LAW COMMISSION: CONSULTATION ON REGULATION OF HEALTH CARE PROFESSIONALS

The Optical Confederation represents the 12,000 optometrists, 6,000 dispensing opticians, 7,000 optical businesses and 45,000 ancillary staff in the UK, who provide high quality and accessible eye care services to the whole population. The Confederation is a coalition of five optical representative bodies: the Association of British Dispensing Opticians (ABDO), the Association of Contact Lens Manufacturers (ACLM), the Association of Optometrists (AOP), the Federation of Manufacturing Opticians (FMO) and the Federation of (Ophthalmic and Dispensing) Opticians (FODO). As a Confederation we work with others to improve eye health for the public good.

We very much welcome the opportunity to comment on the Law Commissions' proposals. We would also like to thank the Law Commission team for meeting with us several times during the consultation period as ideas were developing. It has been a model of excellent engagement.

Summary

We welcome the Law Commissions' proposals to enable the regulators to:

- set the size and composition of their councils (with default powers for government to intervene if necessary)
- determine their own governance arrangement and establish committees as they think fit (with the exception of the Fitness to Practise Committee which will remain in the Act). The Investigation Committee should remain if the precise process by which allegations are screened and decisions not to refer to an FTP Committee reviewed is not agreed. This has been the subject of recent consultation by the GOC and a copy of our response is attached at Annex A.
- set their own rules for procedure in most areas giving them greater flexibility to make appropriate changes after consultation with stakeholders.
- introduce case screening and case assessors
- share functions with other regulators to reduce costs
- make their own rules on the constitution of Fitness to Practise Committees
- join their adjudication system to the United Tribunals Service if this is the most cost-effective and efficient model
- specify overseas applicants' qualifications for registration, including language requirements for non-EU applicants, and establish a clear and transparent process of registration by overseas applicants
- continue to approve domestic qualifications and institutions, courses and programmes and approve schemes which govern the national assessment of students

- respond effectively to the problem of distance selling from abroad.

We also welcome the proposals for:

- the general duties of co-operation
- the general duty on regulators to provide information to the public and registrants about their work
- a requirement that regulators consult widely whenever issuing or varying anything which is binding, anything which sets a benchmark or standard, and competency
- FTP Committee members being appointed separately by a process separate from the council, council members and investigators being prohibited from serving on FTP Committees and each Committee to include at least one lay member
- regulators being able to dispose of minor cases at investigation stage without the approval of a formal committee or FTP Committee, in particular where the cost of a full scale investigation cannot be justified
- the proposal to permit but not require student registration. Collectively, we do not support student registration believing student discipline to be a matter for the universities, although views are mixed on the registration of pre-registration optometrists and trainee Dispensing Opticians (DOs) in practice. (Please see Annexes B and C and separate responses from our colleagues at the Association of British Dispensing Opticians - at Annex D - who have particular issues to raise.)

We also support:

- the Government having a direction-making power to respond to under-performing regulators and the ability to take over a regulator which is failing
- the proposal to remove separate offences for abuse of professional title and function and rely instead on a general criminal offence
- enforcement powers being attached to regulators' powers to require information
- regulators (in the form of a quasi-judicial appeals process) being given power to quash or review decisions of FTP panels where the regulator and parties agree that the decision was unlawful
- the retention of the CHRE's power to refer cases to the higher court
- the retention of the existing systems for the regulation of bodies corporate and the power for regulators to finance or establish a consumer complaints service.

In addition to the above summary, we would like to take this opportunity to provide some detail on matters that we feel require explanation.

Part 2: Structure of Reform and Accountability

The Law Commission has been asked to look at the various different pieces of legislation which currently govern the regulation of healthcare professionals by nine separate regulators. The proposal is to "slim down" the various Acts and combine them into a single Act. We broadly support this move but would caution against removing too much of the detail from

the original acts. The primary legislation must contain sufficient detail to allow the various regulators to perform their functions.

Accountability

The proposal is that the role of the Privy Council in health regulation should be abolished. We would, however, also wish to point out, that having removed the democratic accountability of elected members of regulators and replaced it with competence-based appointments; the Privy Council was the sole remaining body in the system to which an aggrieved profession who felt itself to be "over-taxed" or "over-regulated" could appeal.

The strength of the Privy Council system was that it generally liked to receive joint proposals both from the regulator and the regulated so that it was not forced to arbitrate on controversial issues. This invariably forced the parties to seek reasonable accommodations which were in the public interest.

This important safeguard is now proposed to be removed from the regulated professions. A regulation-making power instead of an order-making power for the government to intervene where "there is sufficient public interest or matters that give rise to questions about the allocation of public resources" is not a sufficient substitute.

Nor is the recommendation that the House of Commons Health Select Committee and Devolved Assemblies should consider holding annual accountability reviews with the regulators.

Experience has shown that these are likely to be post hoc, largely self-congratulatory PR exercises and seldom hard-hitting or genuinely effective in holding regulators to account. Nor, on past experience, do we have confidence that the CHRE will prove any more effective in this regard or in scrutinising new rules

In our view, therefore, there should be a clear right of appeal to the government (in the form of the relevant Health Departments) if, in the view of the professions regulated, a regulator is exceeding its powers, behaving unreasonably or wasting resources.

This, in our view, would be an essential safeguard in a system which otherwise would allow no right of appeal for the generality of the professions regulated.

Annual Accountability Hearings

It follows from the above that we would query whether it is necessary (or indeed logistically possible) to hold annual accountability hearings with the Health Select Committee and Devolved Assemblies.

Given the form these reviews are likely to take, and the cost, it would seem to us that quinquennial reviews would be more appropriate.

The safeguard in the system here would be the requirement on regulators to lay copies of their annual reports, statistical reports, strategic plans and accounts before Parliament, etc,

with the right for Parliament and the Devolved Assemblies to intervene and hold an accountability hearing if they felt something was amiss, were requested to do so by one of the health departments, or on petition from a specific regulated profession.

Moving detail from primary into subordinate legislation

We would wish to see all changes to existing rules or additional rules consulted on and subject to parliamentary approval in the usual way. We could not agree to the regulators being able to make or amend rules without any direct oversight if the government absolves the Department of Health of this responsibility We have already stated we do not consider the CHRE fit to perform this function.

That said we do recognise the difficulties the regulators face in responding to changes when the primary legislation is restrictive, particularly in relation to FTP adjudication and we broadly welcome the proposal to move some detail from the acts into rules. We also consider there is scope for even greater consistency in the FTP procedures across the various regulators.

Transitional arrangements

In eye care the last Section 60 Order resulted in a significant hiatus in hearings before the GOC's FTP Committee. It will be important that proceedings initiated under the existing legislation are dealt with in accordance with existing rules and we would very much like to see this past disruption avoided. In light of the time scales being discussed in this consultation we are optimistic that with careful planning and dialogue this can be achieved

Part 3: Main duty and general functions of the regulators

Bringing Professions into Disrepute

Although "not bringing the professions into disrepute" is mentioned as a condition of regulation in parentheses several times in the consultation document, we would want to see it also made clear in statute that this applies throughout every aspect of the regulators functions.

In this context we would favour the second proposed definition of the regulator's duty:

- 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. (our italics).

The reason for this is that we believe that maintaining confidence in the profession is an essential part of protecting, promoting and maintaining the health and safety of the public – not maintaining confidence in the profession is likely to undermine this core duty. It should also act as a rein on any regulator which pursued egregious ideas about promoting protecting and maintaining the health of the public which would undermine confidence in the profession.

We would also like to see provisions setting out the general principle function(s) of a health regulator. A general power for regulators to do *anything* (our italics) which facilitates the proper discharge of their functions is too broad. In terms of further guiding principles, regulators should ensure their functions are carried out efficiently and expeditiously and balance the interests of the profession with the interests of the public.

Part 4: Governance

We welcome the proposals to enable regulators to set the size and composition of their councils (with default powers for the government to intervene if necessary) and determine their own governance arrangement and establish committees as they think fit. There are various essential and core committees, however, in the adjudication of registrants which we would favour preserving in any new legislation: Fitness to Practise Committee, Investigation Committee, and Registration Appeals Committee.

Part 5: Registers

We agree the statute should set out the core duties on regulators, one of which is to establish and maintain a professional register, including specialist lists.

We have differing views on the registration of trainees in practice – please see Annexes A, B and C

Voluntary Registers

We would support a general power for regulators to introduce voluntary registers in relation to professions not currently regulated, which seems a sensible flexibility provided there was a right of appeal to the Health Departments against this by the professions already regulated.

This, in our view, would be necessary, to prevent the risks of regulation creep, of regulators seeking to bring new groups into regulation to boost funding and of the potential undermining of the professional status of existing registered professionals.

We would, however, support the retention of non-practising registers as this would spare non-practising registrants the additional burdens of CPD, revalidation, etc, whilst at the same time ensuring they were still bound by the codes of conduct of the regulators including not acting in such a way as to bring their profession into disrepute.

In terms of recommending a new profession for statutory regulation, or the removal of the profession, if regulators or CHRE were given a power to do this, this should be the subject of wide consultation and Parliamentary approval.

We would like to see an inclusion to the effect that the regulator must register the applicant provided that they satisfy the relevant criteria and require the regulators to communicate expeditiously with registrants and potential registrants and establish an appeals process for when applications are refused, which will include a right of appeal when registration application are refused to the High Court in England and Wales, the Court of Session in Scotland and the High Court in Northern Ireland.

The duty to maintain and publish the register must remain.

In cases where a registrant has been erased following fitness to practise proceedings, the time period before which applications for registration cannot be made should be left to each existing regulator because of the differences of type and risk between the professions being regulated.

In terms of the content of the register, past sanctions should not be included in the register, nor should any decision taken by case screeners/examiners/ Investigation Committees. Otherwise, the regulator should be given a *discretionary* power to include details of current fitness to practise actions, undertakings, warnings and interim orders in the public register. There should be no requirement to include details of professionals who have been erased from the register.

Protected Titles and Functions

We would argue for the retention of the existing protected functions without amendment. In terms of the existing protected titles, these should be retained and arguably extended to include the words "eye health" and "ophthalmic" and any combination with "medical centre" which implies to patients that they are seeing regulated professionals. The word "optical" should also be included; however, we would caution against including the word "optical" without qualification as it has uses beyond optometry and dispensing optics e.g. optical fibres, therefore its inclusion on a list of protected titles for optometry and dispensing optics should be qualified in terms similar to section 28 (1)(d) of the Opticians Act 1989, i.e. when used to falsely imply that someone is registered in any of the GOC registers or section 28 (1)(e), i.e. when used to otherwise pretend that someone is registered in any of the registers.

If, as per 5.125, issuing regulations requires a political policy decision to be made about which titles and functions should be protected through the introduction of criminal offences, and the allocation of public resources then the powers may be removed from the GOC in the new legal framework and the Government should be given a power to issue regulations which would add to or remove any of the existing protected titles and functions.

The existing protected titles and functions are just about appropriate to the professions of optometrists and dispensing optician (see above). However, the list of protected titles in Annex D specifies two titles, optometrist and dispensing optician, but does not provide a catch all provision similar to section 28 (1)(d) of the Opticians Act 1989, to create an offence where a title is used to falsely imply that someone is registered in any of the GOC registers. An example of this would be the use of the word "optician" which is not listed in Annex D as a protected title.

We would welcome regulators having powers to bring prosecutions. Paragraph 5.123 notes that some regulators do not bring prosecutions because of the practical difficulties associated with bringing prosecutions including the perceived high threshold for pursuing prosecutions, the insufficient deterrent effect of fines, and the fact that any fine imposed is not received by the regulator and any costs order is highly unlikely to cover the costs of preparing the case.

These difficulties will need to be addressed if the powers conferred are to be successfully utilised.

Part 6: Education Conduct and Practice

The statute should not require education institutions to pass on to a regulator *any* information about student fitness to practise actions. In the event that student registration is removed, then we would firstly like to see clear guidance produced by Higher Education Institutions (in conjunction with the regulator) on matters they would investigate, and only then, if an adverse decision were taken**,** would it be appropriate for information to be passed on to the regulator. This guidance will be benefit to potential registrants, registrants and stakeholders of the professions.

The power to select those entering education should remain vested in the Higher Education Institutions, not the regulators.

We would welcome multi-disciplinary education and training and joint working where appropriate, but it should be left for each regulator to determine the relevance and/or need in consultation with others. There is no requirement for a formal statutory framework to be introduced.

Guidance

We would likely oppose the imposition of a statutory duty on regulators to issue guidance and prefer this to be replaced with a duty to ensure that "guidance is issued" – preferring in our case the system by which the College and ABDO develop guidance for the two professions which is then endorsed by the regulator. This in our view has two key advantages:

- it prevents duplication and saves costs
- it ensures the full engagement and "buy in" of the professions regulated whilst keeping the ultimate power to approve guidance (and in extremis issue its own) appropriately with the regulator.

CPD (CET)

We would support the imposition of a duty on regulators to ensure ongoing standards of conduct and practice however we believe the statute should not specify that this should be through continuing professional development (including the ability to make rules on revalidation).

We would prefer to continue to allow the individual regulators to decide the most appropriate method of implementing this taking account of risk, the balance of costs and benefits, and potentially other means of achieving the same ends which would be achieved by a delegated general power rather than a specific new rule.

Part 7: Fitness to Practise: Impairment

In order to protect registrants, we would prefer the statute to establish a single framework for impaired fitness based on the existing legislative schemes and the statutory grounds of:

- misconduct
- deficient professional performance
- convictions and determinations by another regulator
- adverse health.

We feel that both the Shipman proposal and wider options are too open-ended and widely drawn and would not strike the appropriate balance of fairness between the registrant and the public.

Part 8: Fitness to Practise: Investigation

Allegations

The concept of an allegation should remain. A registrant must be able to understand the precise nature of the allegation they are facing and the likely outcomes. By giving the regulators broad powers to deal with complaints in such manner as they consider just would, again, not strike the appropriate balance of fairness between the registrant and the public.

We do not agree that regulators should be able to consider any information that comes to their attention as an allegation and care should be taken in this regard to account for vexatious complaints, speculation etc. If there were an effective 'filter' in place then our concerns in this regard may be lessened. The GMC, for example, is able to filter vexatious complaints. The use of case examiners may not provide this effective filter as they are simply delegated the task of investigating complaints by the Investigation Committee.

We would also welcome a time limit for bringing an allegation against a registrant and consider the five-year limit in use at the GMC apposite.

Regulators should be given the power to establish a formal process for the initial consideration of allegations, such as screeners. The statue may wish to ensure that any case examiners/screeners are suitable by including a requirement that they are trained to identify the relevant issues.

In terms of whether or not the regulator should have the power to establish referral criteria, we would prefer for each decision by the Investigation Committee to turn on the facts in each particular case rather than in response to a pre-defined set of criteria. We would oppose an exhaustive list of cases which MUST be referred directly to the Fitness to Practise Committee, which would be too prescriptive and fetter the powers the Investigation Committee to make their determination based on the complaint and the response received from the registrant.

The question has been raised as to whether the statute should impose more consistency in relation to the criteria used by regulators to refer cases for an investigation or cases that must be referred directly to Fitness to Practise Committees. Whilst we would support the sharing of ideas and information we would warn against trying to apply a 'one sizes fits all' approach to regulation and account should continue to taken by each regulator of the risk associated with each profession. In the case of optometry and dispensing optics, these are low risk profession and whilst there is scope for greater consistency in the rules of procedure across the regulators the issue of risk must not be disregarded. The use of indicative guidance may assist.

In terms of the powers to require disclosure, we would not wish to see any change in this regard.

Investigation committee

As far as possible, the procedural rules across the regulators should be consistent. The regulators should have the same powers to issue warnings, undertakings, accept voluntary erasure and give advice. These are notable inconsistencies in the present legislation and this consultation is an opportunity to address them. The Government should have the regulation-making power to add to this list in the future, if necessary.

Mediation is not appropriate in FTP procedures on the basis that the complainant does not bring the action against the registrant. We are also not sure that a complainant would be content that any mischief had been resolved. We are more concerned that undue pressure could be brought upon a registrant to agree a consensual disposal to avoid a full hearing without the evidence having being properly tested.

In terms of reviewing a decision by the Investigation Committee to refer a matter to the FTP Committee, the statute should also continue to provide for the right to initiate a review of an investigation decision to refer the case to the Fitness to Practise Committee and give the power to terminate if it is felt appropriate. The right to initiate any such review should remain with the regulator and the registrant.

In terms of the grounds for a review, we would not wish to see a simple administrative error result in a review and would like to see the word 'significant' included if the grounds are to be spelt out. The same would apply when considering new evidence, and it should be 'significant'; although we note the proposal to stipulate that a review must be 'necessary for the protection of the public'/'necessary in the public interest'. The statute should include the precise circumstances under which a review may be initiated and should not be too open-ended so as to be uncertain.

Part 9: Fitness to Practise: Adjudication

The statute should require that the structure of adjudication across all the regulators is HRA Article 6 compliant and there should be clear separation of investigation and adjudication to ensure public and professional confidence. As stated earlier, we would support a joint adjudication process but recognise this may need to be balanced with cost.

We would prefer for regulators to be allowed to make their own rules on the constitution of their Fitness to Practise Committees but agree that three members should be the absolute minimum and must contain at least one lay member.

Whilst regulators should be allowed to set their own rules of procedure in this area, the procedures across the regulators should be consistent as far as possible.

The location of the hearings should be left to the discretion of the regulator.

We agree regulators should continue to have the power to admit evidence which would not be admissible in court proceedings if the admission of such evidence is relevant and in the interests of fairness. This coupled with the starting position which is not to admit evidence that would be inadmissible in criminal proceedings confers clarity, certainty and fairness on all parties and should not be amended in any subsequent legislation.

We support the proposals in respect of witness assistance and special measures.

Interim order hearings

There should be a clear structure for the imposition and review of interim orders, including a committee of no fewer than three members (including a lay member) and there should, again as with FTP committees, be a prohibition on council members and investigators from sitting on such committees. There should be a prohibition on Interim Order (IO) Committee members then sitting at the substantive hearing to determine the FTP issues. The test at an IO should be whether the registrant poses a risk to the public only. The maintenance of confidence in the profession should not be considered at this stage but is relevant at the substantive hearing when considering impairment. Registrants should be given the right to give evidence at an IO hearing if they wish.

Substantive Hearings

In terms of available sanctions at a substantive hearing, we would not wish to see any change in this regard. The Opticians Act includes a power to take no action despite a finding that a registrant's fitness to practise is impaired and to make a financial penalty. We would prefer to see these included in any new statute, as well as the power to agree undertakings and voluntary erasure. Immediate orders should be provided for in the new statute and these should be able to be sought by either party. The Government should be given a regulation-making power to add new sanctions and provide for consensual disposals.

The statute should require the regulators to establish a system of review hearings for any order attaching to registration and for that power to be capable of being invoked by either party.

In terms of whether complainants or interested parties should be able to prevent or contribute to any decision to quash or review a decision that was agreed between the parties to have been unlawful, we do not feel this to be an appropriate or necessary addition.

All existing rights of appeal should remain.

Next Steps

We understand that the final report and draft Bill is due for completion in 2014. We have welcomed this consultation but it is, by its nature, extremely broad. We assume and hope that there will be a further opportunity to consider the draft bill before it is presented to Parliament as we consider a further consultation to be appropriate in the circumstances.

Optical Confederation

31st May 2012

Annex A: The Optical Confederation's response to consultation in respect of amendments to Rule 15 of the GOC Fitness to Practise Rules.

Annex B: Student Registration: A discussion paper produced by the Association of Optometrists.

Annex C: Student Registration: An alternative view put forward by the Federation of (Ophthalmic and Dispensing) Opticians

Annex D: Separate submission to the consultation by Optical Confederation member, the Association of British Dispensing Opticians (ABDO)