

Tackling Concerns Nationally

*Establishing the Office of the Health Professions
Adjudicator*

Tackling Concerns Nationally

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Tackling Concerns Nationally

Establishing the Office of the Health Professions Adjudicator

A report by the Tackling Concerns Nationally Working Group

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Department of Health Response to the report of the White Paper Working Group: Tackling Concerns Nationally

In May 2007, Lord Hunt asked Sir Ian Kennedy, Chair of the Healthcare Commission to chair one of the seven working groups to take forward key recommendations in the White Paper *Trust, Assurance and Safety*. This group was asked to examine those aspects of the White Paper concerned with establishment of the proposed independent Office of the Health Professions Adjudicator. Their report is attached below.

The majority of recommendations in the report identify actions for the new body to address once it has been established, rather than for the Department of Health to implement. These will be drawn to the attention of the Chair on appointment.

For example, recommendations 5 to 7 on the governance arrangements of the new body with regard to the role of the body, along with recommendation 22 on information sharing.

Recommendations 1 and 2 on the independent status of the new body and the consideration that it be listed under the Tribunals Courts and Enforcement Act are accepted and we will be working towards this. We also accept recommendation 29 on the creation of a steering group to support the implementation of OHPA

We also accept recommendation 4 that the chair of OHPA be appointed first and sit on the selection panel for other members. We accept recommendation 26 that the initial board be appointed at an early stage.

Recommendations 8 to 19 address the procedures and rules around the fitness to practise panels which will discharge OHPAs responsibilities and we welcome these proposals which will be for OHPA to consider in the formulation of its rules which will be subject to public consultation, reinforced by recommendation 3

The recommendations relating to financial arrangements (20 and 21) are noted and we will ensure that OHPA takes full account of them.

Recommendations 23 and 24 relating to equality and diversity information gathering by the healthcare professional regulators are accepted in principle and we will be discussing how this might be implemented with those concerned.

We welcome recommendation 27 on the extension of OHPAs remit to include the General Optical Council and would support OHPA in moving to this. Recommendation 28 suggests that the Department consider whether other regulators should reform their adjudication processes to facilitate a future transfer to OHPA. We welcome this suggestion and will be consulting with the regulators and, once established, OHPA with a view to working towards such a goal.

Although we welcome the support for the move towards independent adjudication, we do not believe that this will be possible for all regulators before 2011. The adjudicator will first need to take on the role in respect of doctors and those professions regulated by the General Optical Council

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and we will need to evaluate its work, along with Ministers from devolved administrations as appropriate, before considering extending its remit to other professions.

The Department of Health wishes to express its gratitude for the work that Sir Ian and the members of the working group have undertaken and for the thorough and professional approach that has been taken in this matter.

The establishment of the Office of the Health Professions Adjudicator will mark an important milestone in the implementation of commitments made by the Government in light of the recommendations made by Lady Justice Smith in the Shipman Inquiry's Fifth Report. It also marks an important point in the evolution of health professional regulation.

It will now be for OHPA, the UK Government, the devolved administrations and regulators to take these recommendations forward.

Executive Summary

Following the publication of the White Paper "Trust, Assurance and Safety" the legislative framework for the Office of the Health Professions Adjudicator (OHPA) was set out in the Health and Social Care Act 2008. This body will adjudicate on Fitness to Practise cases for, initially, the General Medical Council. The legislation also provides for the General Optical Council's adjudication function to be transferred to OHPA in due course.

The "Tackling Concerns Nationally" Working Group was charged with looking at more detailed structures and procedures for the establishment of the proposed independent adjudicator and this report represents the recommendations.

The report considers:

- the status of the new body and its interaction with other organisations;
- composition of the board of OHPA and principles of governance for the body;
- general principles around the composition and conduct of Fitness to Practise panels;
- funding mechanisms;
- the development of policies on the disclosure of information;
- the need to collect information on equality and diversity issues; and
- the process of transition to the new body of adjudication cases from the GMC and GOC and, potentially, other regulators.

The report has been submitted to the Department of Health and will inform the next stages of the development of OHPA.

Introduction by Sir Ian Kennedy

- (i) I was asked by the Minister of State for Health to convene a working group, on behalf of all UK Health Departments, to support the establishment of the proposed independent Office of the Health Professions Adjudicator. This report sets out the draft recommendations of the Working Group "Tackling Concerns Nationally", one of the seven Working Groups that report to the "Professional Regulation and Patient Safety Programme Board".
- (ii) Lady Justice Smith's fifth report of the Shipman Inquiry¹ recommended as regards the General Medical Council (GMC), a clearer separation of adjudication from the GMC's other functions. In Lady Justice Smith's view the benefits of the model she proposed were:
 - the absolute separation that it created between investigation and adjudication; and
 - the greater confidence that the public might have that decisions were being made purely on the merits of a case.

¹ Shipman Inquiry Fifth Report - *Safeguarding Patients: Lessons from the Past - Proposals for the Future*, December 2004, The Stationery Office

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- (iii) In 2007, the Department of Health published a White Paper 'Trust, Assurance and Safety'², which drew together conclusions from two reviews of regulation of healthcare professionals and set out proposals for reforming the existing system of independent regulation. The White Paper set out a broad programme for change aimed at delivering a system of regulation of healthcare professionals which:
- is geared towards the safety of patients and the quality of care that patients receive from healthcare professionals;
 - improves public confidence in the existing system of regulation of healthcare professionals;
 - is as much about sustaining, improving and assuring the professional standards of the majority of healthcare professionals as it is about identifying and addressing poor practice or bad behaviour;
 - does not create unnecessary burdens, but is proportionate to the risk it addresses; and
 - is sufficiently flexible to work effectively for the different needs and approaches to healthcare within and outwith the NHS in England, Northern Ireland, Scotland, and Wales and to adapt to future changes.

- (iv) The White Paper confirmed the Government's support for Lady Justice Smith's recommendation that there should be independent adjudication of the GMC's fitness to practise cases.

"For doctors, the Government agrees with Dame Janet Smith and with the CMO that the separation of investigation and prosecution from adjudication is essential to ensure complete public and professional confidence in the independence of the decisions made by the adjudicator."

- (v) The GMC supports the proposal to move to independent adjudication and the General Optical Council (GOC) has subsequently indicated that it also wishes to transfer adjudication of its cases of fitness to practise to an independent adjudicator at the earliest opportunity.

- (vi) The Working Group "Tackling Concerns Nationally" was charged with making recommendations on more detailed structures and procedures for the establishment of the proposed independent adjudicator, including advice on whether or not the Chairs of the new body's panels should be legally qualified persons. May I thank the members of the Working Group:

- Ms Ann Abraham, UK Parliamentary Ombudsman and Health Service Ombudsman for England;
- Ms Eleanor Grey, Barrister;
- Mr Philip Grey, Director of Legal and Fitness to Practise, General Optical Council;

² Trust, Assurance and Safety, The Regulation of Health Professionals in the 21st Century, Department of Health, February 2007, The Stationery Office

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- Mr David Laverick, President, Adjudication Panel for England;
- Mr Finlay Scott, Chief Executive, General Medical Council; and
- Ms Sheila Wild, Council Member, General Optical Council.

1. Background

- 1.1. Both of the reviews of the regulation of healthcare professionals which preceded the White Paper, proposed changes to the system of adjudication as key components of a reformed regulatory system, alongside reforms to governance of the regulators of healthcare professionals. It was suggested that such reforms would be important contributions to securing public and professional confidence in the reputation of healthcare professionals.

Shipman 5th Report

- 1.2. Lady Justice Smith, in the Fifth Report of the Shipman Inquiry recommended, with regard to the GMC, that:

“The adjudication stage of the FTP procedures must be undertaken by a body independent of the GMC. This body should appoint and train lay and medically qualified panellists and take on the task of appointing case managers, legal assessors (if they are still necessary) and any necessary specialist advisers. It should also provide administrative support for hearings.”

- 1.3. Recognising that this may not be possible, she proposed that:

“Consideration should be given to appointing a body of full-time, or nearly full-time, panellists who could sit on the FTP panels of all the healthcare regulatory bodies.”

Current Practice

GMC

- 1.4. Since 2004, the GMC has separated internally the functions of investigation and adjudication. Council members no longer have any role in the operation of the GMC's fitness to practise procedures; and the Medical Act 1983 has been amended to disqualify Council members from sitting on adjudication panels. Instead, panel members are now, exclusively drawn from lists of doctors and lay people recruited through open competition and trained by the GMC. There has also been a very substantial increase in the GMC's hearings capacity; and this has resolved the delays which occurred in the 1980s and early 1990s.

Other regulatory bodies

- 1.5. Many of the other regulators of healthcare professionals have followed the GMC's model or are examining whether or not to do so. However, there are still some whose Council members are involved in processes relating to fitness to practise, at the stage both of investigation and adjudication. [Annex A 'Current Arrangements in respect of Procedures Relating to Fitness to Practise'](#), contains further details about current arrangements across regulators of healthcare professionals.

Recommendations on which the Government Consulted in 2006

Good doctors, safer patients

- 1.6. In 'Good doctors, safer patients', the Chief Medical Officer (CMO) for England made a number of recommendations that relate to fitness to practise, ranging from the change to the civil standard of proof to putting greater emphasis on local resolution of matters relating to performance. The separation of adjudication is part of the process of implementing those recommendations.

The regulation of the non-medical healthcare professions

- 1.7. The recommendations in the Departmental review were closely aligned with those in 'Good doctors, safer patients'. Views were sought about whether adjudication should be carried out, without further change, by a single adjudicator for all professions; or whether the non-medical healthcare professionals' regulators should move to an independent system with panellists drawn from a central pool. The creation of an independent adjudicator, whose remit could be extended over time to the other healthcare professions, was the preferred option.

Trust, Assurance and Safety

- 1.8. The White Paper 'Trust, Assurance and Safety' set out the Government's intention to establish independent adjudication for doctors in the first instance, with other regulators given the option of following suit. It also proposed that the independent adjudicator should hold a central list of trained panellists for other regulators to use in their own fitness to practise panels. This latter proposal has not yet been implemented, as the Department took the view that it was preferable to implement change in an incremental way. The Working Group understands that the Department is considering using powers under section 60 of the Health Act 1999 to require the proposed independent adjudicator to hold a list of trained panellists for use by all of the regulators.

2. The Department of Health's Objectives

2.1. The Working Group understands that the Department's intention is to create a single independent body to adjudicate in respect of cases of fitness to practise referred to it by the regulators of healthcare professionals. The body's remit would be UK wide and would include:

- deciding whether a healthcare professional's fitness to practise is impaired or, where relevant, about the fitness to remain on a register of premises used for the purposes of delivering healthcare;
- considering the need for interim orders imposing conditions on, or suspension of, registration prior to a full hearing on fitness to practise;
- deciding whether a healthcare professional should be restored to the register following erasure under procedures to determine fitness to practise.

2.2. The Department's aims are to:

- Ensure that, in future, adjudication in the case of doctors will be undertaken by a separate body which will be demonstrably independent from the GMC, which will continue to investigate complaints and decide whether to refer doctors to a fitness to practise panel run by the new adjudicator;
- Establish the independent adjudicator with an initial remit to adjudicate in respect of doctors' fitness to practise, in order to provide for an incremental, managed transition to independent adjudication in relation to all healthcare professionals. The Health and Social Care Act 2008, therefore, creates the Office of the Health Professions Adjudicator (OHPA). It contains provisions relating to both the GMC and the GOC, as the GOC has requested that it transfer its adjudication to OHPA at the earliest opportunity. This is in line with the Department's longer term policy of enabling the other regulators to move to independent adjudication if they wish; and
- Harmonise processes of adjudication of the various regulators. The Working Group understand that the Department's intention is to take forward reform of regulation (through the use of powers in section 60 of the Health Act 1999) to align processes, ahead of a general move to independent adjudication, in order to facilitate transfer of adjudication to OHPA by all of the regulatory bodies, should that be the eventual decision. The Council for Healthcare Regulatory Excellence (CHRE) is also taking forward work to explore whether there should be greater harmonisation of sanctions across the regulators.

Implementation

2.3. The Department's intention is to create a body which is operationally independent from both the Government and the regulators. This will be achieved within a framework

in which the new body is able to create its own procedures, including making rules on the composition and procedures to be followed by its panels.

The Health and Social Care Act 2008

2.4. The 2008 Act provides an enabling legislative framework that defines the structure of the body and composition of the panels dealing with cases about fitness to practise. In broad terms, the 2008 Act:

- provides that there shall be a body corporate to be known as the Office of the Health Professions Adjudicator (OHPA);
- makes changes to the Medical Act 1983 and the Opticians Act 1989 to take account of the transfer of adjudication to OHPA;
- extends the provisions of Section 60 of, and Schedule 3 to, the Health Act 1999 to include OHPA. This will enable changes to be made to the legislative framework that governs OHPA by Order and also allow for the transfer of adjudication from other regulators to OHPA in future; and
- makes provision for the Government to provide funding (for specific purposes) to OHPA , over and above the fees charged to the regulators using OHPA's services.

3. Status of OHPA

- 3.1. The Working Group believes that the status of OHPA should be commensurate with the need for it to be operationally independent from Government. This is clearly a view shared by the regulators and other interested parties. OHPA should also be independent of the regulators and any sectional interest.

Recommendation 1

That OHPA should have a status commensurate with the principle of independence from Government and from sectional interests in terms of its operational and financial freedom.

- 3.2. The Working Group was advised that the Department gave consideration to the nature of the body, specifically as to whether or not it was to be classified as a Tribunal Non-Departmental Public Body. In the case of a Tribunal Non-Departmental Public Body, the sponsor Department will normally provide administrative staff and support, and will hold the budget. Neither of these features apply to OHPA.
- 3.3. Given the need for independence, together with public assurance about financial controls and accountability (in respect of both the use of public money and the fees paid by the bodies regulating healthcare professionals), the Cabinet Office's guidance indicates that OHPA may meet the criteria of an Executive Non-Departmental Public Body. The mechanism for classification by the Cabinet Office as an Executive Non-Departmental Public Body, is based on the characteristics of the body. Executive Non-Departmental Public Bodies are intended to be operationally independent of their sponsor Department. It should be noted that the classification of OHPA has not been confirmed as at the date of this report. [Annex B 'Features of an Executive Non-departmental Public Body'](#) sets out the Government's expectations in respect of the arrangements for reporting and accountability for Executive Non-Departmental Public Bodies.
- 3.4. OHPA will be required to submit its annual report to the Secretary of State for Health. However, the Secretary of State will have no powers of intervention beyond the limited power to make directions to OHPA with regard to payments and loans made to OHPA by the Secretary of State. This power would be used to direct, for example, that payments made for the purposes of meeting the costs of any action in the Courts are not to be used for any other purpose.
- 3.5. There will be no power of direction in relation to the conduct of, or outcome of, individual cases and the Secretary of State will have no power to influence OHPA's determinations or to overturn them.
- 3.6. It is recognised that aspects of the role of the OHPA are similar to those of other bodies which are publicly recognised as tribunals. That said, the Working Group's understanding is that there is no established definition of what constitutes a tribunal and no obvious legal consequences arise from formal classification as a tribunal.

3.7. The Working Group also noted that, if a body is considered to be sufficiently akin to a Tribunal, it may be designated as falling within the ambit of the Administrative Justice and Tribunals Council (AJTC). The Working Group's understanding is that, if OHPA were to be listed as a body under the remit of AJTC, there would be the following consequences:

- (i) The AJTC would give consideration to OHPA's draft rules;
- (ii) Its members would periodically visit hearings; and
- (iii) The AJTC would "review, consider and report on" OHPA's constitution and activities.

3.8. The Working Group agreed that there could be benefits in the AJTC's oversight of OHPA. Namely, it would:

- bring OHPA within the system of administrative justice with easy access to good practice and expert advice;
- enhance the independence of OHPA from the professions, the healthcare professional regulators and the Department of Health;
- raise the profile of OHPA alongside other Tribunals, such as the Care Standards Tribunal, the Social Security Commissioners, and the Employment Tribunal, each of which falls within the remit of the AJTC.

Recommendation 2

That consideration is given to listing OHPA under the Tribunals Courts and Enforcement Act to bring it within the remit of AJTC. This would ensure that members of AJTC would visit OHPA's hearings and review, consider and report on OHPA's constitution and activities.

Recommendation 3

Under the provisions of the Health and Social Care Act 2008, OHPA will be required to consult persons that it considers appropriate before making its rules. It would make sense for OHPA to consult widely with a range of interested parties, including the various regulators of healthcare professionals, the four UK Health Departments, and bodies representing patients and the public. The Framework Document should make it clear that the Secretary of State would expect OHPA also to consult the AJTC before making its rules.

4. Establishment and Governance of OHPA

OHPA's Board

- 4.1. The size of OHPA's board is governed by legislation. The formula provided for in the 2008 Act allows for a chair, up to three non-executive members and up to three executive members, provided that, the number of executive members does not exceed the number of non-executive members. The Privy Council will appoint both the Chair and non-executive members, but in the first instance will appoint the initial board. We understand that the Government expects that the initial board will consist of:
- (i) A Chair;
 - (ii) A non-executive member; and
 - (iii) An executive member, who in practice, would probably be the Chief Executive.
- 4.2. The Working Group endorses the principle that the board should be small, both for purposes of effective action and to contain costs. However, it is also important to ensure that the board is of a size sufficient to enable it to undertake all necessary governance. The Group has some concerns about the feasibility of a board of three, including an executive member, properly carrying out all its responsibilities.
- 4.3. While an initial board of three persons may be sufficient to oversee the creation of OHPA, serious consideration should be given to the need to increase the size of the board in order to ensure effective governance before OHPA becomes fully operational.
- 4.4. The Working Group suggest that the Chair should be appointed first and that the Chair should be involved in the appointment of the Chief Executive and other Board members. The Chair should thereafter be responsible for making recommendations to the Privy Council about the appropriate size of the Board after consultation with the other non-executive members, the Chief Executive, the Department and relevant others.
- 4.5. We note that, in future, the Privy Council will be responsible for appointing non-executives to OHPA's Board, but that OHPA will appoint its own executive members.

Recommendation 4

In line with established practice, OHPA's chair ought to be appointed first and should sit on the selection panel for other members of the board.

Accountability of the Board

- 4.6. In terms of accountability, the 2008 Act provides:

- (i) For all members of OHPA's first Board to hold and vacate office in accordance with the terms of appointment set by the Privy Council;
- (ii) For all subsequent appointments of executive members to be made by OHPA's Board, which will determine the terms and conditions of service for persons it appoints;
- (iii) For members of the Board to be removed from office by the Privy Council on the grounds of incapacity or misbehaviour;
- (iv) For the terms of appointment of an executive member appointed by OHPA to be determined by the Privy Council in so far as the term relates to tenure of office, or suspension from office;
- (v) That OHPA must keep accounts in such form as determined by the Secretary of State;
- (vi) That OHPA must send copies of its accounts to the Secretary of State and the Comptroller and Auditor General and Department of Health, Social Services and Public Safety, Northern Ireland (DHSSPSNI). The Comptroller and Auditor General must then lay copies of the accounts before Parliament and DHSSPSNI must lay the accounts before the Northern Ireland Assembly);
- (vii) That OHPA must prepare an annual report on the exercise of its functions that it must send to the Secretary of State for Health and DHSSPSNI. The Secretary of State must lay OHPA's report before Parliament and DHSSPSNI must lay the report before the Northern Ireland Assembly;
- (viii) The Privy Council may direct OHPA in respect of the matters to be dealt with in its annual report;
- (ix) The Secretary of State will have limited powers of direction, in respect only of payments and loans.

4.7. As noted above, the board's external accountability is largely provided for in legislation. However, its system of internal accountability is still to be defined. It will be important for the new body to adopt clear structures of internal governance. OHPA's board will also need to make recommendations to the Privy Council about the terms of appointment and vacating of office of persons appointed by the Privy Council. OHPA's initial board should consider both of these at an early stage.

Recommendation 5

One of the first tasks of the initial board of OHPA, should be to produce a statement on governance. The statement should include consideration of the likely effectiveness of a board of three to provide proper governance and accountability and to be able effectively hold the Chief Executive to account, with a view to having any additional members of the board appointed by the time that OHPA becomes operational.

4.8. OHPA's initial board may consider whether there are aspects of its activities that ought to be handled through a system for handling complaints internally (e.g. relating to the appointment of panellists to its pool etc).

The Role of the Board

4.9. The Working Group has taken account of the recommendations in 'Implementing the White Paper: Trust, Assurance and Safety: Enhancing confidence in healthcare professional regulators'³. The purpose of OHPA's Board can broadly be described as to:

- set the direction of OHPA in line with its statutory purpose and duties;
- ensure that systems are in place to enable it to monitor its performance and to hold the executive to account; and
- ensure probity.

4.10. OHPA's Board should establish schemes of delegation to achieve these objectives.

4.11. The CHRE has produced a paper about the principles of an effective board for the Working Group, "Enhancing Confidence in the Healthcare Regulatory Bodies". The principles identified by CHRE, attached at [Annex C 'The Principles of an Effective Board'](#), will provide a useful starting point for OHPA's board.

4.12. The GMC and the GOC have defined the role of their Council members and provided evidence about the role of Council members to the Working Group. The definitions are given at [Annex D 'The Role of Non-Executive Members of council'](#) .

4.13. The role of OHPA's Board members can broadly be described as being to:

- Ensure and review the effectiveness of OHPA in fulfilling its statutory purpose;
- Set the strategic framework for policy and operational performance;
- Hold the executive to account for the management of day-to-day operations;
- Contribute to the development of policy;
- Promote the work of the OHPA externally by supporting constructive collaboration, networking and consultation with key interested parties;
- Ensure that the public interest is served at all times;
- Ensure that the principles of equality, diversity, fairness and human rights are upheld;
- For those regulators whose adjudication is undertaken by OHPA, set the fee payable by them to OHPA, according to the procedure set out in regulations; and
- Appoint the Chief Executive.

³ Implementing the White Paper: Trust, Assurance and Safety: enhancing confidence in healthcare professional regulators - final report, Department of Health, 2008.

Recommendation 6

The role of OHPA's board should be to set the direction of the organisation in line with its statutory duties and purpose. It should ensure that systems are in place to enable it to monitor performance, manage risks and to hold the executive to account. It should also provide that systems are in place to ensure that it acts with probity.

Recommendation 7

The proposed statement on governance to be produced by the initial board should include a schedule of delegated authority for the executive.

Criteria for Appointment of Board Members

- 4.14. A number of regulators have developed frameworks of competence for Council members. A summary of the areas of competence required of members of those Councils that submitted evidence to the working group can be found at [Annex E 'Core areas of Required competence for Members of Council'](#).
- 4.15. The core areas of competence for members of the board of a regulatory body can broadly be described as:
- Demonstrable commitment to act in the public interest;
 - Ability to provide strategic direction;
 - Effective skills in advancing the interests of the body and in communication;
 - Skills in team work;
 - Ability to hold others to account;
 - Intellectual flexibility and sound judgement;
 - Self-belief and drive
- 4.16. The demonstrable objectivity and impartiality of members of the Board, and external perceptions about their impartiality, will be essential.
- 4.17. The Working Group believes that it would be helpful to have the experience of the following reflected in OHPA's Board, once OHPA becomes fully operational:
- Finance
 - Audit
 - Governance
 - Law (in practice this will be provided by OHPA's Chair who is required to be legally qualified)

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- Involvement in managing organisations
- Overseeing/monitoring systems of quality assurance
- Performance management
- Working with patients and professionals

4.18. The Working Group has already made the point, at paragraph 4.2, that it is difficult to envisage how a Board of only three can effectively undertake all the necessary functions of a board. Similarly, we have concerns about whether a board of three will collectively be able to demonstrate all of the expertise needed to command the confidence of those interested in and affected by its activities.

Exclusions

4.19. There are certain persons who should be excluded from membership of OHPA's Board. The 2008 Act excludes any member of a UK Parliament from being a member of OHPA's Board. It would make sense for regulations made by the Privy Council to also exclude:

- Any person who holds a criminal record;
- Anyone who has been erased under fitness to practise procedures from the register of a regulatory body;
- Anyone who is a member of a healthcare regulator;
- Civil servants.

5. Panels

- 5.1. OHPA will carry out its role as an adjudicating body through panels.
- 5.2. The 2008 Act provides for a minimum of three persons on OHPA's panels. These include:
 - (i) A chair;
 - (ii) A lay member;
 - (iii) A professionally qualified member; and
 - (iv) Other members as provided for in rules.
- 5.3. The Working Group took the view that it should be the norm for any specialist advice given to a panel to be given in public at a hearing, rather than in private by a member of the panel. This enables the advice to be scrutinised and, if appropriate, challenged.
- 5.4. Consistently with this approach, the GMC's current policy is not to seek to appoint as members of a panel anyone who comes from the same specialist area as the doctor appearing before the panel.
- 5.5. The GOC holds separate registers for the professions that it regulates, but there are not as many recognised specialties within the professions of optometry and dispensing opticians as there are in medicine. Further, the GOC's rules on fitness to practise require that the professional members of a Committee on a fitness to practise panel are drawn from the same profession as the registrant appearing before the Committee. The GOC believes this assists the committee in arriving at the correct decision and also helps to ensure the legitimacy of the Committee in the eyes of the professions. That said, it is also the GOC's policy and practice for specialist and profession-specific evidence to be given in public.
- 5.6. The Working Group notes that 2008 Act provides for OHPA's panels to have access to clinical and any other necessary specialist advice. It should not therefore be necessary to appoint members of a panel specifically to supply that advice.

Recommendation 8

OHPA should ensure that as a guiding principle any specialist evidence given to its panels should be given in public, except in exceptional circumstances (e.g. proceedings relating to a practitioner's health).

Recommendation 9

OHPA should avoid appointing to a panel members from the same sub-specialism as the respondent practitioner, wherever possible.

- 5.7. The GMC's policy is to begin hearings, which are expected to last beyond a pre-defined period, with more than the bare quorum of panel members. This reduces the

risk that a hearing is disrupted through illness or other enforced absence, or in the event that a member of a panel has to step down after a hearing has started.

- 5.8. The GMC requires three members of a panel to be present in order for a panel to be quorate. An algorithm has been developed to increase the number of initial members of a panel for longer cases.

Recommendation 10

Building on the provisions of the Health and Social Care Act 2008, OHPA should consider whether it would be desirable to make rules that enable additional members of the panel to be appointed for hearings that are likely to be longer than usual. This would be in order to ensure that there would still be a quorum if one or more members of a panel were required to step down after a hearing has begun.

Recommendation 11

OHPA should make rules which ordinarily provide for at least three members of a panel to be present, including the Chair, a lay member and a member of the relevant profession, in order for a panel to be quorate. In certain circumstances, where a panellist has to step down, or is otherwise incapacitated, and the panel becomes inquorate, OHPA's rules should enable a determination of the case to be made, with the agreement of the respondent practitioner and the relevant regulator, by the remaining members of the panel.

- 5.9. Lady Justice Smith recommended that it was desirable for panellists to be appointed on a full-time or almost full-time basis (see paragraph 1.3). The Working Group has reservations about this proposal. There are, in its view, advantages in having members who continue to have active experience of matters other than adjudicating on healthcare professionals. However, the Working Group accepts that panellists should sit regularly and thus maintain familiarity with this particular type of work. Neither would it be desirable for panellists to go too long between occasions when they serve as panellists.
- 5.10. In the case of the Adjudication Panel for England, panellists are expected to sit at least once a month. This ensures that the skills of panellists are kept up to date and helps to ensure that any particular individual does not hear a disproportionate number of cases. Both the GMC and the General Dental Council (GDC) require panellists to sit for a minimum of 20 days per year.

Recommendation 12

OHPA should require prospective panellists to make a formal commitment to be available to sit for a minimum of between 12 and 20 days per year, in order to ensure that their skills as members of a panel are kept up to date.

- 5.11. The GMC has a large pool of panellists and ensures that no one sits on panels in a full time capacity. The GMC decided to maintain a large pool of panellists because of

concerns that if a smaller number of people were to sit more frequently, they might become quasi-professional panel members. The transition to OHPA will have to be managed carefully, particularly in view of the relatively large number of panellists required in total.

Recommendation 13

Plans for the transfer of the GMC's role in adjudication to OHPA should take account of the relatively large number of panellists that will be required to adjudicate on cases of medical fitness to practise and the desirability of retaining experienced GMC panellists in OHPA's pool, where they have a satisfactory performance record. However, there should be no automatic prospect of transfer to OHPA as OHPA will need to satisfy itself that persons appointed to its panels are suitable.

- 5.12. The GOC's pool of panellists is quite small, reflecting the smaller number of registrants, but, like the GMC, no-one sits in a full-time capacity. Specialties are represented in the pool. The small size of the GOC's pool of panellists, as compared to that of the GMC, poses a challenge, particularly during the period of the transition. The way in which the transition is handled may have a bearing on the willingness of the other smaller bodies regulating healthcare professionals to move to independent adjudication.
- 5.13. OHPA should ensure that professional members of panels are up to date and able to command confidence, for example because they are practising or only recently retired.
- 5.14. A single pool of lay and legally qualified members could be used for panels for the various different professions, subject to adequate training being provided.

Chairs of Panels

- 5.15. Lady Justice Smith recommended that:

"In the event that the GMC retains control of the adjudication stage, it should appoint a number of legally qualified chairmen who should, as an experiment or pilot, preside over the more complex FTP panel hearings. The results of the pilot scheme should be scrutinised to see whether there are benefits, whether in terms of the improved conduct of hearings, more consistent outcomes, improved reasons and/or fewer appeals."

- 5.16. The 2008 Act requires OHPA to maintain a list of persons eligible to serve as chairs of fitness to practise panels. This list shall consist of:
- (i) legally qualified chairs;
 - (ii) lay chairs; and
 - (iii) professionally qualified chairs.
- 5.17. The Working Group were asked specifically to make recommendations about the use by OHPA of legally qualified chairs. There were essentially three options open to

the Group in terms of the recommendations it could make about legally qualified chairs. It could:

- (i) recommend that the chairs of OHPA's panels should always be legally qualified;
- (ii) make recommendations about the scope of a pilot as recommended by Lady Justice Smith and possible criteria of success; or
- (iii) recommend specific circumstances, or specific types of case, in which legally qualified chairs should be appointed.

5.18. The Working Group accepted that the qualities required to chair adjudication panels can be found in persons who are not legally qualified, although it is possible (though not proven) that those who have legal qualifications and experience may require less training than those who do not. The essential requirement is that the work of the panels should be carried out fairly, applying the principles of natural justice and in accordance with the particular statutory scheme.

5.19. The Working Group also accepted, albeit on the basis of anecdotal evidence rather than empirical data, that having legally qualified Chairs might lead to shorter hearings and more active case management before hearings than the current model of lay chair and legal assessor. Some concerns, however, were expressed that a legal qualified Chair may introduce factors into the panel's private deliberations which had not been canvassed in argument prior to the panel's retiring. The Working Group also noted that as a Legal Assessor would not be appointed in cases where there was a legally qualified Chair, the process could be more cost-effective. However, this is again unproven.

5.20. The Working Group recognised, therefore, that there were arguments both in favour and against the use of legally qualified chairs. It agreed that it would not make sense to recommend a wholesale move to the exclusive use of legally qualified chairs, given that at best, the evidence in support of such a move is limited.

5.21. The Group also felt that as regards option (iii) in paragraph 5.17, it should not try to define the circumstances in which a legally qualified Chair should be appointed. Instead, it agreed that it would be helpful to identify the specific competence required of the person chairing a panel (who might, or might not, be legally qualified).

5.22. The Working Group suggested that the pilot involve a comparison of the models, in relation to matters such as:

- Cost;
- Length of procedure;
- Extent to which decisions relating to points of law are fully documented;
- Extent to which decisions relating to points of law are communicated to all parties;
- Proportion of panels' time spent dealing with procedural issues;
- Consistency of outcomes,
- The management of both preliminary procedural matters and the giving of evidence;
- The quality of written reasons explaining decisions reached;

- Number of appeals and outcome of appeals;
- Experience of members of panels, particularly as to how their contribution was recognised and taken account of; and
- Experience of witnesses and participants.

Recommendation 14

There should be a pilot scheme to test the benefits of using legally qualified chairs, as recommended by Lady Justice Smith. OHPA should consider making provision in its rules to test, by way of a pilot scheme, the use of legally qualified chairs. This would assist in defining the circumstances in which chairs with specific competence, or specialised knowledge, should be appointed. This would include the consideration of whether, for example, there are circumstances in which either legally qualified, medically qualified, and lay chairs would be beneficial.

5.23. Both the GMC's and the GOC's experience is that an increasing amount of time in hearings is taken up in addressing procedural issues (e.g. the admissibility of particular evidence). If legally qualified Chairs were able to streamline the handling of procedural issues, then there could be real benefits. However, there may be other, equally or more effective, ways of dealing with procedural issues and of ensuring that hearings proceed in a fair and cost effective way. The GMC already has provisions for case management in place, but it is likely that these could be further strengthened, or the role of preliminary hearings on case management could be extended.

Procedural Issues

5.24. The Working Group endorses the initiative taken by the GMC to establish a working group, that will include representation from the GOC, to identify good practice in case management, including the early and effective resolution of procedural issues.

Recommendation 15

OHPA should have regard to the recommendations of the working group established by the GMC to consider issues of case management and procedural issues in hearings.

5.25. In the GOC's experience, the time taken to resolve detailed arguments as to the admissibility of evidence causes as much frustration among panellists as among the parties. While such problems will never be completely avoided, they could be minimised by a structure which requires parties to disclose evidence in accordance with a set timetable and, subsequent to that disclosure, requires the identification of the evidence that either party objects to. Any disputes could be resolved at formal "pre-trial" hearings that are authorised to make binding rulings.

- 5.26. It would be helpful if the working group being established by the GMC to consider the management of procedural issues in hearings could consider:
- the disclosure of documents and the timetable for submitting evidence;
 - handling disputes about the framing of allegations, the disclosure of documents and the admissibility of evidence that either party objects to;
 - the scope for resolving disputes about the admissibility of evidence or other preliminary matters, at formal “pre-trial” hearings conducted by persons with authority to make binding rulings;
 - the possibility of one panel making an interim decision and for another panel to be convened to make a final determination.

5.27. Since 2004, the GMC has moved to a single, coherent, set of procedures relating to fitness to practise designed to determine whether the doctor’s fitness to practise is impaired. The GOC has done likewise. The reformed procedures replaced earlier, separate procedures relating to conduct, health and performance. The GMC believes that there have been significant benefits in moving to the reformed procedures. Among other things, the reformed procedures recognise that impairment is often multi factorial rather than due to a single cause. A particular benefit has been the fact that cases do not need to be streamed into conduct, health or performance at the outset, before adequate investigations have been undertaken. In the past, cases were delayed on occasions when evidence emerged part way through a case that had implications for the way that it should have been handled (e.g. issues of health coming to light after the procedure relating to conduct had commenced).

Location of Hearings

5.28. The Working Group heard a number of views expressed, as to the respective merits of holding hearings at (on the one hand) a central, fixed venue, or (on the other) at a venue convenient for the registrant or for witnesses. It took the view that OHPA’s board may wish to explore the arguments for and against holding hearings at more than one location. If it is considered desirable, then a full feasibility study, which includes consideration of the cost-effectiveness of holding panels in different locations should be undertaken. The GMC already uses video-conferencing in specific circumstances. The continuing and extended use of telecommunications and video-conferencing to facilitate evidence giving by witnesses should also be explored.

Support for Witnesses

5.29. The Working Group recognises that the process of giving evidence can be traumatic for some witnesses. OHPA should therefore give consideration to the need for developing a scheme to support witnesses, particularly for more vulnerable witnesses.

Appointment of Panellists

- 5.30. The 2008 Act requires OHPA to appoint, or arrange for the appointment of, members of panels to its lists. In practice, OPHA may choose to contract out the process of making appointments to its panels to another organisation.
- 5.31. The Working Group received evidence from many of the bodies regulating healthcare professionals and the Judicial Appointments Commission about the range of competence required for panellists hearings cases of fitness to practise. Details of the competence required of panellists by the regulators and the Judicial Appointments Commission are attached at [Annex F 'Core areas of Required Competence for Panellists'](#). The core areas of competence which should serve as the basis for selecting members of OHPA's panels should be:
- Ability to treat everyone with respect and sensitivity whatever their background;
 - Willingness to listen with patience and courtesy;
 - Integrity and independence of mind;
 - Ability quickly to absorb and analyse information;
 - Ability to apply relevant law and procedures; and
 - Ability to explain the procedure and any decisions reached clearly and succinctly to all those involved.
- 5.32. Both the NMC and General Chiropractic Council (GCC) have developed frameworks setting out the required range of competence which are set at two levels; a basic level of requirements for members of panels and a higher level for the chairs of panels. In general, the competence required of chairs is basically the same as that required for members of panels, but chairs are required to demonstrate greater knowledge, skills and attitudes associated with each area of competence. These additional requirements relate to the additional duties undertaken by the chair of the panel.
- 5.33. The Royal Pharmaceutical Society of Great Britain (RPSGB), the NMC and the GDC have established groups or committees to appoint people to their lists of panellists. Those groups or committees are independent of the Councils and made up of both professional registrants and members of the public. This model would appear to represent good practice as it ensures that the process of appointments is independent of the Council.
- 5.34. The GOC has contracted out the procedure for selecting its panellists for cases of fitness to practise to an external recruitment agency. Council members are involved in the selection, but an independent assessor appointed by the recruiting agency, oversees the process of appointment.
- 5.35. The Working Group notes the success of the model adopted by some regulators in contracting out the selection of their panellists. The Working Group believes that OHPA's Board should determine whether to adopt a similar model. Should it decide to do so, it will need to satisfy itself that it is fit for purpose and assure itself of the appropriateness of any training provided.
- 5.36. OHPA should ensure an appropriately diverse pool of panellists. In order to achieve appropriate diversity, OHPA may need to train some potential panellists who do not

initially have the full range of competence required, but who demonstrate the potential to develop it.

The Role of the Chair of OHPA's Panels

The role of the chair of one of OHPA's panels will differ slightly depending on whether a legal assessor is appointed, but can broadly be described as follows:

- (i) To ensure that members of panels and all parties to the hearing are given the opportunity to address relevant questions, to share information and ideas and remain focused on the key issues;
- (ii) To make fair and effective use of adjournments and resources;
- (iii) To guide the panel through each stage of the process of decision-making;
- (iv) To make sure that discussion is purposeful and relevant, and focused on the key issues;
- (v) To ensure that all procedures are complied with either to:
 - A. refer to the legal assessor for legal and/or procedural advice where appropriate, if the chair is not legally qualified and a legal assessor has been appointed to support the panel; or
 - B. provide legal and/or procedural advice to all parties and to the panel where appropriate (such advice should be given in public and subject to scrutiny by both parties) if the chair is a legally qualified person and a separate legal assessor is not appointed.
- (vi) To deliver the panel's decisions and reasons in a clear, concise, authoritative and timely manner;
- (vii) To seek to ensure that all parties understand the decisions reached;
- (viii) To explain procedures to all parties;
- (ix) To challenge views which unfairly discriminate against others;
- (x) To provide sufficient opportunity for all of the panel to address relevant questions and express opinions;
- (xi) Together with the legal assessor where one is appointed (see vi above), to provide guidance to respondents, particularly those who are unrepresented;
- (xii) Challenge and manage inappropriate behaviour on the part of a panellist, representative, respondent, observer or member of the press; and
- (xiii) Provide a balanced summary of discussion to aid decision-making, taking due account of the contributions of the panel members.

Induction and Training

5.37. All of the regulators who submitted evidence to the Working Group have developed structured induction and training for newly appointed members of panels. Details of the induction and training provided for the panellists hearing cases of fitness to practise by the regulators submitting evidence to the Working Group is at [Annex G 'Training for members of Panels'](#). In many cases, such training has to be completed before a panellist can sit for the first time. Several of the regulators also stressed the importance of regular obligatory refresher training for panellists. The possibility of requiring panellists to undergo assessment at the end of induction and training, in order to demonstrate competence, was also suggested to the Working Group. OHPA's initial Board should consider the need for such an assessment.

5.38. Based on the evidence submitted to the Working Group, we believe that panellists should be required to undertake induction and training (and possibly an assessment) before they sit. The induction and training should address the following (as a minimum):

- Relevant law, guidance and administrative processes
- Elements of a fair hearing
- Standard and burden of proof
- Case-management
- Interim orders
- Principles of questioning
- Guidance on Indicative Sanctions
- Decision-making, documenting and rationale for decisions
- Equality, diversity and human rights
- Training in observation and assessment
- Understanding and acting in the public interest
- Standards of conduct

5.39. The Working Group suggested that OHPA should consider existing sources of advice and syllabi uses on training for its panellists, and consult the Judicial Studies Board

Recommendation 16

OHPA should consult existing sources of expertise, including the Judicial Studies Board, about drawing up a syllabus on induction and training for its panellists.

5.40. It is common practice for many of the regulators and tribunals to carry out a regular appraisal of members of panels. The Working Group agreed that OHPA's panellists should be subject to an annual appraisal of their performance. This could include inviting "360 degree" feedback.

Recommendation 17

OHPA should introduce a system of annual appraisal of performance of its panellists. In introducing such a system, OHPA must ensure that the independence of panellists' decision-making is not compromised. There should be transparent criteria by reference to which the performance of individual panellists is assessed. OHPA should seek advice from regulators and from the Judicial Studies Board about the design of a system of appraisal for panellists.

Tenure and Terms of Service of Panellists

- 5.41. OHPA's panellists should be appointed initially for a period of five years, with the expectation of reappointment, except in cases of incapacity, misconduct, or concerns about performance that have not been resolved despite appraisal and any supplementary training considered to be appropriate. There have been suggestions made to the Working Group that panellists should be limited to serving two terms of office. OHPA should consider whether this would be appropriate for its panellists.

Recommendation 18

OHPA's panel members should be appointed, initially for five years, with the expectation of reappointment except in cases of incapacity, misconduct or where performance issues that have not been resolved despite appraisal and any supplementary training considered to be appropriate.

Sanctions

- 5.42. OHPA's panels will make decisions on sanctions, including interim orders, and decisions about restoration to the register following erasure under fitness to practise procedures. They will be able to impose the range of sanctions available in the Medical Act 1983 and the Opticians Act 1989 (as is currently the case for the GMC's and the GOC's panels). Provision is made in the 2008 Act for the GMC and the GOC to publish indicative sanctions guidance and requires OHPA's panels to take account of this guidance.
- 5.43. If additional regulators adopt independent adjudication by OHPA in future, panels may need to take account of similar guidance issued by the relevant bodies regulating healthcare professionals. The Working Group noted that CHRE is currently consulting on the possibility that there should be greater harmonisation of the range of sanctions available to the different regulatory bodies. In the meantime, the fact that different sanctions guidance will need to be taken into account in different cases and the existence of different sanctions for different categories of case should not present an insurmountable difficulty for OHPA's panels. It is noted that the 2008 Act provides for OHPA to apply sanctions involving costs as is already provided for in legislation for the GOC and the RPSGB.

- 5.44. It is noted that the 2008 Act provides for OHPA to make provision for the award and assessment of costs and expenses, as is already provided for in legislation as regards the GOC and the RPSGB.
- 5.45. The Working Group has noted that Lady Justice Smith made a series of detailed recommendations about procedure in cases of fitness to practise. The Working Group commends relevant recommendations for consideration by OHPA's board, subject to the caveat that they need to be adapted to the context in which panels are now to be wholly independent of the GMC.

Recommendation 19

In drawing up rules for its panels, OHPA should take account of relevant recommendations made by Lady Justice Smith in the Fifth Report of the Shipman Inquiry.

Appeals

5.46. The 2008 Act makes provision for appeals against OHPA's decisions to be made by either the registrant, or the relevant regulator, to the appropriate court. We understand that the Department expects to meet any order for costs awarded against OHPA in responding to an appeal by a regulator. This is because, otherwise, OHPA would need to recover those costs through the periodic fee charged to regulators. This would be patently inappropriate.

6. Financial Arrangements

Regulations for setting fees

- 6.1. The 2008 Act requires the Secretary of State to make regulations, subject to the approval of HM Treasury, requiring each of the relevant regulators (initially the GMC and GOC) to pay to OHPA a periodic fee for its services. The Government has indicated that this is likely to be on an annual basis.
- 6.2. The actual fee itself will not be set out in regulations.
- 6.3. OHPA will determine the fee in accordance with a formula and procedures set out in regulations that it will be required to follow. The 2008 Act provides that regulations may vary, replace or revoke a determination of fees, therefore providing sufficient flexibility to vary fees during a year if required, to reflect actual volumes of cases. The Government has indicated that the Secretary of State expects to discuss the regulations for setting fees with OHPA's Board once it has been set up in shadow form in 2009/10. It would clearly make sense to align OHPA's cycle for setting fees, as far as possible, with the business planning cycles of the regulators.

Budgeting

- 6.4. The Government has indicated that it expects the Department to agree a financial memorandum with OHPA. As a minimum, OHPA's financial memorandum is expected to include:
 - the Department's responsibilities in agreeing OHPA's strategic aims, objectives and targets for performance;
 - the responsibilities and financial duties of members of the Board and the Chief Executive and Finance Officer;
 - OHPA's framework for planning including forecasts of income and expenditure, corporate planning and measures to be used to monitor output and performance;
 - arrangements for reporting, including accounts; and
 - administrative management of costs and relating to staff matters.

Setting of the Fee

- 6.5. OHPA's fee will relate to the number and complexity of cases it hears. In order to calculate the fee, it is expected that OHPA will follow a formula and procedures set out in regulations made by Secretary of State.
- 6.6. The Government has indicated that it envisages that OHPA, as part of its annual process of setting a budget, will seek forecasts from the regulators of the number and complexity of cases that they are likely to refer for adjudication in the following year.

OHPA would apply a formula to those forecasts to arrive at an estimate of the costs of its casework in the forthcoming year. After adding overhead costs (which will be divided between the regulatory bodies in proportion to their projected recourse to OHPA), OHPA will make a determination of the fee.

- 6.7. The Working Group notes that there are significant differences between the various professions in relation to the complexity and duration of cases, which should be taken into account in determining OHPA's fee.

Recommendation 20

The formula that OHPA will apply to determine its fee should take account of the complexity and the likely duration of cases as well as the volume of cases.

- 6.8. The GMC and the GOC will be able to make representations to OHPA if they believe that the proposed periodic fee is incorrect or unfair, before the actual fee is finalised. Our understanding is that, if OHPA should fail to take proper account of these representations, the Treasury would have the power to refuse to approve the fee.
- 6.9. The costs of adjudication will be apportioned between the regulators taking account of the number and average length of cases heard by OHPA in respect of each regulator for which it provides adjudication services. This will help to avoid cross subsidy.
- 6.10. Regulations will set out how OHPA's fee is calculated and collected. It would be desirable for OHPA to have the flexibility to carry over any underspend from one year to the next in order to build up reserves which would provide for greater flexibility and reduce OHPA's dependence on Government funding.

Recommendation 21

It would be inappropriate for OHPA to build up significant reserves of funding. However, OHPA should have the flexibility to carry over funding from one financial year to the next.

7. Information

Publication and Disclosure of Information

- 7.1. OHPA should publish a range of information to enable scrutiny, including:
- Minutes of meetings of the Board (and of any committees);
 - Annual report and strategic plan;
 - OHPA's periodic fee for the forthcoming year;
 - Procedural rules;
 - Panels' determinations; and
 - Schemes relating to equality and diversity
- 7.2. OHPA will be responsible for publishing the panels' determinations. However, it is important that regulators' registers remain the definitive source of information about registration status, including any conditions or undertakings. The effect of a determination on registration should therefore, be a matter for publishing by the relevant bodies regulating healthcare professionals. It would make sense to include hyperlinks between OHPA's website and the regulators' registers.
- 7.3. When members of the public request it, OHPA should provide factual details about the status of a case, including the fact that a case has been received for adjudication and the nature of the allegations. A formal policy on the publication and disclosure of information will need to be developed by OHPA's initial board. The Working Group noted that, under the Freedom of Information Act 2000, every public authority is expected to develop a "Publication Scheme" which relates to the publication of its information and must be approved by the Information Commissioner.
- 7.4. The Working Group recognises that disclosure of information relating to a practitioner's health is particularly sensitive and that OHPA's board will need to consider these sensitivities in developing its policy on disclosure and its scheme of publication.

Recommendation 22

OHPA's initial board should agree to develop as soon as possible a "Publication Scheme" governing the publication and disclosure of information which should include policies in respect of the publication of Minutes of meetings of the board, OHPA's fee, factual details about the status of individual cases, and panels' determinations. The scheme should be developed in consultation with interested parties.

Relation Between Local and National Requirements for Information

- 7.5. The 'Tackling Concerns Locally' Working Group's "Information Management Subgroup" has been charged with considering the information needed to support local processes on which the Group was represented, for monitoring standards of care provided to patients, including any concerns raised locally about practitioners and the role of national regulatory bodies.
- 7.6. The "Information Management Subgroup" has defined a dataset of information relating to clinical outcomes and concerns raised about practitioners that should be collected.
- 7.7. The "Information Management Subgroup" has identified three main options for more comprehensive systems of information to support the regulation of professionals and clinical governance:
- purely local – the information is held by a local healthcare organisation (where one can be identified) and selective information is transferred to other organisations as and when required under a duty of cooperation;
 - purely central – the information is held on a central database and individual healthcare organisations, professionals themselves, patients and members of the public have access to different subsets of this information, with safeguards on levels of access. This is the option favoured by the Shipman Inquiry in its Fifth report; or
 - a mixed solution – most of the detailed information is held locally, but a subset of core information is also held on a central database, eg held by the national regulator, and is available to individual healthcare organisations, professionals and members of the public as in option (ii).
- 7.8. The Working Group understand that the Department of Health is shortly to commission a study to explore further the requirements for an approach to sharing information in England to support the regulation of healthcare professionals. The information subgroup will reconvene to review its recommendations once this study has been completed.

8. Equality and Diversity

- 8.1. The Working Group was also asked to consider equality and diversity, both in relation to the establishment of OHPA and in procedures relating to fitness to practise more generally.
- 8.2. Currently, not all of the regulators routinely monitor information relating to diversity and equality in respect of referrals made to them. The Working Group takes the view that all regulators should collect and monitor information on diversity and equality for all registrants. It is important that the information collected should be in a form which enables easy use and analysis of trends.
- 8.3. The regulators should regularly monitor and review, from the perspective of equality and diversity, their referrals to OHPA.

Recommendation 23

The bodies regulating healthcare professionals should collect and monitor information relating to equality and diversity as part of routine collection of data. Information relating to equality and diversity should also be collected and monitored in respect of healthcare professionals against whom complaints are made to the bodies regulating healthcare professionals and referrals for adjudication, including referrals to OHPA.

Recommendation 24

The regulators should seek to standardise the information collected to support their duties relating to equality and diversity. This will facilitate a variety of uses of data and analysis of trends.

9. Transition

- 9.1. Given the time available to the Working Group to consider a wide range of complex issues, it has not proved possible to make detailed recommendations about the transitional arrangements for OHPA. It is clear that further work needs to be undertaken to support the transfer of functions and staff from the GMC to OHPA. In particular, the following matters need to be addressed as a priority:
- (i) The OHPA's Board should be appointed at an early stage, before the body is set up, in order to oversee the development of detailed operating procedures, HR, finance and governance.
 - (ii) OHPA's Board should draw up rules and procedures (including a statement on governance);
 - (iii) An IT system which supports case-management and analysis of trends will be required;
 - (iv) There will need to be a method for exchanging information with the bodies regulating healthcare professionals on the most cost-effective basis;
 - (v) The location of OHPA must be determined;
 - (vi) Regulations for the setting of fees need to be prepared by the Department and consulted on before April 2011;
 - (vii) Requirements for staffing need to be finalised in order to enable due consultation with staff affected by the transfer of functions to begin; and
 - (viii) The amount and sources of funding required to support OHPA during the transition period should be identified.

Recommendation 25

OHPA's initial board should be appointed at an early stage, before the body becomes operational, in order to oversee the detailed work needed to establish policies and procedures.

- 9.2. The relationship between OHPA and the GMC will be critical to the success of the transition. We suggest that a detailed memorandum of understanding should be prepared between OHPA and the GMC before OHPA becomes operational.

Recommendation 26

OHPA's Board should agree a Memorandum of Understanding with the GMC and the Department in order to define relationships and respective responsibilities. As OHPA's remit extends, a similar Memorandum of Understanding should be agreed with the GOC.

- 9.3. The Working Group has seen the Department's early planning assumptions for the establishment of OHPA. Ensuring the continuity of essential business during the

transition will be critical to ensuring that all interested parties retain confidence in OHPA. It is important that a change of this magnitude is well managed and that changes are not rushed through. Based on the Department's estimates we believe that it should be feasible for OHPA to become operational by April 2011.

- 9.4. A clear protocol will need to be agreed between the GMC and OHPA prior to transition about the handling of cases which have commenced, but not been concluded at the point of transition, and those where a review is pending.
- 9.5. The Working Group notes that CHRE recently recommended that consideration be given to the transfer of the relevant responsibilities of the NMC's Conduct and Competence Committee to OHPA at an early stage. In the long run this is desirable. However, it is important that NMC resolves current challenges before any decision to transfer the NMC's adjudication functions to OHPA is taken.
- 9.6. While it makes sense to limit OHPA's remit in the first instance, OHPA should seek to extend its remit to the other regulators as soon as it is practical to do so, after OHPA becomes operational, beginning with the GOC.
- 9.7. OHPA should aim to extend its remit to the GOC's cases relating to fitness to practise as soon as possible. OHPA's initial board should ensure that steps are taken, while it is still in shadow form, to achieve this. OHPA should be aware that any delay in taking over adjudication of the GOC's cases could cause uncertainty for the GOC and may also reduce the likelihood of other regulators wishing to transfer adjudication of their cases to OHPA. Further, delay in OHPA's taking over the GOC's responsibility for adjudication will reduce OHPA's credibility in the eyes of the GOC's registrants.

Recommendation 27

OHPA should aim to extend its remit to the GOC's cases relating to fitness to practise as soon as possible.

- 9.8. It would make sense to build an independent review of OHPA, within two years of its becoming operational, into planning assumptions.
- 9.9. It is the Department's expectation that all of the regulators will eventually choose to move to independent adjudication by OHPA. We would encourage them to do so. It would greatly facilitate the complete transition to independent adjudication if the other regulators aligned their adjudication processes with OHPA's before any transfer. We note that some progress has already been made in this area through the requirement, in the 2008 Act, that all adjudication should use the civil standard of proof. With this end in mind, it would be helpful if the Department, CHRE and, where appropriate, the Devolved Administrations could consider the scope for aligning adjudication procedures across the regulatory bodies.

Recommendation 28

For those regulators which have not already expressed a desire to move to independent adjudication by OHPA, the Department, working with CHRE and, where appropriate the Devolved Administrations, should consider whether it

would be desirable to seek to reform aspects of their existing adjudication processes in order to facilitate a future transfer to OHPA.

9.10. This report has made recommendations about OHPA's operating model. However, a great deal of detailed work is needed to refine the detail of proposals and to put in place the practical arrangements for the new body. An "implementation steering group", to include the GMC and the GOC, should be established to support the implementation of OHPA, at least until such time as OHPA's initial board is in place, with the necessary resources to take forward implementation.

Recommendation 29

An "implementation steering group" should be established to support the implementation of OHPA, at least until such time as OHPA's initial board is in place.

Annex A: Current Arrangements in Respect of Procedures relating to cases of Fitness to Practise

Regulatory Body	Standard Of Proof	Council Members able to sit on Panels	Panels Involved in Proceedings
General Medical Council	Civil from May 2008	No	Fitness to Practise.
General Optical Council	Criminal Civil from November 2008	No	Fitness to Practise Hearings Panel
General Osteopathic Council	Civil	Yes	Investigating Committee, Professional Conduct Committee, Health Committee
Health Professions Council	Civil	No	Conduct and Competence Committee, Investigating Committee, Health Committee
General Dental Council	Civil	No	Fitness to Practise.
Royal Pharmaceutical Society of Great Britain	Civil	No	Statutory Committee (old pre 207 rules only), Investigating Committee, Disciplinary Committee, Health Committee
General Chiropractic Council	Civil	Yes	Investigating Committee, Health Committee, Professional Conduct Committee
Nursing and Midwifery Council	Criminal Civil from November 2008	Yes	Investigating Committee, Conduct and Competence Committee, Professional Conduct Committee, Health Committee Panel

Annex B: Features of an Executive Non-Departmental Public Body

An Executive Non-Departmental Public Body (ENDPB) is established by primary legislation and operates at a degree of independence from Ministers but is constrained by the legislative framework under which Ministers establish it.

Two examples of ENDPBs with regulatory or adjudicatory functions are the Independent Police Complaints Commission and the Financial Services Authority. Both are accountable to Treasury Ministers. In the sphere of health, ENDPBs in England include Monitor, the Appointments Commission, and the Healthcare Commission. All of these bodies have demonstrated their independence from their sponsoring Departments in their decision-making processes.

An ENDPB does not:

- have to refer any judgements taken in the exercise of its functions to the sponsor Department;
- have such judgements and decisions overturned by its sponsor Department; or
- have to give its sponsor Department details of its judgements and decisions.

Accountability

An ENDPB is accountable to Parliament through the Secretary of State for how it is run and for its financial probity.

Business Planning and Setting a Budget

An ENDPB must:

- submit an annual business plan to the sponsor department for agreement on priorities. It can be required to consult with stakeholders;
- have its budget and targets relating to numbers of staff signed off by its sponsor department to determine how it will operate administratively;
- submit monthly financial reports to its host department; and
- report to its sponsor department on a quarterly basis about its performance in meeting its strategic targets.

In addition, an ENDP:

- is subject to the standards of probity required in the public sector and audited by NAO;
- can be questioned by the Public Accounts Committee if there are any concerns about how it is run; and

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- can receive payments by way of grant-in-aid.

Conduct of Business

As regards ENDPBs in the health sector normally;

- members of the board are appointed by the Appointments Commission;
- the remuneration of their senior staff is overseen by the Department of Health's Pay and Performance Oversight Committee to ensure that pay is in line with Treasury guidelines; and
- rules and regulations are made after consultation and subject to Parliamentary approval.

Annex C: The Principles of an Effective Board

The following principles of an effective board were identified by the Council for Healthcare Regulatory Excellence following a review of literature and presented to the 'Enhancing Confidence in the Healthcare Professional Regulators Working Group' in October 2007.

- The Board should determine the purpose and values of the organisation, and review these regularly;
- The Board should be forward thinking and outward looking, focussing on the future, assessing the environment, engaging with the outside world, and setting strategy;
- The Board should determine the desired outcomes and outputs of the organisation in support of its purpose and values;
- For each of its desired outcomes and outputs, the Board should decide the level of detail to which it wishes to set the organisation's policy;
- Any greater level of detail of policy formulation should then be a matter for the determination of the chief executive and staff;
- The means by which the outcomes and outputs of the organisation are achieved should be a matter for the chief executive and staff; the Board should not distract itself with the operational matters;
- The chief executive should be accountable to the Board for the achievement of the organisation's outcomes and outputs;
- In assessing the extent to which the outcomes and outputs have been achieved, the Board must have pre-determined criteria which are known to the chief executive and staff;
- The Board should engage with its ownership regularly and be confident that it understands its ownership's views and priorities;
- The membership of the Board should be capable and skilled to represent the interests of the ownership; this should not be done in a tokenistic way;
- Information received and considered by the Board should support one of two goals – to enable decision making, or to fulfil control and monitoring processes; and
- The Board must govern itself well, with clear descriptions of its role and that of its chair, and its members, with agreed methods of working and self-discipline to ensure that time is used efficiently.

Annex D: The Role of Non-Executive Members of Council

The following table sets out the role of Members of Council as defined by the General Medical Council (GMC) and the General Optical Council (GOC):

GMC	GOC
<p>The GMC has defined the role of a Member of Council as follows:</p> <p>Provide strategic direction for the GMC by:</p> <ul style="list-style-type: none"> • Setting the framework for policy and operational performance that provides an integrated regulatory framework that keeps together the GMC’s four interlocking functions. • Contributing to the development of policy. <p>Ensure and review the effectiveness of the GMC in fulfilling its statutory purpose by:</p> <ul style="list-style-type: none"> • Promoting the work of the GMC externally, promoting public and professional confidence and support for the GMC and its work. • Evaluating the effectiveness of the Council in fulfilling its statutory purpose. <p>Exercise oversight of the GMC’s activities by ensuring that they are</p>	<p>The Council is made up of professional and lay members with different backgrounds and skills, all of whom share the same duty of public protection and oversee the range of regulatory processes. Members share corporate responsibility for:</p> <ul style="list-style-type: none"> • Policy and strategy decision making in the interests of public protection • Holding the Executive to account • Equality of opportunity, accountability, openness and transparency • Financial Stewardship • Communication - with the public, registrants, professional bodies, government, and other interested parties • Promoting public confidence in regulation and enhancing the Council’s reputation

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aligned with the strategic direction by:

- Holding the Executive to account for the management of the day to day operations of the GMC, ensuring that its resources are used properly.
- Ensuring that decisions are made in accordance with our charitable purpose and your duty as a trustee.

Annex E: Core Areas of Required Competence for Members of Council

The following table provides a summary of the main areas of required competence for Members of Council for those Councils which submitted evidence to the Working Group.

HPC	GCC	GDC	GMC	GOC	NMC	RPSGB
			Ability to command the confidence and support of the GMC's key interest groups			Commanding the respect of the public and professions
Focus on Patients	Focus on public interest/ involvement	Focus on public interest/ involvement	Capacity and skill to understand the priorities of the GMC's key interest groups	Ability to command the confidence and support of the GOC's key stakeholders	Focus on public interest/ involvement	Being able to view situations from a patient's and member of the public's perspective
	Strategic direction	Strategic direction	Ability to contribute to strategic	Ability to provide strategic direction.	Strategic direction	Strategic Direction

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HPC	GCC	GDC	GMC	GOC	NMC	RPSGB
			direction			
	Effective influencing and communication	Effective influence and communication	Ability to communicate effectively and influence others	Ability to communicate effectively and influence others	Effective influence and communication	Good communication skills
Team-work	Teamwork	Team-work	Ability to build relationships and work effectively as part of a team	Ability to build relationships and work effectively as part of a team	Team-work	Team-work
Holding to account	Holding to account	Holding to account	Being accountable for own actions and to hold others to account	Being accountable for one's own actions and able to hold others to account.	Holding to account	Holding to account
Intellectual flexibility <i>(Be able to build constructive relationships and work effectively in a team of people and be</i>	Intellectual flexibility	Intellectual flexibility	Intellectual flexibility and sound judgment	Ability to exercise intellectual flexibility and sound judgement	Intellectual flexibility	Intellectual flexibility

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HPC	GCC	GDC	GMC	GOC	NMC	RPSGB
<i>able to let others take on the operational work</i>						
			Probity and fairness			Probity
Self belief and drive (<i>Be willing to accept a challenge and prepared to stand up for your views</i>)	Self belief and drive	Self belief and drive		Demonstrable evidence of self belief and drive	Self belief and drive	Self belief and drive
						Sound judgment
						Being aware of and taking into account the profession's views

Annex F: Core Areas of Required Competence for Panellists

Many of the bodies regulating healthcare professionals have developed frameworks of competence for their panellists hearing cases of fitness to practise. The following table sets out the areas of competence required of those Councils submitting evidence to the Working Group and of members of tribunals' panels as required by the Judicial Appointments Commission, the body responsible for making independent appointments to tribunals:

HPC	GCC	GDC	GMC	GOC	NMC	RPSGB	JAC
Experience of participating on quasi-judicial proceedings in equivalent situations. (Desirable)	Application of relevant legislation	Experience of previous service on a tribunal, board, council, or other committee and/or judicial work and an understanding of the healthcare system (Desirable)		An understanding or the ability to gain an understanding of legislation on Human Rights and its application within quasi-judicial processes	Working within a legislative framework	Application of Law and procedure	Appropriate knowledge of the law and its underlying principles
An understanding of the importance of upholding public interest in all that HPC	Understanding of committee function in providing expertise in protecting the public	Integrity	Integrity	A commitment to upholding the public interest in professional regulation		Understanding the committee's function in securing both the protection of the public	Integrity and independence of mind

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HPC	GCC	GDC	GMC	GOC	NMC	RPSGB	JAC
undertakes Commitment to the seven principles of public life.				A commitment to the Seven Principles of Public Life		and a fair hearing	
Experience of working collaboratively sufficient to support networking and consulting with a broad range of stakeholders	Working in a collaborative and professional manner		Work with others	A proven ability to work in a team	Collaborative and professional skills in communication	Working in a collaborative and professional manner	Ability to explain the procedure and any decisions reached clearly and succinctly to all those involved
Ability to grasp the detail of a wide range of issues and contribute to objective decision-making by exercising sound judgement.	Reaching decisions fairly	Comprehension	Decision making	Ability to understand and analyse complex information and to reach judgements from conflicting evidence	Skills in analysis and decision-making	Decision-making	Ability quickly to absorb and analyse information

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HPC	GCC	GDC	GMC	GOC	NMC	RPSGB	JAC
		Social awareness	Commitment to Equal Opportunities	Commitment to the principles of equal opportunity and racial equality and an ability to gain an understanding of the issues involved	Integrity and valuing diversity	Equal treatment	Ability to treat everyone with respect and sensitivity whatever their background; Willingness to listen with patience and courtesy
		Sound judgement	Sound judgement				Sound judgement
Well developed verbal and skills in written communication	Communication and conduct during hearing	Communication and interpersonal skills	Communication Skills	Well developed skills in interpersonal relationships and communication		Communication and conduct of hearing	
	Leadership of the committee and proceedings				Skills in Leadership		Ability to work constructively with others (including skills in leadership and management where appropriate)

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HPC	GCC	GDC	GMC	GOC	NMC	RPSGB	JAC
Demonstrable experience of contributing to and encouraging open and active accountability to the public and the professions				The ability to embrace the concept of open accountability to the public Proven experience of having made a contribution to the concept of open accountability to the public			
Ability to explain and justify decisions and promote HPC's interests to all stakeholders concerned							
		Maintain confidentiality	Confidentiality				
		Maturity and sound temperament	Sound temperament				
		Commitment and reliability					

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HPC	GCC	GDC	GMC	GOC	NMC	RPSGB	JAC
							High level of expertise in chosen area or profession
				Sufficient gravitas to command the confidence of the public, employers, institutions involved in training and the health professions			Ability to inspire respect and confidence
							Ability to maintain authority when challenged
							Ability to work at speed and under pressure;
							Ability to organise time effectively and produce clear reasoned judgments expeditiously;
							Decisiveness

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HPC	GCC	GDC	GMC	GOC	NMC	RPSGB	JAC
							Ability and willingness to learn and develop professionally
			IT literacy				
			Genuine interest				
			Intellectual and analytical ability				

Annex G: Training for Members of Panels

The bodies regulating healthcare professionals have adopted the following of training for all panellists:

HPC	GCC	GDC	GMC	GOC	NMC	RPSGB
The legal framework (the Health Professions Order and the rules made under it)	The legislation	The legal framework	The legislative background	Regulatory issues and legislation	Relevant legislation, guidance and administrative processes	Society's framework of governance; Pharmacists' Code of ethics and standards expected of registrants and conditions of registration
	Competence required of Committee Members		The role of panellists	The role of the panellist and the required standards and competence	The role of the panellist and the required standards and competence	
	The role of the GCC and the public interest	The role of the GDC and the panel dealing with cases of fitness to practice	Role of the GMC		The legal duties and overriding objectives of NMC	

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HPC	GCC	GDC	GMC	GOC	NMC	RPSGB
	Concepts of a fair hearing			Fairness for all		Concepts of a fair hearing
Evidence and the standard of proof	The standard and burden of proof			Standard of Proof		Standard and burden of proof
	Complaints – their journey through the GCC	The route of cases to the Practice Committee	Overview of GMC procedures			
Conduct and competence and health panels; Preliminary steps - summoning witnesses - services of documents - expert witnesses - adjournments - locations of hearings		The process of hearing a case		Role of the presenting officer, registrants representative and the legal adviser	Individual responsibilities relating to the process, tone and conduct of proceedings of the FtP	Case-management

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HPC	GCC	GDC	GMC	GOC	NMC	RPSGB
	Issues at a hearing and how to cope with them					
Interim Orders	Interim Orders					
	Good questioning and impartiality	Principles of good questioning		Effective questioning	Questioning witnesses	
Sanctions Conduct of a hearing	Guidance on Indicative Sanctions	Serious Professional Misconduct, impairment of fitness to practise and sanctions	Sanctions issues, including the GMC's Indicative Sanctions Guidance	Guidance on Indicative sanctions How to apply conditions		(Chairs only) guidance on indicative sanctions
Decision-making	Decision-making and drafting Determinations		Drafting a determination	Decision making and giving sound reasons for decisions	Decision-making and Documenting and giving reasons for decisions	Decision-making and giving reasons

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HPC	GCC	GDC	GMC	GOC	NMC	RPSGB
	CHRE and its role in GCC's decisions					
	A review of relevant legal cases	Recent appeals outcomes and implications	Key appeal judgements			(Chair only) case study/case law
The standards (of proficiency and conduct, performance and ethics)		Standards expected of a dental professional				Practice and governance relating to pharmacy
Human rights						
Skills in engagement			Effective questioning			
The role of the investigating panel		The role of members of a panel				
Equality and diversity		Equality and diversity	Equality and Diversity Issues			
Appeals relating to registration						
The process relating to health and character			Health Assessments			

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HPC	GCC	GDC	GMC	GOC	NMC	RPSGB
					Recognise personal prejudices and the need to set them aside when working on panels	
					Listening and communicating	
				Note taking	Structured note taking	
					Giving written and verbal feedback to others	
						Benevolent Fund and Scheme of Listening Friend
		Acting in the public interest	Acting in the public interest			Acting in the public interest

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HPC	GCC	GDC	GMC	GOC	NMC	RPSGB
						(Chairs only) guidance on applications for restoration to register
						(Chairs only) Conditions bank
						(Chairs only) Assessments of costs
						(Chairs only) dealing with unrepresented individuals or individuals who may have problems with their health
						(Chairs only) The test of "real prospect" criteria for referral and decision-tree
						Mitigation

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HPC	GCC	GDC	GMC	GOC	NMC	RPSGB
			The performance assessment process	Self assessment and appraisal process		

Annex H: Respondents to the Working Group

In addition to the organisations represented on the Working Group, the following bodies and individuals provided submissions and comments.

Association of Optometrists
British Medical Association
Care Standards Tribunal
Dame Carol Black
Department of Health, Social Services and Public Safety, Northern Ireland
Dr M E J Wise
General Chiropractic Council
General Osteopathic Council
Health Professions Council
Medical and Dental Defence Union of Scotland
Medical Defence Union
Mental Health Act Commission
Royal Pharmaceutical Society of Great Britain
Scottish Executive Health Department
The Regulation and Quality Improvement Authority, Northern Ireland