases directly to a final hearing. The screening provision is an acceptable alternative to this if the HPC were to be overwhelmed with allegations. Therefore the HPC support the proposal that the regulators should have the power to establish such arrangements, but that they retain the discretion not to do so.

Provisional Proposal 8-6: The regulators should have the power to prohibit certain people from undertaking the initial consideration of allegations and specify that only certain people can undertake this task.

We agree with this proposal.

If a screening process were to be adopted, this proposal would ensure, as the consultation document argues, the perceived and actual independence of the initial consideration process.

Provisional Proposal 8-7: The regulators should have powers to establish referral criteria for an investigation and specify which cases must be referred directly to a Fitness to Practise Panel.

We agree with this proposal.

We already adopt this approach through our 'standard of acceptance for allegations'. However we do not agree that matters concerning the fitness to practise of a registrant should be referred directly to a final hearing panel. Please see our response to provisional proposal 8-5.

Question 8-8: Should the statute impose more consistency in relation to the criteria used by regulators to refer cases for an investigation or the cases that must be referred directly to a Fitness to Practise Panel?

We do not consider that it is necessary for the statute to impose more consistency in this area. Please see our responses to provisional proposals 8-5 and 8-7.

Provisional Proposal 8-9: The statute should enable but not require the regulators to establish an Investigation Committee.

We agree with this proposal.

This proposal would provide the regulators with flexibility to implement a structure which best supports its circumstances. However, whilst welcoming such enabling powers, we still consider that the Investigating Committee performs a central role in our fitness to practise procedures.

The current approach taken by the regulators in this area differs considerably. In some instances the regulator is provided with direction from the Investigating Committee on the way in which an investigation should proceed prior to any investigative work being undertaken. The Committee then reassesses the case once the investigation has been undertaken in line with their directions, and makes a case to answer decision.

The approach we take is that a decision is made by the Case Manager, in line with Council policy, as to whether the case meets the standard of acceptance for an allegation. An investigation is undertaken by the Case Manager, independently from the Investigating Committee. Once complete, the information gathered is presented to a panel of three members of the Committee and a case to answer decision is made. In a small number of cases the Committee may ask for further information in order to come to a final decision (3% of cases in 2011-12). The Committee's role is to assess the information gathered and the investigative efforts of the Executive to determine whether there is adequate information to make a decision and, if so, whether there is a case to answer.

Due to the range of professions regulated by HPC, and the small size of some of those professions, the use of Investigating Committee panels is an effective approach. It may prove difficult to obtain the profession specific input required, particularly for the smaller professions, using an alternative, such as case examiners. The panel members used for the purposes of Investigating Committee panels can also be sit on Conduct and Competence and Health Committee cases (although not for the same case). This provides the flexibility required and enables us to engage appropriate individuals from a small pool for a range of activities. The use of the same chairs and lay panel members in cases involving different professions can ensure consistency in approach across those professional groups.

The length of time it takes a case to reach an Investigating Committee once an allegation has been made, and therefore for a decision to made about whether the case should proceed to full public hearing, is currently a median of five months. We do not consider that this would be reduced if decisions were taken in an alternative way. The same level of investigation would need to be undertaken in order to make a decision as to whether the case should proceed to a hearing. The delays that can occur during the process are often due to the registrant requiring additional time to respond to the allegation. This is an important element of the process and the registrant's input and opportunity to make representations must be safeguarded.

The costs of operating Investigating Committee panels are relatively fixed (daily fee for panellists, plus expenses) and can be budgeted for with a high degree of accuracy. The panels consider a number of cases in a day and are scheduled a number of months in advance. We utilise teleconferencing for smaller professions where there are few cases. If we were to move away from case to answer decisions being made by Investigating Committee panels, professional input would still be required. Engaging professional input or advice on an ad-hoc basis could make the costs more difficult to estimate and extend time frames while appropriate input was sourced and obtained.

Provisional Proposal 8-10: The regulators should be given broad rule and regulation-making powers concerning how and by whom an investigation is carried out.

We agree with this proposal.

Provisional Proposal 8-11: The statute should give all of the regulators a general power to require the disclosure of information where the fitness to practise of the registrant is in question.

We agree with this proposal.

Article 25(1) of the Order provides powers to demand the disclosure of information in the investigation of fitness to practise cases. These powers cannot be used to demand information from the registrant who is the subject of the allegation.

Question 8-12: Are the existing formulations of the power to require disclosure of information useful and clear in practice?

We have had no practical difficulties with the power to require the disclosure of information. The formulation is useful and clear in practice.

Provisional Proposal 8-13: The power to require information should be extended to the registrant in question.

We consider that the power to require information should extend only as far as requiring any patient and service user records held by the registrant concerned.

Although such requests can be made by the data subject (complainant), in practical terms it would assist with case investigations and provide clarity if such records could simply be demanded directly from the registrant by the regulator.

However, we do not consider that the power to require information from the registrant in question should extend to all and any relevant material. Nor do we consider that it should be extended to requiring submissions from registrants. Registrants should be able to maintain the right to remain silent or choose not to engage in the fitness to practise process. Evidence of genuine insight is especially important to panels that make fitness to practise decisions and any requirement for registrants to provide submissions or engage could potentially hamper a panel in forming a balanced view of the case and of assessing any likely risk of repetition.

Question 8-14: Should any enforcement powers be attached to the power to require information?

We agree with this proposal.

Article 39(5) of the Order makes it a criminal offence for a person, without reasonable excuse, to fail to comply with a request made under Article 25 of the Order. A review of Investigating Committee panel decisions for an eight month period between April to December 2011 highlighted that the HPC's Article 25 powers were used 16 times (in 376 cases).

Although to date it has not been necessary to use our enforcement powers for failure to produce information, from a governance point of view this is a particularly useful power.

Provisional Proposal 8-15: The statute should provide that the test for all referrals to a Fitness to Practise Panel across the regulators is the real prospect test.

We agree with this proposal. (We use the similar term, 'realistic prospect', in our policy documents.)

Article 26(5)(a) of the Order sets out the powers of the Investigating Committee to make a 'case to answer' decision. Although the legislation does not specifically set-out the 'realistic prospect test', this is the test that the HPC's Investigating Committee panels apply when making a case to answer decision. Our practice note on case to answer determinations clearly sets out the 'realistic prospect test' and how it should be applied by panels when making a case to answer determination. We consider that the statute should provide that the test for all referrals to a Fitness to Practise Panel is the realistic prospect test. This would ensure clarity as to the threshold test that is to be applied.

Provisional Proposal 8-16: The regulators should have powers to issue or agree the following at the investigation stage: (1) warnings; (2) undertakings (3) voluntary erasure; and (4) advice to any person with an interest in the case.

We consider that this is an area that should be treated with caution.

The consultation document highlights the concerns that have previously been raised with taking such an approach.

Question 8-17: Should the statute require that any decision to use any power listed in provisional proposal 8-16 at the investigation stage must be made or approved by a formal committee or Fitness to Practise Panel? Alternatively, should the powers of the CHRE to refer decisions of Fitness to Practise Panels to the High Court be extended to cover consensual disposals?

We agree with both suggestions.

Our process of disposing appropriate cases by consent has been in place for a number of years and is a process by which the HPC and the registrant concerned may seek to conclude a case without the need for a contested hearing. We will only consider resolving a case by consent:

- after an Investigating Committee has found that there is a case to answer, so that a proper assessment has been made of the nature, extent and viability of the allegation;
- where the registrant is willing to admit the allegation in full. (A registrant's insight into, and willingness to address, failings are key elements in the fitness to practise process and it would be inappropriate to dispose of a case by consent where the registrant denies liability.); and
- where any remedial action agreed between the registrant and the HPC is consistent with the expected outcome if the case were to proceed to a full hearing.

The HPC practice note on disposal of cases by consent provides more information on this topic.

As the decision taken to dispose of a HPC case via consent is considered by a final Fitness to Practise Panel, the CHRE already have the jurisdiction to review cases through its Section 29 powers. This means that the CHRE are able to consider whether a decision demonstrates undue leniency, ensuring an extra degree of public protection that would not exist if the CHRE did not review such cases. It also mitigates against the possible perception that professions are 'protecting their own'.

We consider that it is appropriate for cases to be considered for consensual disposal only once a case to answer decision has been made. This prevents regulators from diverting cases which would not otherwise have been referred to final hearing through this process. This strikes an appropriate balance between the rights of the registrant and protection of the public.

Provisional Proposal 8-18: The Government should be given a regulation-making power to add new powers to those listed in provision proposal 8-16, and to remove powers.

We agree with this proposal.

Question 8-19: Does the language used in the proposed list of powers contained in provisional proposal 8-16 convey accurately their purpose?

We consider that the language suggested in the consultation document accurately conveys the purpose of these powers.

Question 8-20: Is the use of mediation appropriate in the context of fitness to practise procedures?

Provisional Proposal 8-21: All regulators should be given rule and regulation-making powers to introduce a system of mediation if they wish to do so.

We agree that the regulators should be given discretionary powers to introduce a system of mediation if they consider it to be appropriate.

We are due to begin a mediation pilot next year. This follows extensive research that we have commissioned in this area. An evaluation of the effectiveness and appropriateness of mediation will be undertaken after the conclusion of the pilot.

Provisional Proposal 8-22: The statute should provide for a right to initiate a review of an investigation decision in relation to decisions: (1) not to refer a case for an investigation following initial consideration; (2) not to refer the case to a Fitness to Practise Panel; (3) to issue a warning; or (4) to cease consideration of a case where undertakings are agreed.

We agree in principle with this proposal. However, we consider that such a review should only take place where the *Ladd v Marshall* criteria apply.

Article 30(7) of the Order enables a striking-off order to be reviewed at any time where 'new evidence relevant to a striking-off order' becomes available after such an order has been made. We have produced a practice note on this topic. We consider that a similar provision should apply in relation to the initiation of a review of an investigation decision as per the decisions listed above. That practice note provides that the *Ladd v Marshall [1954] 1 WLR 1489* criteria apply to such a review it would be prudent to apply the same criteria to any review of an investigation decision. The practice note particularly provides that:-

> *'Whether new evidence may be admitted is a question of law. As with other proceedings under the Order, a Panel may admit evidence if it would be admissible in civil proceedings in the part of the United Kingdom in which the case is being heard and in addition, Rule 10(1)(c) of the procedural rules gives Panels the discretion to admit other evidence if the Panel is satisfied that doing so is necessary in order to protect members of the public;*

Whether new evidence should be admitted is a matter of discretion for the Panel. In exercising that discretion, the factors to be taken into account and the weight to be attached to each of them will depend on the facts of the case but should include:

- the significance of the new evidence;
- the *Ladd v Marshall* criteria for reception of fresh evidence, namely:
  - whether with reasonable diligence the evidence could have been obtained and presented at the original hearing;
  - whether the evidence is such that it could have an important influence on the result of the case;
  - whether the evidence is credible;
  - any explanation of what the new evidence could not have been presented at the original hearing or, if it could have been, whether there is a reasonable explanation for not doing so; and
  - the public interest, including the impact upon others if he case is re-opened, the need for finality in litigating and any prevailing public interest factors.

Rule 4(7) of the Health Professions Council (Investigating Committee) (Procedure) Rules 2003 already allows the Investigating Committee the discretion to take into account a previous allegation where a no case to answer decision has been reached. This is permitted if, within three years (and other procedural safeguards), a subsequent allegation is made and the previous allegation is considered 'relevant' to the new allegation.

As set-out elsewhere in this response, we consider that decisions taken to issue a warning or to cease consideration of a case where undertakings are agreed should fall within the Section 29 jurisdiction of the CHRE. We also consider that given independent panels make the decisions listed in the provisional proposal, a provision in the form of judicial review does apply to the review of decisions. If the HPC were in receipt of new evidence it would open a new case in any event. A review should not be on the basis of disagreement with the decision taken (save for the decision of the regulators with respect to undertakings and warnings).

Provisional Proposal 8-23: Anyone who has an interest in the decision should be able to initiate a review of an investigation decision, including but not limited to the Registrar, registrant, complainant and CHRE.

Please see our response to Provisional Proposal 8-22. Such a review should only take place if the *Ladd v Marshall* principles apply.

Provisional Proposal 8-24: The grounds for a review of an investigation decision should be that new evidence has come to light which makes review necessary for the protection of the public or the regulator has erred in its administrative handling of the case and a review is necessary in the public interest.

We agree with this proposal.

However, we consider that the grounds for review should be provided for within the statute. This would be a clearer statement and promise for what an organisation will and has to deliver than simply providing for it within policy or rules.

Provisional Proposal 8-25: The statute should give the regulators broad rule making and regulation making powers on all aspects of the process for the review of an investigation decision, except those matters specified in provisional proposals 8-22, 8-23 and 8-24.

We support this proposal, subject to the matters addressed in our response to provisional proposal 8-24 and the caveats we have outlined in response to provisional proposals 8.22 and 8.23.

Part 9: Fitness to Practise: Adjudication

Question 9-1: Should the statute require the regulators to ensure that they establish a structure which is compliant with Article 6 of the European Convention on Human Rights without taking into account the role of the higher courts?

We agree with this proposal.

As part of our programme of work for the coming year, we are looking at mechanisms to make our fitness to practise processes more independent. This includes looking at structures to ensure compliance with Article 6 of the European Convention on Human Rights (ECHR) without taking into account the role of higher courts.

We were the first regulator to put its panels at 'arm's length' and end the practice of Council members sitting as panellists. Similarly, we have always respected the concept of 'equality of arms' and ensured that lawyers who regularly appear as presenting officers in fitness to practise cases are not involved in policy development or the training of panellists. We have also never had any form of review or 'sign- off' arrangements for individual panel decisions, recognising that any such process would undermine their independence and impartiality.

Question 9-2: Should the new legal framework ensure the separation of investigation and adjudication, and if so how?

We have achieved the separation proposed in the consultation document through the appointment process of panel members and by prohibiting panel members from sitting on cases that they have already considered at a previous stage.

However, further work can and should be done to ensure the separation and we support the principle that the new legal framework should make express provision for such separation.

Question 9-3: Should the statute allow for the option of the regulators' adjudication systems joining the Unified Tribunals Service?

We consider that this is a decision that should rest with the Government given the range of reform that is suggested in the consultation proposals.

Provisional Proposal 9.4: The statute should give all the regulators a broad power to establish rules for case management.

We agree with this proposal.

We already have in place a range of practice notes, many of which cover the use of case management techniques in HPC hearings. Effective case management is a process which enables:

- the issues in dispute to be identified at an early stage;
- the arrangements to be put in place to ensure that evidence, whether disputed or otherwise, is presented clearly and effectively;
- the needs of any witnesses to be taken into account; and
- an effective programme and timetable to be established for the conduct of the proceedings.

Those practice notes include ones which provide guidance on the exchange of document and agreeing witness statements, disclosure of documents and the service of documents.

Provisional Proposal 9-5: The statute should provide that the overriding objective of the Civil Procedure Rules – that cases must be dealt with justly – is made part of the regulators' fitness to practise procedures.

We agree with this proposal.

This objective should be provided for within statute as a clear statement of intent, purpose and belief.

Provisional Proposal 9-6: The statute should require each regulator to establish Fitness to Practise Panels of at least three members for the purpose of adjudication.

We support the proposal that the statute should require each regulator to establish Fitness to Practise Panels of at least three members for the purposes of adjudication.

This is in line with Rule 6 of the Health Professions Council (Practice committees and Miscellaneous Amendments Rules) 2009.

Provisional Proposal 9-7: The statute should (1) require the regulators to establish a body which is responsible for all aspects of the Fitness to Practise Panel appointment process and which is separate from Council; and (2) prohibit Council members and investigators from membership of Fitness to Practise Panels; and (3) require that each Fitness to Practise Panel must have a lay member.

We agree with this proposal.

We are currently looking at mechanisms to further enhance the independence of our appointments processes.

Provisional Proposal 9-8: Other than on those matters specified in provisional proposals 9-6 and 9-7, the regulators should have broad powers to make rules on the constitution of their Fitness to Practise Panels.

We support this proposal, with one caveat.

We consider that the statute should provide an express provision that a panel considering a case should include a registrant from the same part of the register as the registrant concerned. This ensures profession-specific input into the case.

In the consultation document reference is made to this proposal allowing a regulator to require a legally qualified chair in all or some cases, if it wished to do so. We would be likely to continue with our current arrangement of appointing a legal assessor. We do not believe that a legally qualified chair is able to undertake the role of both a legal assessor and a panel chair. The role of a legal assessor is an important safeguard in fitness to practise proceedings, ensuring that all parties are treated fairly, particularly in situations where the registrant concerned is unrepresented or not in attendance.

In HPC hearings, the legal assessor does not sit with the panel. This step has been taken to signify their independence from the panel and their role in giving advice to all those who are in attendance at the hearing. The legal assessor only joins the panel when they are requested to do so to help with drafting decisions and leaves the panel room after help has been given. They are also required to announce to the hearing what advice they have given to the panel whilst they were with them.

We have taken the view that the benefits of not having a legally qualified chair outweigh any advantage. Chairs should be focused on ensuring hearings progress swiftly. They should not become drawn into legal disagreements, but maintain their focus on resolving disputes as quickly as possible. Legal assessors are able to talk to both parties in advance of proceedings starting and will often facilitate common points of opinion to be agreed. Because of their position of independence, they are able to intervene when appropriate, e.g. if questioning of witnesses is unnecessary or questions being put to witnesses are unfairly phrased. For a panel chair to be involved in these types of issues it could easily lead to impressions being made that their opinions were biased towards one party or another.

Provisional Proposal 9-9: All regulators should be given broad rule-making powers on most procedural aspects of fitness to practise hearings.

We agree with this proposal.

Question 9-10: Should the statute require that fitness to practise hearings must take place in the UK country in which the registrant is situated or resides?

We consider that the statute should require that fitness to practise hearings must take place in the UK country of the registered address of the registrant concerned. This reflects the existing provisions outlined in Article 22(7) of the Order.

The HPC practice note on hearing venues provides more guidance to panels and those appearing before them on where hearings should be held. Hearings are not confined to Belfast, Cardiff, Edinburgh and London and we seek to take a flexible approach to hearing venues taking into account the finite resources available and the needs of those individuals who must attend a hearing. We consider that such an approach is fair and reasonable and accords with principles of open and transparent justice. Registrants should not be prohibited from attending a hearing simply because they cannot afford to attend. Cost savings should not and cannot be a bar to ensuring fairness and justice.

Provisional Proposal 9-11: The statute should apply the civil rules of evidence to fitness to practise hearings. The relevant rules should be those that apply in the part of the UK in which a hearing takes place.

We agree with this proposal.

Provisional Proposal 9-12: Fitness to Practise Panels should be able to admit evidence which would not be admissible in court proceedings if the admission of such evidence is fair and relevant to the case.

We agree with this proposal.

Rule 10(1) (c) of the Health Professions Council Procedure Rules provide that the '[relevant] Committee may hear or receive evidence which would be admissible in [civil] proceedings if it is satisfied that the admission of that evidence is necessary to protect members of the public'. We consider that this is an area where there should be greater consistency across the regulators.

Provisional Proposal 9-13: The statute should require the civil standard of proof in fitness to practise hearings

We agree with this proposal.

As Dame Janet Smith recommended in the 5th Report of the Shipman Inquiry, the civil standard of proof is appropriate in a protective jurisdiction (such as the one in which the regulators operate within). It is also important to expressly recognise this within the statute so as to ensure fairness and consistency in approach across regulation.

Provisional Proposal 9-14: The statute should require that all fitness to practise hearings must be held in public unless one or more of the exceptions in the Civil Procedure Rules apply.

We agree with this proposal.

The normal practice of the HPC is to hold fitness to practise hearings in public, with the Panel provided with the discretion to exclude the press or public from all or part of a hearing. The decision made by the Panel has to be consistent with Article 6(1) of the ECHR. We have published a practice note on conducting hearings in private which provides more detail on when all or part of hearing should be held in private and guidance on what, if any, 'public pronouncement' it will make.

Providing such clarity within the statute would help to contribute to ensuring fairness and transparency in fitness to practise proceedings. We consider that there is no need to make separate provision for health cases and Interim Order hearings to be held in private. If there is a need to hold such a hearing in private (and for that matter any other type of hearing), one of the exceptions of the Civil Procedure Rules would apply.

Provisional Proposal 9-15: The statute should provide that a witness is eligible for assistance if under 17 at the time of a hearing if the Panel considers that the quality of evidence given by the witness is likely to be diminished as a result of mental disorder, significant impairment of intelligence and social functioning, physical disability or physical disorder. In addition, a witness should be eligible for assistance if the Panel is satisfied that the quality of evidence given by the witness is likely to be diminished by reason of fear or distress in connection with testifying in the proceedings.

We agree with this proposal. Please our response to question 9-16.

Question 9-16: Should the statute provide for special measures that can be directed by the Panel in relation to witnesses eligible for assistance, such as screening witnesses from the accused, evidence by live link, evidence in private, video recoded evidence, video cross examination, examination through intermediary, and aids to communication?

We consider that the statute should provide for such measures to be set-out in rules.

Rule 10A of the relevant Health Professions Council Practice committees Procedural Rules makes provision for how evidence can be received from vulnerable witnesses and who should be treated as a vulnerable witness. The same rule also makes provision for cross examining witnesses in cases of a sexual nature. As is recommended in the consultation document, the approach taken by the HPC in this area is closely modelled on the approach taken in the Youth and Criminal Evidence Act 1999. The HPC has also produced practice notes on the topics of equal

treatment and cross-examination in cases of a sexual nature. Panels are also provided with comprehensive training of the procedure to adopt in such cases.

We are concerned that it might be unnecessarily restrictive for the statute to provide for special measures that can be directed by the Panel given the pace of societal and technological change. This can instead be provided for in rules.

However, we do consider that the statute should provide a single definition of a vulnerable witness to ensure consistency and transparency in approach across the regulatory bodies.

Provisional Proposal 9-17: The statute should require the regulators to establish a system for imposing or reviewing Interim Orders.

We agree in principle with this proposal, but consider that the regulators should have less discretion in this area than that proposed in the consultation document.

The consultation proposes that the regulators should have power to issue rules on the criteria for review hearings (such as timescales and the availability of new evidence); on the powers of the Panel; on the time period of orders and renewals; the rights of the person concerned to appear before the panel; on the rights of representation; and the process of notification. It is also proposed that it would not be necessary for a regulator to have to apply to the court to extend an order beyond the period initially set.

Article 31 of the Order sets out the powers panels of the Investigating, Health and Conduct and Competence Committees have to make Interim Orders. That Article also sets out the review provisions of such orders, when an Interim Order shall cease to have effect and the powers of the relevant committee to make an order when a final disposal decision has been made by the relevant Committee. Amongst other things, it also provides that on expiry of such an order (which under the Order can only be imposed for a maximum period of 18 months). Any application to extend an order has to be made to the appropriate court. Finally, that article also makes provisions on the rights of a registrant in terms of being notified of proceedings under Article 31 and his or her rights to be represented.

Our practice note on Interim Orders provides advice and guidance to panels and those appearing at or before them on the procedure that should be adopted with respect to the application, granting and subsequent review of Interim Orders.

Given that Interim Orders (by their very nature) are imposed before evidence has been tested and a determination has been reached as to whether the registrant's fitness to practise is impaired, regulators should issue clear guidance on the process that should be followed in respect of such applications. It would be more appropriate to ensure that the statute provides that regulators have to make rules in the way set-out above rather than simply providing them with the discretionary power to do so.

We consider that the current time frames for review within the Order are appropriate as it means that it places an extra duty on the regulator to proceed with the case expeditiously. We further consider that the existing arrangements to apply for an extension to any order to the appropriate court should be retained as a requirement within the statute. Fairness to the registrant outweighs any cost or other practical burdens that this may place on the regulator concerned.

Provisional Proposal 9-18: The statute should require each regulator to establish panels of at least three members for Interim Order hearings (including a lay member). In addition, Interim Order panels must be appointed by a body which is separate from the Council and there would be a prohibition of Council members and investigators from sitting on such Panels.

We support this proposal.

Interim Order panel members should be appointed in the same way as other types of panel member.

Question 9-19: Should the statute prohibit Interim Order panellists sitting on a Fitness to Practise Panel (either in relation to the same case or more generally)?

We support the suggestion that the statute should prohibit Interim Order panellists from sitting on a Fitness to Practise Panel in the same case, but not more generally.

Our current practice is to prohibit any panellists who have been involved in the consideration of a case before a different Practice committees from considering the case at a future Practice committees. This in effects means that if a panellist has considered whether there is a case to answer in respect of an allegation they are excluded from considering that case at a final hearing or at an Interim Order hearing.

However, if a panellist has considered the case before at an Interim Order hearing they are not excluded from considering the case again at future reviews of that order. Panellists are also not excluded from considering reviews of substantive suspension or conditions of practice orders if they have previously considered the case at final hearing or at a previous review.

Although not provided for in the Order or associated rules, we consider that natural justice means that such exclusions should apply. Such provisions help to ensure the perception of fairness in the proceedings.

There is no need to introduce a general prohibition of panellists sitting on Interim Order Panels also sitting on Fitness to Practise Panels. There is huge benefit in having panellists with the ability to sit across all types of cases. Furthermore, from a purely practical basis, given the requirement to have a registrant from the same part of the register as the registrant concerned to sit on the panel, it would be logistically

challenging to have such a prohibition and this could adversely impact upon the administration of justice.

Provisional Proposal 9-20: The test for imposing an Interim Order should be that it is necessary to protect, promote and maintain the health, safety and well-being of the public (and maintain public confidence in the profession).

We agree with this proposal.

However, we consider that the criteria should also reflect that there may be cases where an Interim Order is also necessary 'in the interests of the person concerned' (Article 31(7) of the Order).

Provisional Proposal 9-21: On all procedural matters in relation to Interim Order hearings (except for those specified in provisional proposal 9-18) the regulators should have broad rule making powers.

We support the proposal that regulators should have broad rule-making powers on all procedural matters in relation to Interim Order hearings, with the exception that the quoracy of Interim Order panels should be provided for in the statute.

There are no specific HPC procedure rules that relate to Interim Order hearings. All HPC Interim Order hearings are held in line with the relevant procedure rules relating to each of the practice committeess – Investigating, Conduct and Competence or Health. The Committee that hears the matter will depend upon what stage the case is in the fitness to practise process. Our Interim Orders practice note sets out guidance for both the practice committees panels and those appearing before them.

Question 9-22: Should the statute guarantee the right of registrants to give evidence at Interim Order hearings?

We agree with the consultation proposal that the statute should guarantee the right of registrants to give evidence at Interim Order hearings.

The Order and rules do not make any specific reference to the admission of oral evidence by panels at Interim Order hearings. Panels may allow any person to give oral evidence at an Interim Order hearing but given the nature of the hearings and that the panel's role is not to make any findings of fact, it is rare for any person other than the registrant concerned to give oral evidence before the panel. Guaranteeing the right of registrants to give oral evidence ensures fairness to the registrant concerned and does not place any unnecessary burden on the panel to make an assessment of whether it would be desirable to hear specific evidence.

Provisional Proposal 9.23: The right of appeal against an Interim Order should continue to be to the High Court in England and Wales, the Court of Session in Scotland and the High Court in Northern Ireland.

We agree with this proposal. This mirrors the provisions included in Article 31(2) of the Order.

In addition, Article 31(6)(b) of the Order allows for a review of an Interim Order to take place at any time where new evidence relevant to the order has become available after the making of the order. This is an important power that allows for review of the order outside of the mandatory review periods. It ensures that there is adequate public protection and also that registrants are afforded the right to return to practice at an early stage if new evidence is received that indicates that they no longer pose a risk of harm to the public or that there is no public interest in maintaining an Interim Order. On the basis of any new evidence the panel may revoke, replace or vary an Interim Order.

Provisional Proposal 9-24: All Fitness to Practise Panels should have powers to impose the following (1) erasure from the register; (2) suspension; (3) conditions; and (4) warnings.

We agree in principle with this proposal but with concerns about some of the proposed terminology.

Article 29(5) of the Order allows the HPC's Practice committeess to impose the following orders against a registrant: striking off, suspension, conditions of practice and caution. Our indicative sanctions policy sets out the Council's policy on how these sanctions should be applied by the Practice committees panels. This policy is intended to aid panels in their deliberations and assist them in making, fair, consistent and transparent decisions.

We do not agree with the proposed language of 'erasure'. The CHRE have previously concluded that erasure is an unfamiliar term to the public. 'Struck-off' was the preferred term that was the most familiar and reassuring. The term 'struck-off' is more likely to convey that strong, final action is being taken. This also accords with the HPC's general approach in ensuring that language used is clear and accessible to members of the public and registrants alike.

The HPC has the power to issue a caution order after a finding of impaired fitness to practise and the term warning is not set-out in the Order. We consider that the term 'warning' is clearer and more meaningful to the public. Again, we would agree with the CHRE's review in this area, which found that the term caution is understood as an official rebuke, but that it was not necessarily expected to appear on a registrant's record. A warning was viewed as a more familiar term, carrying more weight and implying a formal procedure. We consider that the term warning is more meaningful and avoids potential confusion with the imposition and meaning of a police caution.

Provisional Proposal 9-25: The Government should be given a regulation making power to introduce systems of financial penalties and cost awards.

We are content with the Government being given a regulation making power to introduce systems of financial penalties and costs awards.

However, we disagree with the principle of financial penalties and cost awards. We do not seek to have such powers as we consider that they are disproportionate and not sufficiently aligned to the purpose of fitness to practise proceedings.

Provisional Proposal 9-26: All Fitness to Practise Panels should have powers to agree undertakings and voluntary erasure.

We agree with this proposal. Please see our comments in response to provisional proposal 9-24 about the use of the term 'erasure'.

Such powers provide regulators with flexibility in their adjudicative approach. In providing such flexibility, however, care has to be taken to ensure justice, fairness, openness and transparency whilst also ensuring public protection. The HPC's disposal by consent process is a mechanism by which the HPC and the registrant concerned may seek to conclude a case without the need for a contested hearing, by putting before a panel an order of the kind which the Panel would have been likely to make in any event. Central to this process is that a case to answer decision has been reached by the Investigating Committee and that a final hearing panel determines whether it is appropriate to use the consent mechanism to dispose of a case.

Furthermore, in cases where the HPC is satisfied that it would be adequately protecting the public by permitting the registrant to resign from the Register, it is done on similar terms to those that would apply if the registrant had been struck-off. That agreement also provides for an agreed statement of facts to be published on the HPC's website. In cases where it is agreed that it would be appropriate to dispose of a case via a caution, conditions of practice or suspension order, the information is published in the usual way.

Provisional Proposal 9-27: The regulators should have powers to introduce immediate orders (or use Interim Orders for this purpose).

We consider that Interim Orders should be used where appropriate to cover the appeal period before a fitness to practise sanction takes effect.

Article 31(1)(c) of the Order 2001, allows an Interim Order to be granted where a practice committees issues a striking off, suspension or conditions of practice order to cover the appeal period. This ensures that the public are afforded adequate protection during the appeal period.

There is no need for the introduction of a separate immediate order power which could confuse the public and registrants. In addition, we consider that any Interim Order decision made to cover an appeal period should be made by way of a separate decision (albeit within the same hearing), to ensure that the registrant has the right to make submissions.

Provisional Proposal 9-28: The test for imposing any of the sanctions listed in 9-24 and consensual disposals in 9-26 should be to protect, promote and maintain the health, safety and well-being of the public (and maintain confidence in the profession).

We agree with this proposal.

In addition, public faith in the regulatory process is also crucial to the imposition of fitness to practise sanctions and consensual disposal.

Provisional Proposal 9-29: The regulators should be given broad powers to make rules in relation to the sanctions listed in provisional proposal 9-24 and consensual disposals in provisional proposal 9-26.

We agree with this proposal.

We consider that the statute should also provide for mandatory reviews of suspension and conditions of practice orders and the length of time such orders should be imposed for. This should not be left to the discretion of individual regulators. This ensures transparency and consistency across all of the regulators.

Provisional Proposal 9-30: The Government should be given a regulation-making power to add new sanctions and consensual disposal to those listed in provisional proposals 9-24 and 9-26 and remove any sanctions and consensual disposal.

We agree with this proposal.

Please see our response to provisional proposal 9-24 with respect to available sanctions.

Provisional Proposal 9-31: Does the language used in the proposed list of sanctions and consensual disposals contained in provisional proposals 9-24 and 9-26 convey accurately their purpose?

We consider that the language used does accurately convey their purpose. Please see our responses to provisional proposals 9-24 and 9-26.

Provisional Proposal 9-32: The statute should require all of the regulators to establish a system of review hearings for conditions of practice and suspension orders. In addition, the regulators should have powers but would not be required to establish hearings for warnings and undertakings.

We do not agree with the proposal with respect to review hearings.

We consider instead that the requirement to hold review hearings for conditions of practice and suspension orders should be set-out in statute to ensure transparency and consistency.

Article 30 of the Health Professions Order 2001 sets out the provisions for reviews of orders made by the HPC's practice committees. This includes the review of suspension and conditions of practice orders which must be reviewed prior to the expiry of the order. At the review hearing, a panel of the relevant practice committees will consider any new information received since the final hearing and make an assessment as to the registrant's fitness to practise. The review panel has a range of powers which includes extending, revoking or varying the existing order or they may replace the order with any order which it could have made at the time it made the order being reviewed which includes striking off (but not in competence or health cases). However, under Article 29(6) of the order a panel may strike-off (in health and competence cases) a registrant who has been continuously suspended or subject to conditions of practice for at least two years.

In addition, Article 30(2) allows the registrant concerned to apply for a review of an order made under Article 29(5)(b), this includes caution orders. Article 30(7) also provides for a review of a striking-off order where new evidence relevant to that striking off order becomes available. The HPC's practice note, 'Review of striking off orders: new evidence and Article 30(7)' sets out the procedure to be adopted.

We agree that the regulators should have discretionary powers to establish hearings for warning and undertakings. We would not wish to be required to establish hearings for warnings and undertakings.

Provisional Proposal 9-33: The regulators should have broad rule-making powers to establish the procedures for review hearings.

We agree with this proposal.

We would wish to establish procedures which are similar to those we already have in place. The Health Professions Council (Conduct and Competence Committee) and (Health Committee) (Procedure) Rules 2003 set-out the procedures for review hearings in accordance with Article 30 of the order. This includes service of documents, representation and the production of documents.

Question 9-34: Should the regulators be given an express power to quash or review the decision of a Fitness to Practise Panel where the regulator and the relevant parties agree that the decision was unlawful? If so, should complainants and other interested parties be able to prevent or contribute to any decision to use this power?

We agree with this proposal.

This is a power that should be used sparingly for significant miscarriages of justice.

Provisional Proposal 9-35: All professionals should continue to have a right of appeal against a 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 in Northern Ireland.

We agree with this proposal.

Part 10: The Council for Healthcare Regulatory Excellence

Question 10-1: How effective is the CHRE in performing the role of scrutinising and overseeing the work of the regulators?

We consider that the CHRE is effective in scrutinising and overseeing the work of the regulators.

In August 2012, the regulation of social workers in England will transfer to the HPC and will fall within the CHRE's oversight. We suggest that, with the agreement of the devolved administrations, consideration might be given to extending CHRE's remit to also cover the regulation of social workers by the care councils in Scotland, Wales and Northern Ireland.

Provisional Proposal 10-2: The current powers and roles of the CHRE (including those introduced by the Health and Social Care Bill 2011) should be maintained in as far as possible.

We agree with this proposal.

Provisional Proposal 10-3: Appointments to the CHRE's General Council should be made by the Government and by the devolved administrations. Appointments would be made in accordance with the standards for appointments to the health and social care regulators made by the CHRE.

We agree with this proposal.

Provisional Proposal 10-4: The CHRE's general functions should be retained, but modernised and reworded where appropriate.

We agree with this proposal.

Question 10-5: Is the CHRE's power to give directions still necessary?

We agree that the CHRE's power to give directions (subject to regulations) should be maintained.

Although such directions should rightly only be made as a 'last resort' (paragraph 10.31), such powers may still be needed, particularly given that the new legislative framework would mean a greater degree of discretion for the regulators in addressing some matters in rules that have hitherto only been specified in primary or secondary legislation.

Provisional Proposal 10-6: The existing power for Government to make regulations for the investigation by the CHRE into complaints made to it about the way in which a regulator has exercise its functions should be retained.

We agree with this proposal.

Question 10-7: Should the CHRE's power to refer cases to the High Court in England and Wales, the Court of Session in Scotland and the High Court in Northern Ireland: (1) be retained and exercised alongside the regulator's right to appeal, in cases when the regulator's adjudication procedure is considered to be sufficiently independent; *or* (2) be removed when a regulator's right of appeal is granted in such circumstances; *or* (3) 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?

We support option (3) as outlined above.

We consider that it is appropriate that the CHRE should retain its jurisdiction under Section 29 of the NHS and Health Care Professions Act 2002. The CHRE as an independent oversight body is in a better position to assess which cases should be referred to the Court, not the regulator given that they are a party to the proceedings.

Part 11: Business Regulation

Question 11-1: To what extent does regulation in a commercial context make a difference to how the regulators approach the task of professional regulation and does the law provide adequately for professional regulation in a commercial context?

In our experience regulation in a commercial context does not make a significant difference to the task of the regulation.

All regulators in performing their roles need to be alert to the contexts in which practitioners work. This might affect, for example, any requirements the regulators set for CPD or revalidation. The proposed legal framework appears to be wholly applicable to all regulated professionals, regardless of whether they work within the NHS, within other managed environments or within commercial settings.

Provisional Proposal 11-2: The statute should retain the existing premises regulation regimes of both the General Pharmaceutical Council and the Pharmaceutical Council of Northern Ireland.

We have no comments to make on this proposal.

Question 11-3: Are any further reforms needed to the premises regulation regimes of the General Pharmaceutical Council and the Pharmaceutical Society of Northern Ireland?

We have no comments to make on this question.

Question 11-4: Should the statute retain the existing systems for the regulation of bodies corporate?

We have no comments to make on this question.

Question 11.5: Should the regulators have powers to finance or establish a complaints service?

We support the provisional view outlined in the consultation document that 'the proper role of professional regulation is to protect the public and not to provide redress to the complainant' (paragraph 11.32) and therefore that regulators should not have powers to run their own consumer complaints service. The role of professional regulation is to protect the public not to provide general resolution to consumer complaints.

Part 12: Overlap Issues

Question 12-1: How could the legal framework establish clearer interfaces between the various regulatory systems?

We consider that the proposals outlined in the consultation document, including duties to co-operate and an overall simplification of the legislative framework, are sufficient in encouraging clearer co-operation between the regulators.

This is largely a matter of policy and practice for the regulators rather than a matter for statute and we have no suggestions to make for improvements to the proposals in this area.

Question 12-2: What practical difficulties arise as a result of parallel criminal and fitness to practise proceedings?

Our practice note on concurrent court proceedings sets out the approach the HPC takes when the registrant concerned is subject to criminal proceedings.

As a general principle we will postpone proceedings if the register concerned is being tried concurrently for related criminal charges, although we may take steps to apply for an Interim Order if our risk assessment indicates one is needed. We will postpone regulatory action because a potential injustice may arise if regulatory proceedings are conducted at the same time as a related criminal trial. As more restrictive rules of evidence will apply in criminal proceedings, there is a risk that evidence which has not been admitted at that trial may enter the public domain by being admitted in the course of the regulatory proceedings**.**

Question 12-3: What are the practical and legal difficulties associated with joint working?

The consultation proposals provide a legal framework which would assist in overcoming any practical difficulties associated with joint working.

Each regulator would need to ensure that any joint working was appropriate and did not jeopardise their independence or the delivery of their regulatory functions.

Provisional Proposal 12-4: The statute should include a permissive statement to the effect that each regulator may carry out any of its functions in partnership with another organisation.

We agree with this proposal.

Provisional Proposal 12-5: The statute should 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 should provide that any such arrangements do not affect the liability of the regulator for the exercise of any of its statutory functions.

We agree with this proposal.

Provisional Proposal 12-6: The statute should impose a general duty on each regulator to make arrangements to promote co-operation with other relevant organisations or other persons…'

We agree with this proposal.

Question 12-7: Should the statute specify or give examples of the types of arrangements that could be made under the provisional proposal 12-6?

We consider that it is unnecessary for the statute to specify or give examples of the types of arrangements that could be made under this proposal. This should be a matter left to the discretion of the regulator, but might include arrangements such as memoranda of understanding.

Question 12-8: The statute should impose a specific duty to cooperate, which would apply when the regulator in question is:

(1) considering registration applications and renewals

(2) undertaking the approval of education and training

(3) ensuring proper standards of practice and conduct

(4) undertaking an investigation into a registrant's fitness to practise

We agree with this proposal.

Question 12-9: Are there any other circumstances in which the specific duty to cooperate contained in provisional proposal 12-8 should apply?

We consider that the areas outlined in provisional proposal 12-8 are sufficient.

Part 13: Cross Border Issues

Provisional Proposal 13-1: The statute should require the regulators to specify in rules which qualifications would entitle an applicant to be registered, including overseas qualifications.

We agree with this proposal.

Provisional Proposal 13-2: The default powers of the Government should include the ability to intervene in cases where there is likely to be or has been a failure to implement the Qualifications Directive properly.

We agree with this proposal.

Provisional Proposal 13-3: The statute should include broad powers for the regulators to register those from non-EEA countries, including powers to set requirements as to the language, practice and education requirements.

We agree with this proposal.

Question 13-4: Would there be benefits in the same regulatory arrangements applying in the Channel Islands and the Isle of Man? If so, what would the best way to achieve this be parallel legislation or a single statute?

For most of the professions we regulate, legislation passed by the Isle of Man Government ensures that professionals are appropriately HPC registered and means that we can deal effectively with concerns about an individual's conduct and/or competence. However, the Isle of Man legislation has not caught up with professions brought into regulation by more recent UK legislation.

There are considerable benefits in the same regulatory arrangements applying in these jurisdictions including ensuring that professionals are regulated to the same standards and supporting the mobility of professionals. The simplest way of achieving this would be a single statute, but ultimately the legislative vehicle is less important than ensuring public protection throughout the UK, Isle of Man and the Channel Islands.

Question 13-5: How could the new legal framework address the interface between the regulatory systems in the UK and the Channel Islands and the Isle of Man?

We consider that the proposed legal framework is sufficient to facilitate the 'interface between the regulatory systems in the UK and the Channel Islands'.

Provisional Proposal 13-6: The regulators should 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.

Question 13-7: What are the practical difficulties which arise as a result of the requirement to quality assure UK qualifications which are awarded by institutions based overseas?

We are content with the suggestion that the regulators be given these powers, with the ability to determine whether they wish to exercise them. However, we would want to consider them very carefully.

Our existing legislation does not permit us to approve programmes delivered outside of the UK by a non-UK institution or where a programme is delivered under a collaboration or franchise agreement between UK and non-UK education providers. Where all or part of a programme is delivered outside of the UK (e.g. an overseas practice placement) it may be approved only where it is delivered by a UK institution. We consider that the reasons for the regulators' involvement in this area, outlined in paragraph 13.31 of the consultation document, are weak, particularly any suggestion that approval of overseas qualifications is merited because of the reputation of UK regulation or because such approval is considered a 'badge of honour'.

Practical difficulties of approving overseas qualifications would include the cost of approval visits to overseas institutions. However, the enabling provisions outlined in paragraph 6.44 of the consultation document for the regulators' role in education would assist in overcoming any barriers for those regulators who consider it appropriate to be involved in this area.

Question 13-8: How might our statute enable the regulators to manage the issues that arise from distance service provision?

'Health tourism' is on the increase. This is currently most relevant to medical services but there are more and more examples of distance service provision across the professions.

The consultation proposals provide powers which would allow the regulators to produce guidance in this area or to work appropriately with other agencies. For example, this might include working with others to produce cross-jurisdiction guidance on internet advertising or working appropriately with other agencies, such as the Medicines and Healthcare Products Regulatory Agency (MHRA) on ensuring compliance.

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.