

Council, 2 July 2014

Reforms to the legislation of the health and care professional regulators

Executive summary and recommendations

### **Introduction**

In April 2014 the Law Commissions of Scotland, Wales and Northern Ireland published their proposals and draft Bill for reforming the legislation of eight of the health and care professional regulators. The Council discussed an update about this work at its meeting on 15 May 2014.

This paper updates the Council about the progress of the proposed legislation. It also provides a short summary of some of the themes from the Law Commissions' proposals and draft Bill.

### **Decision**

This paper is for discussion; no decision is required.

### **Background information**

See paper

### **Resource implications**

None as a result of this paper.

### **Financial implications**

None as a result of this paper.

### **Appendices**

None

### **Date of paper**

18 June 2014

## **Reforms to the legislation of the health and care professional regulators**

### **1. Introduction**

- 1.1 The Council considered a paper at its meeting on 15 May 2014 which discussed the publication of the Law Commissions' proposals and draft Bill<sup>1</sup> for reforming the legislation of eight of the health and care professional regulators.<sup>2</sup>
- 1.2 The Council agreed at that meeting that it would receive a future paper looking at this area, the nature of which would be dependent upon whether the Government indicated its intention to bring forward legislation in the next session of parliament. This legislation was not included in the Queen's speech on 4 June 2014.
- 1.3 Section two of this paper updates the Council about progress of the proposed legislation. Section three provides a short summary of the key themes of the Law Commissions' proposals and draft Bill.

### **2. Progress of the proposed legislation**

- 2.1 The omission of this legislation from the Queen's speech means that parliamentary time has not been allocated to it in this session of parliament. A general election will take place in May 2015. The legislation may be taken forward (subject to political commitment) by the newly elected administration.
- 2.2 The Department of Health ('the Department') has indicated that it is still committed to legislate when parliamentary time allows. It has indicated that it wishes to continue to engage with the regulators about its 'policy and response' to the Law Commissions' proposals, as well as engaging with other groups who will be affected by it, such as the public, service users and registrants.
- 2.3 Since the publication of the Law Commissions' proposals, members of the Executive have attended a number of meetings at which the Department has sought the views of the regulators on areas of the draft Bill. As the Department are considering which parts of the Bill to take forward, the Government legislation when published could deviate in some areas from that proposed by the Law Commissions. Therefore whilst the Law Commissions' draft Bill indicates a direction of travel, it is already to an extent an historic document, as it may not reflect the actual legislation if it is subsequently taken forward.
- 2.4 The Department has indicated that it will take forward a number of pieces of secondary legislation - Section 60 Orders - prior to the general election. These include changes to the fitness to practise procedures of the Nursing

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<sup>1</sup> Law Commissions of England and Wales, Scotland and Northern Ireland (2014). Regulation of healthcare professionals. Regulation of social care professionals in England. [http://lawcommission.justice.gov.uk/docs/lc345\\_regulation\\_of\\_healthcare\\_professionals.pdf](http://lawcommission.justice.gov.uk/docs/lc345_regulation_of_healthcare_professionals.pdf)

<sup>2</sup> Does not include the Pharmaceutical Society of Northern Ireland.

and Midwifery Council, the subject of a recent consultation.<sup>3</sup> At this stage one of these Section 60 orders affects the HCPC and relates to the regulation of public health specialists (please see Policy and Standards report at this meeting for an update about the regulation of this group).<sup>4</sup>

- 2.5 We anticipate that the Government will at some point publish its response to the Law Commissions' proposals and draft Bill, with an interim report anticipated during the autumn of 2014 and a subsequent report sometime thereafter.

### 3. Themes

- 3.1 The following provides a summary of some of the themes from the Law Commissions' proposals and draft Bill.
- 3.2 The Executive has focused on those areas which represent noteworthy changes from the HCPC's existing legislation and/or the policy position of the Council to date.

### Legislation

- In the existing system, the HCPC is governed by a piece of secondary legislation, the Health and Social Work Professions Order 2001 (HSWPO 2001). This can be amended by either primary legislation or using secondary legislation, a Section 60 Order under the Health Act 1999. The constitution of the Council itself (for example, the number of lay and registrant members) is set out in a separate Order.
- The HSWPO 2001 allows for certain matters to be addressed in Rules. These cover more procedural detail in key areas. For example, the Rules for registration set out the information required for applications for registration and the registration renewal dates.
- The Law Commissions' have recommended a single statute across eight of the regulators. The overall aims are to give the regulators greater operational autonomy whilst imposing greater consistency in some areas, such as in fitness to practise.
- The aim of autonomy is achieved in part in the draft Bill through increasing the amount of discretion the regulators have in some areas through Rule making powers. For example, the draft Bill would allow the regulators discretion in Rules to determine whether fitness to practise hearings should be held in the

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<sup>3</sup> Department of Health (2014). Nursing and Midwifery Council. Proposed changes to governing legislation.  
<https://www.gov.uk/government/consultations/nursing-and-midwifery-council-changes-to-governing-legislation>

<sup>4</sup> For background information about the regulation of this group, please also see: HCPC Council (July 2013). Regulation of public health specialists.  
<http://www.hcpc-uk.org/assets/documents/100040D5Enc27-Regulationofpublichealthspecialists.pdf>

country in which the registrant is resident. At the moment this is prescribed on the face of the HSWPO 2001.

- These Rules could be set by the regulator without the need for Department of Health involvement and Privy Council approval, speeding up the ability for the regulators to make changes to policies and processes. A public consultation when setting Rules would continue to be required.
- The Government would be given regulation making powers (a type of secondary legislation) in a range of areas, including to regulate new professions and to establish the constitution of the regulators. It would be a decision for the Government as to whether it wished to exercise these powers. These powers are sometimes proposed in the Bill in connection with areas which are likely to be relevant only to a minority of the regulators. For example, most regulators do not want to open registers of non-practising professionals but a minority wish to continue to maintain such registers.

### **Governance**

- The draft Bill keeps arrangements for the constitution of the Council and other governance arrangements broadly the same.
- The draft Bill provides that concurrent membership of more than one regulatory body Council would not in future be allowed.
- The draft Bill would remove all statutory requirements to establish Committees. The Education and Training Committee and the three practice Committees which hear fitness to practise cases are currently established in statute. It would be open to the regulator, however, to decide which Committees it wished to have.

### **Registration**

- The draft Bill sets out high level requirements and duties in the area of registration which mirror those set out in the HSWPO 2001.
- The draft Bill would allow regulations to be brought forward to introduce a 'barring scheme' such as the 'negative registration' scheme proposed in the Council's policy statement on regulation of the adult social care workforce in England. If such a scheme was introduced, a 'prohibition order' could be issued, barring an individual from working in a particular profession, from carrying out certain activities, and/or from using certain titles.<sup>5</sup>

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<sup>5</sup> HCPC (2012; updated 2013). Proposal for regulating adult social care workers in England. <http://www.hcpc-uk.org/aboutregistration/aspirantgroups/adultsocialcareworkersinengland/>

- The draft Bill would give powers to a Registrar to enable him or her to remove an incorrect or fraudulent entry in the Register. At present, this is dealt with through the fitness to practise process.
- The draft Bill would require a regulator to publish in a registrant's entry in the public-facing Register details of fitness to practise sanctions, including sanctions which are no longer in force (for example expired caution or conditions of practice orders). There is also provision for publishing lists of people who have been struck off. The Council's position previously has been that it would be disproportionate to include in the Register information about sanctions that are no longer in force and that including struck off registrants in the Register would be contrary to the HSWPO 2001.<sup>6</sup>
- The draft Bill would remove the power introduced as part of the Health and Social Care Act 2012 which allows the regulators to establish voluntary registers. This is consistent with the Council's thinking on this topic. None of the regulators has to date established a voluntary register.<sup>7</sup>

### **Education and standards**

- This part of the Bill, which deals with the standards set by the regulators and their role in approving education and training programmes, is broadly consistent with the HSWPO 2001.
- The regulator would be able to set both standards for education, as well as what are referred to as 'entry level standards'. With regards to the latter, the Executive, other regulators, and the PSA have all fed back to the Department that this is unnecessary given that standards for education can be set and because the regulators should not be involved in setting detailed requirements for admission to programmes.
- The draft Bill provides for separate provisions which relate to CPD requirements and auditing; and to regulation making powers which would allow 'revalidation' to be introduced (broadly speaking drafted to enable the existing General Medical Council model to continue). There has been general agreement amongst the regulators and the PSA that this distinction is unhelpful, particularly given many regulators' approaches to continuing fitness to practise are based on CPD.

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<sup>6</sup> HCPC Council (July 2010). Suspended and struck off registrants.  
<http://www.hcpc-uk.org/assets/documents/10002FB320100707Council05-CHREreport-regulatorsregisters.pdf>

<sup>7</sup> HCPC Council (February 2012). Voluntary registration.  
<http://www.hcpc-uk.org/assets/documents/10003897enc06-voluntaryregistration.pdf>

## Fitness to practise

- The Executive's assessment is that the Law Commissions' draft Bill in general strikes a positive balance between the need for expeditious management of fitness to practise cases and protection of the rights of all those involved including members of the public and registrants. The Executive would want to see this balance maintained in any subsequent legislation that is introduced.
- The draft Bill sets out the grounds for an allegation of impairment. One of the changes proposed is that misconduct should in future be referred to as 'disgraceful misconduct'. The Executive and the other regulators have argued that this is an unnecessary change and the PSA have expressed concerns that this would unnecessarily narrow the range of matters which could be considered by the regulators.
- The draft Bill includes provisions which if introduced would allow the HCPC to deal more expeditiously with a small number of cases involving serious criminal convictions.
  - Regulators would be required to remove automatically registrants from the Register who have been convicted of a specified range of serious offences including murder, rape and sexual assault (subject to appeal and other safeguards).
  - Regulators would be able to specify other types of conviction cases where an allegation could be referred directly to hearing.
- The draft Bill includes regulation making powers which would allow the Government to introduce mediation by one or more of the regulators. In the meetings with the Department, a view has been expressed by some that these powers should not be included in any Bill. The Executive is currently conducting a pilot of the use of mediation in the fitness to practice process.
- The draft Bill includes regulation making powers which would allow the Government to introduce a separate adjudication system for any of the regulators. This would mean that the adjudication of cases could be put at arm's length from the regulators' other functions, in a similar model to that implemented through the GMC's Medical Practitioners Tribunal Service (MPTS).<sup>8</sup>
- The draft Bill provides powers which would allow the HCPC to review some fitness to practise decisions, including decisions not to refer a matter to investigation or not to refer to hearing, where the decision is considered to be flawed or where new information comes to light.

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<sup>8</sup> Medical Practitioners Tribunal Services (MPTS)  
<http://www.mpts-uk.org/>