

ARDL RESPONSE TO:

LAW COMMISSION

SCOTTISH LAW COMMISSION

NORTHERN IRELAND LAW COMMISSION

JOINT CONSULTATION PAPER LCCP 202 / SLCDP 153 / NILC 12 (2012)

REGULATION OF HEALTH CARE PROFESSIONALS

REGULATION OF SOCIAL CARE PROFESSIONALS IN ENGLAND



PREFACE TO ARDL RESPONSE

This response is submitted on behalf of the Association of Regulatory and Disciplinary Lawyers (“ARDL”).

ARDL is a professional association for lawyers practising in the fields of regulatory and disciplinary law. ARDL’s website may be found at www.ardl.co.uk.

The subject matter of the present Consultation is highly relevant to the interests and expertise of ARDL members, hence ARDL has established a working group to prepare this response – see details of the working group below. We have given ARDL’s members the opportunity to contribute to this response via our website.

ABOUT ARDL

ARDL was established in 2002 in response to the rapid growth in professional regulation and the recognition that regulatory and disciplinary law has become a defined area of legal practice.

ARDL now has approaching 1,000 members, who include barristers, solicitors, legal executives and trainee lawyers, at all levels of seniority in the respective professions.

ARDL members practice across a spectrum of professional discipline and regulatory areas, but with a strong representation in health and social care regulation.

Our members are a mixture of lawyers in private practice and lawyers working in-house at regulatory or representative organisations. Members represent a cross-section of those who primarily act for regulatory bodies and those who regularly defend individual professionals before their regulators.

ARDL is led by a Committee of 17 elected and co-opted members who represent the diverse interests within ARDL's membership. Amongst its activities for its members, ARDL runs a programme of educational seminars on relevant legal topics given by eminent speakers, produces a quarterly legal update bulletin and holds a number of networking and social events each year.

ARDL'S RESPONSE TO THE CONSULTATION

ARDL represents a broad cross-section of interests in professional discipline and regulation. ARDL members are likely to hold a range of different views on the questions raised in this important Consultation. We have therefore approached the preparation of this response by establishing a working group which represents a reasonable range of the membership's interests. However, we would ask that it be recognised that the views expressed in the response are those of the working group and may not be taken to represent a single, definitive view on behalf of the organisation as a whole.

The working group has responded to each Part of the Consultation document. We have not answered each and every question, but have responded to those in respect of which we believe we have the relevant experience and expertise to offer a useful contribution.

The members of the working group are:

- Kenneth Hamer, Henderson Chambers – Chairman of the Working Group
- Timothy Dutton QC, Fountain Court
- Joanna Glynn QC, 1 Crown Office Row
- Salim Hafejee, Nursing and Midwifery Council
- Christina Lambert QC, 1 Crown Office Row
- Jonathan Lewis, Henderson Chambers
- Gerard McEvelly, General Pharmaceutical Council
- Julie Norris, Kingsley Napley
- Rosemary Rollason, Russell Jones & Walker part of Slater & Gordon Lawyers.

The Association of Regulatory & Disciplinary Lawyers

May 2012

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.

We agree. The most effective way in which the regulation of health care and social care professionals can be consistent is by the passing of a single statute setting out common features for all regulators. For convenience we shall call this the Health and Social Care Professions Act (HSCP), although because 9 of the 10 current governing statutes and orders relate to the health professions, and only 1 to social workers, it may be more apt (and more likely to be readily understood by the public) if any proposed statute were to be called the Medical and Health Care Professions Act.

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. We would also emphasise the distinction between the need to enable there to be consistency *as regards the ability of regulators to discharge their functions* as opposed to *consistency in how functions are implemented*. Therefore, any single Act must be sufficient to allow each regulator flexibility in how it implements its core functions. This would reflect the diversity of approach the regulators require to manage what is recognised as the varying degrees of potential risk to the public. Therefore, it is essential that any overarching statute should be confined to truly core matters. The governing legislation for many of the health care professions contains similar features. The Nursing and Midwifery Order 2001, covering the nursing and midwifery professions; the Health Professions Order 2001, covering many different health care professions; and the Pharmacy Order 2010, covering pharmacists and pharmacy technicians, all have core arrangements for (1) the constitution of the regulator; (2) registration; (3) education and training; and (4) fitness to practice, appeals and the power to make rules. We suggest that reference to this legislation could provide a useful template for identifying the core matters that

would govern the health care regulators. We agree that core procedural requirements, for example , those relating to hearing of fitness to practise panels, should also form part of the core matters, especially in light of the fact that the significant amount of case law in this area already points towards a consistent and common approach. We suggest that the exercise of powers by the Privy Council and the “default powers of the Privy Council”, for example, in Articles 48 and 49 of the Nursing and Midwifery Order 2001, and Articles 42 and 43 in the Health Professions Order 2001 should be transferred to the Council for Healthcare Regulatory Excellence (CHRE).

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. The current system is overly bureaucratic, and critically, very slow. This inhibits the ability of regulators to make changes quickly that are necessary and urgent. The current process of approval is weighted very much in favour of safeguards and oversight of the regulators and does not support the regulators’ need to make changes that they are best placed to identify as necessary changes. Equally, as you rightly say at paragraph 2.28 of the consultation paper, some regulators derive significant benefits from expert advice and assistance provided by the Department of Health in developing and drafting rules. If regulators need a port of call, and the Department of Health is no longer to be available, then the obvious candidate for this important service is CHRE.

Provisional Proposal 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?

As to the first sentence, the answer is “No”. As to the second sentence, we consider that CHRE should be given an active role in scrutinising new rules in the same way as that function is currently carried on by the Department of Health, but only to the extent of auditing the quality of the new rules and providing and developing principles and standards to assist regulators in making rules. Otherwise, there is a risk the bureaucracy and delay would merely be shifted to a new CHRE approval process. However, in respect of rule changes in key areas where there would be a strong public interest, for example, fitness to practise rules, the CHRE scrutiny should be an ‘enhanced’ scrutiny requiring formal approval. We see no role for the Secretary of State in these circumstances. In the event of any dispute between the regulator and CHRE, the matter can be reported in any annual report to the House of

Commons Health Committee or as a last resort by way of judicial review proceedings.

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

We feel this is a matter for the regulators rather than a body such as ARDL to comment on.

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.

The present mixture of rules for procedural and operational matters (such as fitness to practise hearings) and regulations for such matters as registration, professional development and revalidation is somewhat confusing. The word “regulation” is often synonymous with a statutory instrument, and perhaps should be discarded and used only in cases where a statutory instrument is in force.

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 it considers appropriate, including:

- **members of the public, patients and services users;**
- **registrants (including business registrants);**
- **employers of registrants;**
- **the other health and social care inspectorates, the independent safeguarding authorities and any other regulatory bodies;**
- **the Department of Health, Northern Ireland Executive, Scottish Government and Welsh Government;**
- **professional bodies that represent registrants;**
- **persons or bodies commissioning or funding the services provided by registrants or at a registered premises/business.**

Clearly, the principal that regulators should consult where appropriate and necessary is unarguable. However, as consultation is not binding, and it can potentially introduce delay, we would question whether consultation on every rule change would be practicable or proportionate, There is a risk it would undermine the regulators’

ability to respond quickly where there was a need for urgency. Ultimately, the extent to which regulators should consult on any rule changes is a matter essentially for the regulators and Parliament, but we should hope that any list of consultees would include any professional body or association such as ARDL.

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 for the reasons stated above.

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 CHRE's performance reviews. The Scottish Parliament, National Assembly for Wales and Northern Ireland Assembly should also consider instituting similar forms of accountability.

We consider one or more representatives from CHRE should attend each year before a select committee, along with such other person or persons as the members of the select committee consider appropriate. If regulators are given broader powers to make rule changes, then this process would also provide a necessary and proportionate degree of parliamentary accountability on the part of the regulators in the discharge of their functions

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 give rise to questions about the allocation of public resources.

We agree with the broad proposition that matters that involve political policy, such as, extending the remit of regulation or allocation of public resources should be matters for the Secretary of State. However, on the issue of what would constitute 'sufficient public interest' greater caution needs to be exercised as there is a risk of the public interest exemption undermining the aim of safeguarding the regulators from government pressure or interference.

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

Each regulator currently maintains a website with such information, and whilst it may do no harm to include a requirement to continue to do so it is not something that needs to be provided for by statute. Any requirement to publish information should in any event recognise the role and experience of individual regulators on how much information it chooses to publish.

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. The annual report of each regulator should be freely available and can be useful.

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.

This is a matter for the regulators but we agree that any change that removes bureaucracy or unnecessary requirements is useful and welcome.

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 that section 60 of the Health Act 1999 can have no useful function if the proposals outlined in the consultation paper and above are enacted. Any regulation-powers retained by the Government should be identified and strictly confined to the kinds of decisions set out in para. 2.86 of the consultation paper (establishing a new regulatory body and extending statutory regulation to new professional groups). The proposal to include such powers in the new Act as set out in para. 2.89 is the one that is most cost effective and consistent with the aim of having simpler process and a more stream-lined process.

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.

This flows from our response to provisional proposal 2-14. However, any decision to merge or abolish regulators, or add new professional groups to statutory regulation, necessarily would involve a strong public interest element and also one of political policy, and should be presented openly and in clear terms to Parliament. We agree with your comment at para. 2.98 that before using any such powers the Government would be required to undertake a full public consultation, and furthermore, the Secretary of State must be satisfied that the use of such powers does not undermine in any way the health, safety and well-being of the public, or we would add, public

confidence in the independent regulation of the health care or social care professions and the lowering of professional standards.

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.

There is no reason to extend the role of CHRE which is and should continue to be to oversee the regulators to an area which is more to do with political policy. No doubt in practice CHRE would be consulted as part of any public consultation process but we are concerned at over-extending the remit of CHRE in any new legislation.

Provisional Proposal 2-17: The Government should be given powers to issue a direction in circumstances where a 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 (see also provisional proposal 13-2).

We agree that where a regulator is failing to perform any of its key functions to the extent that it cannot safeguard the health, well-being public or safety of the public, then the Government should have a power to issue directions. This should be a power of last resort. It is also important that there is a check against any unnecessary or arbitrary use of power, and we recommend that the Government should after consultation with CHRE appoint a nominee who should be accountable to and report to the Health Committee of the House of Commons. We consider it important that the principle should be maintained that regulation of healthcare and other professionals should be and be seen to be independent of Government.

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

Please see our response to provisional proposal 2-17 above.

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.

Provisional Proposal 2-20: If the Scotland Bill 2010 does not become law, any use of the proposed regulation-making power set out in provisional proposal 2-13 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.

This is not a matter that ARDL feels able to comment on.

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

This is not a matter that ARDL feels able to comment on.

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 into the main legal framework of the new statute (following approval by the Northern Ireland Assembly)?

This is not a matter that ARDL feels able to comment on.

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?

This is not a matter that ARDL feels able to comment on.

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?

The Pharmacy Order 2010 provides, by way of example, transitional provisions arising from the General Pharmaceutical Council replacing the Royal Pharmaceutical Society of Great Britain as the regulator for pharmacists, pharmacy technicians and pharmacy premises. Schedule 5 to the 2010 Order, paragraphs 12 and 13 deal with outstanding fitness to practise proceedings and paragraph 14 with outstanding proceedings under section 80 of the Medicines Act 1968.

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 CHRE 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 consider the second formulation better reflects the functions of a modern regulator. Public confidence in the professions and the need for practitioners to observe high standards of behaviour in all aspects of their lives is a major matter of consideration in practically all fitness to practise proceedings. Many regulators would no doubt argue that confidence in a practitioner and in the profession in general is a key component of health care delivery and success above and beyond the technical delivery of care.

Provisional Proposal 3-2: The statute should not include a statement setting out the general or principal function(s) of the regulators.

We agree that the need for general principles is unnecessary if the paramount duty is specified in the 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?

We do not consider this is necessary.

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 do not consider this is necessary.

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 key question which may need to be addressed (and is not covered in the consultation paper) is a clear statement about what the Council or Board is for and what the expectations on those appointed to it are. If that were clearer it would perhaps be easier to consider which of the three options were best suited to the role.

Of the three options proposed by way of a board structure, we can see little benefit and many risks by having a statutory executive board. We do not think this approach would command the confidence of the regulated professions. There would also be concerns about difficulties of holding required expertise in such a group and there would be a reduced level of public accountability and fewer checks and balances in the system.

Of the other two options, we support the retention of the current model. We see this as well established and clearly understood and has transparent separation between Council Members and the Executive. Therefore, of the three options proposed, we support option (1) to reform the existing structure to encourage Councils to become more board-like.

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.

Agreed.

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 are suspended, education and training of Council members, and attendance requirements of Council 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?

In relation to 4-3 to 4-5 above, we believe this area needs further consideration. Although we see the potential for an increased role for Councils in determining how their members are appointed, we believe the process needs to be at arms-length.

Question 4-6: Should: (1) the statute specify a ceiling for the size of the Councils of 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?

We support the current model of composition with equal lay and registrant members. It is important that there is consistency across each of the regulators.

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

We support the definitions of lay and registrant members as described.

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

Absent any issue of conflict, Council members should be appointed on merit.

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.

Agreed.

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.

Agreed.

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 publicly available scheme of delegation. There should continue to be a prohibition on delegating any power to make rules.

Agreed.

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. The register is the centrepiece of statutory regulation. Regulatory schemes based upon a system of statutory registration are well understood by the health and social care professions and, we believe, by the wider public.

Whilst we generally endorse the proposal to leave the detail of the mechanisms for implementation to individual regulators, an underlying theme of our response in this section is that we would support a move towards greater uniformity between the health and social care regulators on core issues.

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

We tend to agree with the provisional views expressed at paragraphs 5.16 and 5.17, as to the somewhat anachronistic nature of the office of Registrar. We agree that the arrangements as to how and by whom each register will be maintained should be left to individual regulators.

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-making power to add, remove or alter the parts of the register and specialist lists.

We agree with this proposal, primarily for the reasons set out in paragraph 5.28 in relation to the possible impact of changes on other legislation.

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.

We agree with this proposal and that for the reasons set out at paragraph 5.30, this is probably a matter appropriate for Government.

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?

We believe it should. We recognise the resource implications in increasing the number of student registers and the burdens which would be imposed upon students, educational institutions and the regulators. However, we are conscious of the relative frequency of fitness to practise issues arising in relation to newly qualified entrants to certain professions and of the difficulties which educational institutions can face in tackling such issues locally during pre-qualification training.

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

We tend to agree with CHRE's perspective on this issue (as set out at paragraph 5.35) in terms of the risk of public confusion should the statutory bodies hold voluntary registers and in particular, the likely expectation from the public that the regulators' powers will be the same as those it holds in respect of the statutory registers. We suggest the views of the regulators themselves will be important on this issue.

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.

Were this course to be adopted, we agree that CHRE may be an appropriate body to make recommendations on the issue.

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

We consider that the power to maintain non-practising registers should be retained and that whether or not to keep such a register should be a matter for the regulator. In our view, a non-practising register bestows an acceptable status on former practitioners, but more importantly provides a clear delineation in the public's mind between non-practising practitioners and those whose name has been erased or removed from the register following fitness to practise proceedings. In some cases, there is nothing to prevent such a person from describing themselves as non-practising.

However, we submit that the parameters of non-practising status must be clearly defined by any regulator who maintains such a register, and the regulatory obligations to which the non-practising registrant is subject must be clearly explained.

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 the proposal in respect of full, conditional (but see below – only as part of an interim order or a final order of a fitness to practise panel) and temporary registration.

We have reservations about wider introduction of provisional registration. The circumstances in which it is used by the GMC may be effective, but it may not be as suitable in other professions. We consider the concept has the potential to be confusing to the public and that generally, registration should indicate that the registrant is fully fit to practise without restriction, unless once they have been registered, an individual's registration has had to be made subject to restrictions following a finding of impairment of fitness to practise.

We are also not convinced that conditional registration is appropriate, other than where conditions represent a restriction upon full registration following a finding of impairment of fitness to practise, or as part of an interim order. Paragraph 5.53 in the next section refers to the power in the legislation of the General Chiropractic Council and the General Osteopathic Council to grant conditional registration subject to compliance with certain conditions, including a period of past practice, a prescribed test of competence and undertakings. However, conditional registration was only utilised by these Councils during their respective 2 year transitional periods following the initial setting up of their registers. The purpose was to allow experienced practitioners who did not hold a recognised qualification to be "grandfathered" onto the new statutory registers. As far as we are aware, these provisions have not been used since the respective GCC and GOsC transitional periods closed in around 2000 and 2001, and they have been effectively redundant since.

We submit it is desirable to avoid a multiplicity of types of registration as far as possible in order to avoid public confusion, hence we are not persuaded of the general need for regulators to be able to grant provisional registration.

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, be fit to practise, have adequate insurance or indemnity arrangements (except for 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.

In our view, the requirements for registration are an area where it is desirable that there should be greater consistency between the regulators in order that the public has a clear understanding of what being a registered healthcare professional represents. We submit that this is particularly important in terms of how fitness in

terms of good health and good character are required to be demonstrated, and requiring appropriate insurance or indemnity arrangements to be in place.

We agree with the specific proposal in 5.11, and that it is appropriate for the regulators to specify the precise detail under the core requirements individually.

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.

Subject to our overall view of the desirability of consistency, and our reservations about provisional registration as explained above, we agree.

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?

Yes

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 the second formulation better reflects the functions of a modern regulator, though we agree there is little real difference between the two formulations in practice.

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 the provisional proposal, but the requirements must be compliant with EU Directive 2005/36/EC and any changes ultimately introduced as a result of the present review.

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

We agree with this proposal. A registration appeals committee is a sensible and helpful way of dealing with appeals against refusal of registration and also provides transparency.

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. We do not consider the county court would be an appropriate forum and all appeals should go to the High Court or equivalent.

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 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 decided 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

Generally in respect of 5-18, 5-19 and 5-20, we agree that it is appropriate for regulators to be able to establish the detail of their own processes and we do not see this as an area where the need for consistency between the regulators' processes in the public interest is as great as in other areas we have mentioned.

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 strongly agree: it is important that applications for restoration where erasure has followed fitness to practise proceedings must be dealt before a Fitness to Practise Panel. Whilst most if not all the regulators now follow this approach, we are of the

view that a robust process for consideration of applications for restoration is a critical element of the overall public protection ensured by the regulatory process and is one which has sometimes been a weak area in the past.

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?

We are of the view that the statute should set a consistent time period between all the regulators before which applications for restoration can be considered following removal for a fitness to practise issue. The disparities in the various legislative provisions of the regulators are a result of the long period over which the various statutes date, from 1984 in the GDC's case to 2010 in that of the GPhC. We cannot see any logical justification for a different period to apply to different professions. This is an area where there is a cogent argument for consistency in the interest of certainty and clarity for the public.

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 it wishes to adopt.

We agree with this proposal. We do not consider the argument in favour consistency is of the same significance in relation to this type of restoration application and we can see that there may be different factors affecting the different professions.

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 provisional proposal 5-27.

We would generally favour consistency on the core information appearing on registers, in the interest of clarity for the public. There should be uniform minimum requirements.

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 do not have any fixed view on this proposal.

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

We agree.

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).

If the new statute introduces a range sanctions which will apply uniformly to all regulators, then we suggest there is no reason why there should not be a more consistent approach to this issue in the public interest. Live restrictions or sanctions should be shown.

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?

Yes, we agree with this proposal.

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

We see the force of the arguments put forward in paragraph 5.30 that this may not be appropriate, as the register should deal primarily with matters affecting current fitness to practise. It may be that previous sanctions should be included for different periods according to the gravity of the sanction (again, assuming that the statute will harmonise the available sanctions between all regulators).

We agree that expired interim orders should not be included. An interim order is an urgent, protective measure. It does not represent any formal finding of impairment and it will be replaced by a substantive order if there is a fitness to practise finding. Hence we do not consider previous interim orders should be referred to.

Provisional Proposal 5-31: All the existing protected titles and functions that are contained currently in the governing legislation should be specified in the new statute.

Please see response after 5.34

Provisional Proposal 5-32: Government should be given a regulation-making power to add to or remove any of the protected titles and functions.

Please see response after 5.34

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

Please see response after 5.34

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).

Subject to the following observations, we broadly support the provisional proposals at 5.31 to 5.34.

The concept of the protection of professional titles underpins the current regulatory framework and, if the system is to function effectively, there must be robust enforcement. Given the historical proliferation of protected titles across the professions, this is a complex and difficult area for reform. We put forward the following observations for consideration:

- there is excessive complexity given the range of legislative provisions which govern the activities constituting, for example, medical practice. This does not provide clarity for either the public or the professions;
- the protection rendered to the public where there is purely protection of a title, for example in the cases of "chiropractor" and "osteopath", rather than of actual function, is weak, given that a practitioner who is erased following a finding of unacceptable professional conduct may continue exactly the same form of practice upon the same patients immediately afterwards, provided s/he does so under a different title, for example "spinal therapist" or "manipulative therapist".
- we believe the issue of the use of title "doctor" by the medical and other professions is confusing to the public, is open to misuse and should be clarified;
- we are familiar with the difficulties faced by regulators in bringing criminal prosecutions to enforce protection of title, but this is fundamental if our regulatory system is to be based around the holding of such professional titles;

- we sense there is a perception that the sanctions available in respect of the criminal offences provided for in the respective statutes are inadequate and do not represent a sufficient deterrent to protect the public.

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? If so, how could this be achieved?

We believe this is primarily an area for comment by the educators and regulators themselves.

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

- **which qualifications are approved qualifications for the purposes of pre-registration and post-registration qualifications;**
- **the approval of education institutions, courses, programmes and/or environments leading to an award of approved qualifications and the withdrawal of approval;**
- **rights to appeals to an individual or a panel against the decision of the regulator to refuse or withdraw approval from an institution, course or programme;**
- **the quality assurance, monitoring and review of institutions, courses, programmes and/or environments; and**
- **the appointments of visitors and establishment of a system of inspection of all relevant education institutions.**

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 decision regarding approvals.

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.

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

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

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?

Responses to provisional proposals 6.2, 6.3 and 6.4 and Questions 6.5, 6.6 and 6.7

We believe that these areas relating to educational matters are more appropriately left for comment by experts in education and the regulators themselves.

However, we specifically agree with paragraph 6.43, concerning the proposal for a requirement upon educational institutions to pass on to the regulator information about student fitness to practise sanctions and the related proposal at 6.4.

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

It is our experience that guidance issued by regulators provides useful and necessary explanation for all stakeholders. There is a legitimate question about the volume and quality in some cases.

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

We agree with this proposal.

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.

This may be a helpful clarification given the amount of guidance being issued.

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

We see an important distinction, as alluded to a paragraph 6.75, between standards of practice (conduct and performance) and ethical codes. The latter may well be able to be in the form of a set of core principles which are common across all the health and social care regulators, which would be in the interests of clarity for the public.

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

We agree with this proposal

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)?

(1) For the reasons advanced in §7.37, we favour the first of the three options in the question above (option 2 at §7.31), namely “consolidating” the current two-stage approach, using simplified language.

(2) We do not believe that the Shipman Inquiry proposal (the second proposal in question 7.1 above) should be translated in to a statutory test. It provides useful guidance in some circumstances (see *CHRE v Nursing and Midwifery Council and Paula Grant* [2011] EWHC 927 at §7.41 of the Consultation Paper), but it is inappropriate as a statutory test because: it is not sufficiently flexible; it suggests that if any of the criteria in (a) – (d) are found then impairment follows (which is overly prescriptive and does not accord with the modern case law on the role of personal mitigation); and although capable of amendment, the inclusion of the word “or” (as in “and / or”) in all four parts of the Shipman proposal, permits a finding that a registrant’s fitness to practise is impaired (present tense) on the basis of future risk alone. We believe that any finding of impairment must be based on past misconduct

(performance etc) and an assessment of future risk flowing from it, not future risk alone.

(3) This part of the question is predicated on the retention of the concept of impairment.

We do not consider that removing the categories of impairment and replacing them with a new test for impaired fitness to practise based on whether the registrant poses a “*risk to the public and undermining public confidence in the profession*” [§7.45 *et seq*] is appropriate, nor will it improve the current position. We cite three reasons for this view:

(i) the requirement to characterise the facts found proved as “misconduct”, “deficient performance” etc defines the issues and provides the decision-maker with a rigor of approach to the facts and a route-map to the decision on impairment, and indeed sanction, which should not be abandoned in favour of a focus on the ***consequences alone*** of what he has done (future risk to the public, undermining public confidence); we predict that if there is no codified requirement to categorise the essence of the complaint by reason of which it is said the practitioner’s fitness to practise is impaired, competent panels will continue to do so anyway, (demonstrating the need to codify the requirement for all panels);

(ii) we believe that the removal of the statutory grounds (or in other words the requirement to categorise the facts) is likely to lower the threshold for a finding of impairment;

(iii) the current position regarding the categories of impairment and their meaning has been clear for some years. There is no such thing as a new test that beds-in with no further need for interpretation or judicial guidance on its application. For that reason we think that there must be an appreciably good reason to change the process, given the certainty that exists now about the definition and scope of the current categories or grounds of impairment. We have not identified such a reason in the discussion in the consultation paper.

We query whether this third proposal adds anything to the current position, observing that a finding of “*risk to the public*” or “*undermining public confidence in the profession*” has been central to a finding of impairment since the introduction of the current scheme in 2004. For example, a typical case might conclude with a determination that, taking into account the findings of fact, which amount to past misconduct (or deficient performance etc), there is a future risk to the public and therefore the registrant’s fitness to practise is impaired.

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 take the view that the list of statutory grounds of impairment at §7.31, along with the current extra-territorial and temporal scope described in §7.32, achieve the optimal prescription of the categories of impairment. We agree that the regulators should be permitted a degree of flexibility, (as in §7.33), but ***only in relation to convictions and disposals in the criminal justice system (listed at §7.14), not other non-conviction disposals.***

Our concerns about “other disposals” arise principally because the other potential disposals will almost certainly result from procedures that are inappropriate to found a disciplinary sanction that could permanently terminate a professional person’s ability to work in his or her chosen profession.

We cite as an example the “barred list” legislation referred to at §7.16. This is legislation which provides that being on a barred list is one of the grounds on which a practitioner’s fitness to practise may be impaired; it relates to all the healthcare regulators, and none of it is in force.

The barred list scheme, even after *Wright*, does not provide for a hearing of any sort, and the Independent Safeguarding Authority makes its decisions (except where it is relying on a conviction) on information provided by the police, employers or other sources, none of which can be tested by cross-examination before the decision to place the registrant on the barred list is made. Such a scheme bears no “fair trial” comparison with the procedures of the other “earlier findings” routes to impairment (convictions, findings of other healthcare regulators etc).

Therefore we think that relying on such non-conviction disposals is unfair; assuming that the practitioner is not permitted to call or have called evidence to undermine the “other non-conviction disposal” (as is the case with convictions) the unedifying possibility is raised of a practitioner being deprived of his ability to practise his profession without the opportunity to test the evidence or to explain it by giving evidence himself *at any stage of the process.*

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 are not qualified to address this question.

PART 8: FITNESS TO PRACTISE INVESTIGATION

ALLEGATIONS

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 the requirement that cases where there is a reasonable prospect of proving impairment must be referred to fitness to practise proceedings)?

We consider that regulators should be able to consider any information which comes to their attention and not just formal complaints which are communicated in a set format. However there should be a requirement that any complaint should be provided in written form in order to avoid subsequent dispute as to the precise content of the initial complaint and to provide an unambiguous factual basis for the initial screening process.

We do not support removing the concept of the “allegation” entirely; we believe it is important to maintain a clearly identifiable gateway to the fitness to practise processes of the healthcare regulators, whether the gateway is an “allegation” made by someone separate from the regulator, or a “concern” on the part of the regulator that triggers an investigation by the regulator.

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 that be)?

We believe that registrants should be protected from facing stale allegations and that a limitation period should be prescribed within the legislation. We consider that the appropriate limit is five years, subject to an exceptional circumstances plus public interest power to exclude and that there should be a presumption that complaints made outside that time frame will be excluded from the investigation process by the initial screener unless the public interest demands further investigation. We acknowledge that any prescribed time limit is to an extent arbitrary, however, the imposition of a “five year rule” (with thereafter the expectation that any hearing will take place within a reasonable timescale) strikes the balance between the protection of registrants from having to meet old allegations and public protection.

INITIAL CONSIDERATION

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. We believe that in the interests of efficiency regulators should have a power to sift out at the earliest stage complaints which are obviously vexatious and/or which do not fall within one of the prescribed categories of impairment. This initial screening process should exist in conjunction with a further assessment following investigation.

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 for the reasons stated in paragraph 8.29.

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

We agree. In particular those complaints which are to be referred without further investigation to the Fitness to Practise Panel should be defined (and limited to) those relating to (a) certain serious criminal offences or (b) sentence.

INVESTIGATION

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

We do not consider that regulators should be required to establish an Investigation Committee for the purpose of undertaking the referral exercise. Such committees may neither be the most efficient nor cost effective means of determining whether a complaint should be routed to a fitness to practise panel or some other disposal ordered. Regulators should therefore retain a broad power to establish the referral body which best fits the nature and volume of its case load. However, whatever the nature of that referral body whether it be for example an Investigation Committee or case examiners, the criteria for referral (or not) and the referral route should be prescribed.

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

We agree. See above.

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

We agree.

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

Yes.

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

We agree that the power to require information should extend to the registrant in question provided (a) that the registrant is entitled to rely upon his privilege against self-incrimination as a shield to such disclosure and (b) the power is restricted to the disclosure of information and not his case.

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

THRESHOLD TEST

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 for the reasons stated in paragraphs 8.55 and 8.56

DISPOSAL OF CASES

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.

The regulators would be given broad powers to make rules governing the use of such powers. This would include rules governing who or which body can issue them and the circumstances in which the powers can be agreed or imposed.

Subject to the following caveat, we agree with both limbs of the provisional proposal for the reasons stated in 8.66 and 8.67. We do not agree that the regulator should be empowered to issue advice (for example, as to future conduct) to any person with an interest in the case: any advice from the regulator should be directed to the registrant only. To extend this power to advise to “anyone with an interest in the case” raises what may be a contentious issue as to who may have an interest in the case. Further that interested party may not have been engaged or engaged fully in the investigative process and thus any advice issued may be founded on incomplete information.

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 do not consider that it is appropriate that any power listed in provisional proposal 8 -16 must be made or approved by the Fitness to Practise Panel. Such a limitation would defeat the objective of dealing with such cases efficiently and expeditiously. Nor do we consider that it is necessary that any decision should be made or ratified by a formal committee as such. We do however consider that the powers should be exercisable after the investigation stage has been concluded and that the powers should be exercised by that body (whether it be a committee or individuals, for example case examiners) who undertake the referral decision exercise.

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

We agree for the reasons stated in paragraph 8.70

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

Yes.

MEDIATION

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 powers to introduce a system of mediation if they wish to do so.

We do not believe that mediation as used within the civil jurisdiction has a role within the field of healthcare regulation for the reasons stated in paragraph 8.73. In particular, we consider that mediation, and the emphasis within that process on achieving a mutually satisfactory outcome, may be inconsistent with the public interest, or may lead to the perception that the outcome is not in the public interest and will lack transparency. Further there are practical difficulties associated with mediation, not least the cost implications for both the regulator and the registrant.

We do however consider that some form of consensual disposal, over and above the agreed imposition and acceptance of a warning, undertakings or voluntary erasure or advice, may have a role in a limited number of cases in circumstances in which the registrant accepts unambiguously at the conclusion of the investigation stage that his fitness to practise is impaired and there is agreement by the registrant as to the appropriate disposal. By way of example only, if a registrant admits that his fitness to practise is impaired and that a period of structured remediation is appropriate (whether by way of conditional registration only or coupled with a period of suspension) then in those limited circumstances it would be expedient and consistent with the public interest to avoid a fitness to practise hearing. In the circumstances contemplated above, the role of a neutral mediator for the purpose of obtaining agreement as to the factual basis upon which an agreed finding of impairment may be founded and/or for the purpose of obtaining consensus as to the particular terms of any appropriate sanction may be established.

We acknowledge that the unrepresented registrant may be inhibited from participating in any form of consensual disposal (mediation or otherwise). Nonetheless, the cost to the regulator in enabling the registrant to access independent legal advice is likely to be outweighed by the avoidance of a fitness to practise hearing. We also acknowledge that any form of resolution by agreement will require an offer to the complainant, where there is one, of involvement in the process.

REVIEW

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 decision 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 with the provisional view.

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.

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 that the power to initiate a review should be widened to include those individuals or bodies able to establish an interest in the decision provided that the grounds of the review are limited to those set out in provisional proposal 8-24. We note again however the difficulties which may attach to defining who may have an interest in the decision (over and above the complainant and the registrant).

Provisional Proposal 8 -25: The statute should give the regulators broad rule 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 -24.

We agree.

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?

Yes. We recognise that all the healthcare regulators are already compelled by virtue of their status as public bodies and s.6 of the HRA 1998 to provide disciplinary procedures that are Art.6 compliant.

However, the relevant jurisprudence allows for “rescue by appeal” in some circumstances of non-compliance. We do not regard this as an appropriate response to procedural defects in a mature fitness to practise jurisdiction. Indeed, from the early days of the Human Rights Act the courts have not advocated reliance on “rescue by appeal” as an answer to non-compliance: see Lord Cooke in 2001, “a disciplinary system in which a hearing satisfying Article 6(1) could be secured only

by going as far as the Privy Council could not be commended.” Although we accept that due to the regulators’ significantly improved Article 6 compliance in recent years, “rescue by appeal” does not feature often in the modern appeals, it is still available as an argument. The statutory provision suggested by the joint Commissions would appropriately eliminate such an option.

We also think a provision such as that suggested by the joint Commissions would be useful to address some regulators’ failure to import a real, as opposed to an artificial, separation of the core functions of investigation and “prosecution” on the one hand and adjudication on the other (see Q9.2 below)).

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

Yes, we are satisfied that even in recent years the conduct of at least one of the healthcare regulators has given the impression (whether real or otherwise) of interference with the adjudication of fitness to practise processes; members of ARDL are aware of the resulting loss of professional confidence in that regulator’s system of adjudication. As we said in answer to Q9.1 above, in our view this is not remediable by “the subsequent control of the fitness to practise decision by a court of full jurisdiction” (para. 9.17) The obvious answer was the wholly independent Office of the Health Professions Adjudicator, whose demise after only a few months in 2011 represents, in our view, a false economy and is a source of regret to many ARDL members.

However, we agree that a separate FTP adjudicator is not necessary to achieve compliance with Art.6 (para. 9.16), and we agree that the GMC’s MPTS will introduce an appreciably higher degree of independence than before, benefitting as it does from the work undertaken in this regard by OHPA (§9.20).

We think it not merely “arguable” (para.9.21) but essential that all healthcare professionals should have access to adjudication of an appropriate degree of independence. We are not sufficiently informed of the cost and resource implications of achieving adjudicatory independence across the board. However, we endorse the CHRE’s suggestion in their report of 2010 (cited in the consultation paper at §9.22) that other regulators might use the MPTS in order to share in its benefits, including economies of scale. In addition we endorse the CHRE’s report of August 2011 entitled “Modern and Efficient Fitness to Practise Adjudication” which draws on the work the CHRE had undertaken with OHPA, and which recommends that regulators should work together to improve the operational efficiency of adjudication by getting more value from the time, people and resources invested in adjudication, for example, through joint training of panelists, better use of pre-hearing case management, and shared use of hearing rooms.

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

We do not endorse this proposal. If pooling of resources is to be pursued (which we welcome – as above) we think the healthcare regulators should do this in an environment in which those sharing facilities are similar in their requirements (for example: for legal assessors, panel secretaries, legally qualified chairs, systems of case management etc) and have similar objectives, rules and structures. We can see no advantage in permitting regulators to opt for joining the UTS. In addition we note the Government's view that this would be "a complicated and lengthy process" and the joint Commissions' view that it is an unlikely option to be taken forward [§9.26]

Provisional Proposal 9-4: The statute should give all the regulators a broad power to establish rules for case management.

Yes, we agree. Although consistency is important, the regulators have some heterogeneous characteristics and we can see no point in striving for "one size to fit all."

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 understand that this proposal is advanced as an alternative to a requirement that proceedings should be conducted "expeditiously" [§9.32]. We do not see that either of these exhortations adds anything to existing fair trial principles. In our view, to require that cases must be dealt with "justly" has the potential to provide another source of procedural argument as to meaning / scope etc, in addition to those under Art.6 and the common law, to no good purpose.

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 agree.

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 the 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 all three proposals. In addition we believe that the numbers should not permit of a lay majority decision.

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 agree.

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

We agree.

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 agree that this should be left to the discretion of the regulator –as it is now for all except one of the regulators.

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.**

This is one of the four areas in respect of which the joint Commissions' paper suggests consistency across all the healthcare regulators [§9.61]

(a) We agree that there should be consistency across the regulators and that the rules should be those that apply in the relevant part of the UK.

(b) ARDL members were not of one view about the proposed rules of evidence.

We are in agreement that the statute should not require that the rules of evidence from another jurisdiction, whether criminal or civil, should “*apply*”. Most of the healthcare regulators' disciplinary panels have been granted a high degree of

flexibility, determining issues of admissibility based on the concepts of relevance and fairness, with the civil or criminal rules of evidence deployed as *guidance* only.

Some ARDL members are of the view that the Panels' guidance should be drawn from the civil rules of evidence; this would be consistent with the procedural rules of many of the regulators outside the field of healthcare and it is the position in relation to all save three of the healthcare regulators. Furthermore fitness to practise proceedings are not criminal proceedings.

However other ARDL members believe that the criminal rules of evidence provide more useful, specific and coherent guidance for panels determining fairness than those that apply in ordinary civil litigation (which, in contrast to most disciplinary hearings, is adjudicated by a judge who does not need the same degree of guidance). Those in favour of the criminal rules of evidence as the appropriate guidance also cite the fact that most of the contentious evidential, procedural and substantive law applied in healthcare disciplinary proceedings has evolved into settled disciplinary law based on criminal jurisprudence or criminal legislation as interpreted by the criminal courts. For example:

Procedural

- Disclosure - *criminal, pre CPIA* common law rules (Maguire, Judith Ward etc) [see *Rajan v GMC* [2000] Lloyd's Rep Med 153 etc].
- Proceeding in the absence of the practitioner; *R v Jones* [2003] 1 A.C. 1, (also known as *Hayward and others*);
- Abuse of the process – the common law arguments re delay; *Att-Gen's Reference (No.1 of 1990)* [1992] Q.B. 630, CA, as restated, taking into account subsequent authorities, in *R.v.S.* [2006] EWCA Crim 756 CA,

Substantive law

- Entrapment [*R. v Loosely*; *Att-Gen's Reference (No.3 of 2000)* [2001] 1 W.L.R. 2060]

Admissibility of evidence

- Admissibility of illegally obtained evidence (*R. v. Sang* [1980] AC 402; *R.v.Khan* [1995] 1 Cr.App R. 242)
- Hearsay [Criminal Justice Act 2003, *R v Horncastle* [2009] UKSC 14, etc]
- Similar fact.

The advocates of the deployment of the criminal rules of evidence do not agree with the consultation paper in its assertion that disciplinary proceedings are essentially "civil in character" [§9.62]; it is because of the distinctions between ordinary civil proceedings and disciplinary proceedings that the courts have consistently found that there should be no artificial demarcation between Art.6(1) and the crime-specific

rights enshrined in Art. 6(2) and 6(3), see:

- *Albert and Le Compte v Belgium* (1983) 5 EHRR 533, para. 30 “Dr Albert relied in addition on paragraph 2 and on paragraphs (a), (b) and (d) of paragraph 3, but, in the opinion of the Court, the principles enshrined therein are, for the present purposes, already contained in the notion of a fair trial as embodied in paragraph 1; the Court will therefore take these principles into account in the context of paragraph 1.”
- Brooke LJ (having just cited the passage from *Albert and Le Compte* above): “So disciplinary proceedings against a professional man or woman, although certainly not classified as criminal, may still bring in play some of the requirements of a fair trial spelt out in Article 6(2) and (3), including the presumption of innocence;”
- Laws LJ: “It is a grave thing for a man to be condemned for misconduct at the bar of his professional peers; graver, often than a criminal conviction. **In these cases, something not far distant from the full rigour of Article 6(2) and (3) will be applied**”

In summary, the advocates of admissibility guided by the criminal rules, as it is currently in the disciplinary proceedings of the GMC, the GCC and the GOC, take the view that to adopt this approach avoids the re-litigating of much settled law and it is more appropriate in the light of the “prosecutorial” nature of the proceedings and the serious consequences for the practitioners facing them.

For the sake of completeness the members who advocate guidance from the criminal rules of evidence see no difficulty in disciplinary panels utilising the criminal rules of evidence but applying the civil standard of proof, nor are they aware of any problems arising in this respect in the proceedings of the three regulators for whom this has pertained for the past three years or more.

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; this is the rule that currently exists in relation to most of the healthcare disciplinary regimes; it provides the flexibility we refer to above.

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

We agree.

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 – not because they are drawn from the Civil Rules of Evidence, but because they include not just the current rules relating to interim orders (interests of justice exception) and health (confidentiality exception) , but also the common law which currently underpins the decision-making on this topic.

Provisional Proposal 9-15: The statute should provide that a witness is eligible for assistance if under 17 at the time of the 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 is should be eligible for assistance if the Panel is satisfied that the quality of the 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, both that there should be a provision relating to vulnerable witnesses that applies across the board, and that it should be drafted in these terms.

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?

Yes, (as above), we think special measures should be provided for in the statute, there being no good reason why they should not apply consistently across the board.

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

We agree.

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 to the Council and there would be a prohibition of Council members and investigators from sitting on such Panels.

We agree. We do not believe that reviews of interim orders need a three member panel; they can be undertaken by the panel chairman without a hearing.

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 do not think that Interim Order Panelists should be prohibited from sitting on Fitness to Practise Panels, and vice versa; panelists obtain valuable experience by sitting on both panels, each of value when sitting on the other. However they should not be able to sit on both panels in relation to the same case.

We do not accept that the FTPP has access to the same evidence as the IOP, rendering unnecessary any prohibition on panelists sitting on both panels in the same case (§9.84). At an IOP the charges are not yet formulated and often there is no sufficient evidence to support some of the complaints rehearsed before the IOP by the time the case reaches the FTPP. We therefore suggest that the regulators' administrative systems are such that they can ensure that a panelist who has sat on at IOP cannot sit on the FTPP convened to hear the case, or any "linked" case. An example of a linked case would be a case in which the accused practitioners practised in the same practice, or the alleged modus operandi and experts to be called by the regulator are the same.

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 confidence in the profession).

In our view, given the settled jurisprudence in relation to this part of the healthcare disciplinary regime [*Sheill, Sandler* etc] there would need to be an identifiable benefit to changing the current test to be applied in the regulators' IOP schemes. Currently the test applied across all the healthcare regulators focuses on whether an interim order is necessary for the protection of members of the public, but some regulators' test (including the GMC's) includes alternatives such as where an interim order is "**otherwise in the public interest**" or **in the interests of the registrant**. We think that the "public interest" ingredient is important, even if it is rarely used by the IOP, because it provides the flexibility that an IOP occasionally requires (see *Sandler v GMC* [2010] EWHC 1029 where the doctor had committed criminal offences in connection with his completion of forms for cremation, which had no public safety element but suspension was deemed to be in the public interest). We endorse consistency across the healthcare regulators and urge the adoption of the three-element test that currently applies at the GMC.

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 agree.

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

Yes; we think that the IOP is often assisted in making its decision by hearing the registrant. The hearing frequently takes place before evidence can be compiled of the impact of an interim order on the registrant, and calling him or her is the only way of providing the Panel with the required information.

Currently the registrant appearing before the GMC's IOP has to obtain permission to give evidence: r.27(2) of the GMC's Fitness to Practise Rules 2004. The position at common law is set out in *GMC v Sheill* [2006] EWHC 3025 (Admin) para.36:

“it will be relevant to note any concessions about the truth of an allegation. However, if an allegation is denied, it is not the function of the Panel or the court to resolve such a dispute. The doctor's evidence will, however, be of great importance in assessing the effect of an order on the doctor, since it is common ground that the effect on the doctor must be taken into account and a balancing exercise performed”

Although it is unlikely that it will be in the interests of the registrant to give evidence about the merits of the case against him, in exceptional circumstances it might be important for the IOP to receive evidence about the complaint or the complainant in order to assess if an interim order is appropriate, and if so which one. We think that the statute should not make the registrant's right to give evidence conditional on permission or content, given the IOP's inherent power to curtail irrelevant 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. We also believe that the High Court's powers in the case of the GMC should be extended to allow for an order for interim suspension to be substituted by interim conditions. There should be consistency across the regulators regarding appeals and interim orders.

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.

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

This is a controversial issue and one that ARDL, with its heterogeneous membership, is not best placed to address. However, we make the following observations:

- A costs model based on “costs follow the event” is inappropriate; firstly, the registrant is compelled to engage in this litigation and has no control over the costs, and consensual disposal (which in any event is not the same as settling) may not be an option; secondly, it is often not possible to say which side has won or lost (how should a case that results in a warning, or a case in which misconduct but not impairment is found, be treated);
- A costs jurisdiction would almost certainly generate satellite litigation about costs, which itself is wasteful of resources that come, in one way or another from the registrants (who fund the insurers and the regulators);
- If costs are to be awarded against the parties for egregious failures to comply with rules or case management directions, numerous problems arise, including the difficulty in apportioning blame between the registrant, his solicitor and counsel.
- There are public interest reasons why costs should not be awarded against a regulator in favour of an acquitted registrant [*Baxendale-Walker v Law Society* [2008] 1 W.L.R. 426, CA]
- Nevertheless there is a good argument in favour of costs orders where, for example, there is a clear and deliberate breach of a case management direction and the person responsible who is to pay the costs can be identified as the registrant or his representatives.

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

We agree.

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

We agree

Provisional Proposal 9-28: The test for imposing any of the sanctions listed in provisional proposal 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; in our view, this test is not very different to the test that applies now.

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.

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

We agree.

Question 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?

Yes, we think it does

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

We agree.

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

We agree.

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 think that where it is agreed by the regulator and the registrant that a mistake has been made (such as in the case of *Jenkinson*), the tribunal should be permitted to correct the error without the cost of going to court. We do not think that the complainant should have any role in this decision; he or she is not a party to the proceedings, and if the regulator is in error in agreeing to the quashing of a finding

on the basis of unlawfulness, the CHRE can refer the matter to the High Court for resolution.

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

We agree.

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 do not feel we are in a position to form a view on how effective CHRE is. We note that although the approach of CHRE is said to be systemic, it nevertheless also functions in ways which are more consistent with a 'discrete case model' in that it does identify individual faults within particular regulators. We further note that currently CHRE are overseeing a large number of regulators.

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.

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.

In light of a recognition that any government involvement in appointing would have implications for CHRE's perceived independence, we consider that appointments should not be made directly by government but that government establishes an

independent office to make recommendations as to appointments to the CHRE in accordance with the current standards.

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

We agree.

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

We take the view that a power to make directions to secure public protection where regulators are failing in their duties is a necessary power. However, if as suggested [in chapter 2] that the secretary of state would retain a power to intervene we would question to what extent or what the remit of the CHRE would be in making directions?

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 exercised its functions should be retained.

As stated above, we consider that government should have a less direct role in the governance of the CHRE.

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:

- **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; *or***
- **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?**

We favour option (2). It is unnecessary to provide for two routes to challenge a decision and consider that it is best if challenges are made within the statutory framework.

PART 11: BUSINESS REGULATION

The first observation we make relates to the fact that this section is titled 'business regulation'. However, some regulators may not regard their role as regulating 'businesses' but rather the services provided from the registered premises. Furthermore, some may not operate in a commercial setting.

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?

It is unclear whether this question is about 'professional regulation' in a commercial context, or 'systems regulation'.

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

We take the view that this question is best answered by the GPhC and the PSNI.

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 take the view that this question is best answered by the GPhC and the PSNI.

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

We take the view that this question is best answered by the GPhC and the PSNI.

Question 11-5: Should the regulators have powers to finance or establish a complaints service?

It is accepted that that the proper role of professional regulation is to protect the public and not to provide redress to a complainant. We note the view of the Law Commission that it does not believe that it would be appropriate for the regulators to have powers to run their own consumer complaints service. In relation to the proposition of the regulators having the ability to fund a consumer complaints service (run by another organisation) it is hard to see how this is in reality any different.

Provisional Proposal 11-6: The Government should be given a regulation making power to extend to any regulator the powers given to the General Pharmaceutical Council or the General Optical Council to regulate businesses.

We take the view that this question is best answered by the other regulatory bodies concerned.

PART 12: OVERLAP ISSUES

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

We recognise the need for clear interfaces between different regulatory systems and agree that the current model, with the improvements as suggested in the Paper, constitutes the best vehicle to achieve this aim.

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

Our experiences show that there is an inconsistent approach taken by different regulators, and indeed different panels, to the question of concurrent criminal proceedings. Criminal proceedings running alongside regulatory proceedings do not, as a matter of course, result in an adjournment of the regulatory proceedings. The obvious difficulty that this raises is one of a lack of consistency and predictability to registrants, and the inherent problems associated with witnesses giving evidence in more than one forum

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

We consider that regulators are best positioned to answer this question.

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

We agree. Joint working between the regulators is to be encouraged and promoted.

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.

Question 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, including those concerned with the:

- (1) employment of registrants;**
- (2) education and training of registrants;**
- (3) regulation of other Health or Social Care Professionals;**
- (4) regulation of Health or Social Care Services; and**
- (5) provision/ supervision/ management of Health or Social Care Services.**

Setting this general duty out in legislation may well assist regulators, and those acting on their behalf, in seeking the co-operation of other relevant bodies. Anecdotally there can often be significant hurdles in the obtaining of information relevant to fitness to practise proceedings from bodies such as the ISA, the police and other agencies.

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

Yes. We agree that a non-exhaustive list of the types of arrangements that could be entered into by regulators would be helpful but it should be clear that the list is not finite and the arrangements may include, but are not limited to, the listed examples.

Question 12 – 8: The statute should impose a specific duty to co-operate 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 practise and conduct; and**
- (4) undertaking investigation into a registrant's fitness to practise.**

In the fitness to practise context, the duty to consider joined up working could extend to the joining of proceedings for different regulated professionals, with the aim of achieving consistent outcomes. For example there may have been significant advantages in the 'Bloodgate' case to the Doctor and the Physiotherapist having their fitness to practise proceedings being determined by the same Panel. The fact that the Doctor was found not to have been impaired whilst the Physiotherapist was

struck off the register (albeit that this was reduced to a caution after appeal) are decisions that perhaps open to criticism on the basis of lack of consistency.

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

Not in our view.

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.

This seems to be a very sensible proposal. We agree that the regulatory schemes of different regulators are too disparate and the rules too detailed to be the subject of primary legislation.

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 that this is an essential safeguard that should reside with the Government for use in exceptional circumstances.

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. Regulators are best positioned to determine the specific entry requirements appropriate to the professions they regulate. In order to ensure transparency, these requirements would need to be published.

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

This is not something that ARDL feels able to comment on.

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?

This is not something that ARDL feels able to comment on.

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.

This is a sensible proposal. Regulators are best placed to determine the appropriateness of overseas institutions and courses.

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?

This is not a matter upon which ARDL feels able to comment on.

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

This is not a matter upon which ARDL feels able to comment on.