General Osteopathic Council

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Council
1 May 2014
Law Commission report and draft Bill

Classification	Public
Purpose	For noting
Issue	The paper sets out a synopsis of the Law Commissions' report and draft Bill and the possible timetable for future activity
Recommendation	To note the content of the report.
Financial and resourcing implications	None at present.
Equality and diversity implications	None at present.
Communications implications	None at present.
Annexes	A. Key proposed changes from current legal framework B. Law Commissions' Summary report
Author	Tim Walker

Background

1. The publication by the Law Commissions on 2 April of their report *Regulation of Health Care Professionals, Regulation of Social Care Professionals in England* marks the conclusion of a three-year legislative review that commenced with the publication of *Enabling Excellence* by the Government in February 2011.

2. The Law Commissions for England and Wales, Scotland and Northern Ireland were asked to carry out 'a simplification review of the legislative framework for professional regulation, with a view to giving greater autonomy to the regulatory bodies to decide how best to meet their statutory duties.' The work has been led by the Law Commission for England and Wales.

3. The initial Law Commission consultation paper was published in March 2012, see: http://lawcommission.justice.gov.uk/docs/cp202_regulation_of_healthcare_professionals_consultation.pdf. The GOsC submitted a detailed response to the consultation which can be found here: http://www.osteopathy.org.uk/uploads/gosc_response_to_law_commission_consultation_on_healthcare_regulation_2012.pdf.

4. In the intervening two-year period the Law Commission has analysed the consultation responses, consulted further with stakeholders, considered its own (internal) policy response, and produced the final report and draft Bill. The final report can be found here: http://lawcommission.justice.gov.uk/publications/Healthcare-professions.htm and a summary can be found at Annex B.

5. The Department of Health is working on its own version of the Bill to be put before Parliament in due course.

6. This paper seeks to encapsulate the major changes proposed to the GOsC's legislative framework by the draft Bill and the anticipated next steps.

Discussion

The legislative framework

7. We welcome the draft Law Commission Bill. It provides a significant opportunity for the GOsC to amend or replace outdated rules and processes, which have not been open to us in recent years and which reduce the economy, efficiency and effectiveness of our regulatory processes.

8. Rather than identify all the areas where we would be required to make new rules (and where it is proposed we should be given flexibility to do so), we have set out the key proposed changes from our current legislative framework thematically in Annex A to this paper.

The Government Bill and next steps

9. It is no secret that there are some aspects of the proposals where the Government is not in complete agreement with the Law Commission. One major area of divergence is in relation to the role of the Privy Council in rule making and other matters.

10. It is anticipated that there will be other areas in which the Government proposes an alternative approach. However, until the Government publishes its own version of the Bill this will not be entirely clear.

11. The timetable for publication remains unclear. If the Bill is to be considered in the final session of this Parliament, this will be announced in the Queen's Speech on 3 June. This would allow ample time for the Bill to gain Royal Assent before the General Election in May 2015.

12. A possible alternative is that the Bill will be subject to pre-legislative scrutiny by Parliament in 2014-15. This would involve a Parliamentary Committee (either the House of Commons Health Select Committee or a joint committee of both Houses of Parliament) taking evidence on the Bill and publishing a report recommending any additions or changes prior to further consideration by Parliament.

13. There may be considerable advantage in pre-legislative scrutiny taking place as it allows for a more considered approach to the legislation. However, it would add a minimum of an extra year to the timetable before it was enacted. This period could be longer as, even if the results of the scrutiny process are taken into account, no future government would be bound to introduce the Bill early in the new Parliament (or arguably at all).

Opportunities to seek changes

14. While we are broadly happy with the direction of travel there are a number of areas where we would wish to seek clarification or changes. These areas, which are likely to be shared with a number of other regulators include:

    a. Seeking an explicit power to establish threshold criteria for initial consideration of fitness to practise complaints to avoid the need to investigate trivial matters.

    b. Removing the requirement for holding hearings and appeals in different parts of the UK.

    c. Removing the requirement for an 'intent to deceive' test in protection of title cases.

    d. Clarifying the relationship between CPD, continuing fitness to practise and revalidation to enable a flexible approach to be adopted by regulators.

e. Seeking to include 'reputation of the profession' and 'public confidence' cases within the PSA's appeal powers.

f. Including powers for costs sanctions to make case management provisions effective.

g. Clarifying aspects of the new categories by which a registrant's fitness to practise may be impaired including 'deficient professional performance' and 'disgraceful misconduct'.

15. Now that the draft Bill has been published we will be seeking to influence the process further through representations to the Department of Health in advance of its own Bill being published.

16. If the Bill is subject to pre-legislative scrutiny, this will give us the opportunity to make further representations to the Committee considering the Bill.

17. We are working closely with the other regulators, the majority of which have broadly similar aims, to ensure that the Bill provides a new legislative framework that is effective, proportionate, flexible and cost-effective.

Further consideration by Council

18. In its seminar session in January 2014, Council considered how the process of policy and rule development might proceed in the light of the anticipated Bill. However, since that meeting the prospect of legislation being enacted by May 2015 has diminished and it is still too early commence detailed planning on implementation.

19. The likely prospects for the Bill will be clearer by the time Council meets again on 23 July at which point the Executive will table a further report.

Recommendation: to note the content of the report.

Key recommendations	Commentary
General	
3. The regulators should be given powers to make legal rules which are not subject to approval by Government or any Parliamentary procedure. The Professional Standards Authority should oversee the processes adopted by the regulators to make and amend rules.	Currently all GOsC rules (including fees) must be approved by Privy Council and hence by the Department of Health (DH).
8. The formal role of the Privy Council in relation to health and social care professionals regulation should be removed entirely.	Privy Council is responsible for making appointments and holds reserve powers. In practice DH exercises these powers and the Law Commission believes this should be made explicit.
14. The regulatory bodies should be required to ensure that, as far as possible, members concentrate on strategic or policy matters rather than operational delivery.	This is broadly in line with our current arrangements.
13. The main objective of each regulator and the Professional Standards Authority should be to protect, promote and maintain the health, safety and well-being of the public. The regulators and the Authority also have the following general objectives: to promote and maintain public confidence in the profession and to promote and maintain proper standards and conduct for individual registrants.	This is broader and more explicit than out current objectives but does not include the 'development' role. However, there is a more explicit duty to promote proper professionals standards within the professions regulated. It is also worth noting that these general objectives apply to fitness to practise and registration appeal panels.
21. A registrant member of a regulatory body should be defined as someone who is or has been registered with any of the professionals regulators, including predecessor organisations, or is eligible to be registered. A lay member should mean a member who is not a registrant when appointed.	This will rule out lay members from other professions serving on Council and also mean that not all registrant members of Council need be osteopaths.
22. Concurrent membership of the regulatory bodies should be prohibited.	This is allowed at present.
Registration	
29. All registrants should intend to practise the profession in order to be	This would have an impact on our current approach to 'non practising'

registered. 30. The Government should have regulation-making powers to require a regulator to keep a supplementary register of professionals who do not intend to practise.	registration. However, it may be possible that matters such as maternity leave/career breaks can be accommodated within the fees rules.
38. Where a regulator has reasonable grounds for believing that an entry in the register has been fraudulently procured or incorrectly made, it may remove that entry. A right of appeal should lie to a registration appeals panel and to the High Court in England and Wales, the Court of Session in Scotland, or the High Court in Northern Ireland.	At present the right of appeal in these cases is to the County Court not the High Court.
41. Public registers should indicate all current sanctions imposed on a registrant, cases where impairment has been found but no sanctions imposed, current interim orders and consensual disposals. The public registers should include details of all previous sanctions (except warnings which are over five years old). 42. The regulators should be required to maintain lists of persons whose entry has been removed following a finding of impairment or voluntary removal.	This approach will mean that our current fitness to practise publication policy will no longer apply.
Education, conduct and practice	
46. The regulators should be required to set the standards for education, training and experience, and have broad powers to approve matters such as institutions, examinations, tests, courses, programmes, environments, posts and individuals. 47. The regulators should have powers to refuse, withdraw or suspend approval of education providers, attach conditions to any approvals and issue warnings.	This is a much more flexible approach to our current arrangements whereby we can only approve or withdraw approval from courses.
50. The regulators should have powers to require information from an education or training provider about student fitness to practise sanctions.	This is an important addition.

53. The regulators should be required to set standards of continuing professional development, and should have the power to make rules setting out the circumstances in which registrants will be regarded as having failed to comply and the consequences. 54. The Government should have regulation-making powers to introduce or authorise systems of revalidation for any of the regulated professions.	There is a lack of clarity about the inter-relationship between CPD and continuing fitness to practise schemes that do not meet the Bill's definition of 'revalidation'.
Fitness to practise	
55. A person's fitness to practise a regulated profession should be regarded as impaired by reason only of: (1) deficient professional performance; (2) disgraceful misconduct; (3) the inclusion of the person in a barred list; (4) a determination by a relevant body to the effect that the person's fitness to practise is impaired; (5) adverse physical or mental health; (6) insufficient knowledge of the English language; (7) a conviction or caution in the British Islands for a criminal offence, or a conviction elsewhere for an offence which, if committed in England and Wales, would constitute a criminal offence; (8) the person having accepted or been dismissed with an admonition under section 302 of the Criminal Procedure (Scotland) Act 1995, been discharged under section 246(2) or (3) of the Act, accepted a conditional offer under section 302 of that Act, or accepted a compensation offer under section 302A of that Act;	The range of reasons for impairment is significantly wider than at present.

(9) the person having agreed to pay a penalty under section 115A of the Social Security Administration Act 1992; or (10) the person having been bound over to keep the peace by a magistrate's court in England or Wales.	
57. The regulators should be required to refer allegations for preliminary consideration in accordance with rules. The rules may make provision about the procedure for preliminary consideration. 64. The regulators should be required to make rules specifying their investigation process.	We will have the option of a more flexible approach to investigations, however there remains a lack of clarity over the discretion not to have to investigate all potential allegations.
60. The regulators should be required to refer allegations concerning convictions resulting in custodial sentences directly to a fitness to practise panel and have powers to specify in rules any other categories of cases that must be referred directly. 63. A regulator must remove automatically any registrant who has been convicted of murder, trafficking people for exploitation, blackmail (where a custodial sentence is imposed), rape and sexual assault (where a custodial sentence is imposed), and certain offences against children.	This is a welcome approach which will simplify some of our procedures.
61. Following a decision to proceed with an investigation or make a direct referral to a fitness to practise panel, the regulators should be required to notify the registrant, the complainant, the UK Government and devolved administrations, and any employer. The regulators should have powers to notify any other person where it is in the public interest to do so. The regulators would be required to make rules about notification requirements.	This is a new requirement which goes further than our current notification policy.
65. The regulators should be given a power to require the disclosure of relevant information by any person (including the registrant) in fitness to	This is a useful addition to current limited powers.

practise proceedings.	
67. Following the conclusion of an investigation and where the case is not being referred to a fitness to practise panel, the regulators should have powers to: (1) take no further action; (2) give advice on any matter related to the allegation to the registrant and to any other person or body involved in the investigation, in respect of any matter related to the investigation; (3) give a warning to the registrant regarding their future conduct or performance; (4) agree with the registrant that they will comply with such undertakings as the regulator considers appropriate; or (5) grant a registrant's application for voluntary removal.	This is a welcome approach for dealing with cases not referred to a panel. However, we will need to consider carefully how we might monitor compliance with undertakings under (4).
70: The regulators should have powers to review decisions…if the regulator considers that the decision may be materially flawed or that there is new information which may have led to a different decision.	This is a new power which has not previously been available to us.
72. The Professional Standards Authority should be required to oversee the regulators' progress towards introducing greater separation between investigation and adjudication, and provide best practice advice. 73. The Government should have regulation-making powers to introduce a separate adjudication system for any of the regulators, based on the Medical Practitioners Tribunal Service.	We will need to review the separation of investigation and adjudication; the Bill gives us the opportunity to consider establishing a joint tribunal with others.
74. All fitness to practise hearings should be conducted by a panel of at least three members (including at least one lay member). Members of the regulatory bodies (including those from other regulators), members of the PSA's board,	The removal of members of other regulators from our panels may have implications. However, this does not prevent membership of panels in multiple regulators.

and investigators should be prohibited from membership of fitness to practise panels.	
75. The regulators should be required to establish a body responsible for appointments, appraisal and continued professional development of fitness to practise and interim order panellists.	This requirement will mean changes to our current appointments processes and potentially to the Remuneration and Appointments Committee.
79. The regulators must comply with an interested party's request that a fitness to practise hearing takes place in the UK country in which the registrant resides or where the incident took place, unless the regulatory body considers that there are reasons that justify refusing the request.	There are significant potential cost and logistical implications from this proposal.
89. All fitness to practise panels should have the same powers to impose sanctions or otherwise dispose of cases. The sanctions would be advice, warnings, conditions, suspension and removal from the register. All panels would be able to agree undertakings and voluntary removal, and issue immediate orders pending the outcome of any appeal to the higher courts.	The range of sanctions is wider than at present.
Joint working	
94. Any two or more regulators should be able to arrange for any of their respective functions to be exercised jointly. The Professional Standards Authority should be given a general functions to promote co-operation between the regulators. 95. Each regulator should be given an express power to delegate any of its functions (except the power to make rules) to another regulator or any other person.	This is welcome.
Premises and business regulation	
100. The regulators should have a power to finance an independent consumer complaints service. The approval of the Professional Standards Authority should be required in order to exercise this	It may be useful to have this facility open to us in the future.

power.	
Other	
112. The regulators should have a power to do anything which is calculated to facilitate, or which is conductive or incidental to, the exercise of their functions.	See comment on 13 'objectives' above.
114. The regulators should be able to apply to become registered with the Charity Commission, the Office of the Scottish Charity Regulator and the Charity Commission for Northern Ireland.	This is welcome in the light of current discussions.
115. The regulators should not be required to establish formal committees.	This provides for more flexibility in our governance arrangements.
118. The regulators should continue to have the ability to bring prosecutions (except in Scotland) and would be required to set out their policy on bringing prosecutions in a publicly available document.	This reflects our current development of an enforcement policy in this area.
119. Interim orders should be made or reviewed by an interim orders or fitness to practise panel. 121. Interim orders may be imposed for up to 18 months and must be reviewed every six months (or sooner if the person makes a request in the first three months or if new evidence becomes available which justifies an earlier hearing).	This is a new requirement for interim order panels and also a harmonisation of interim order powers