



How should the Medical Council be formed? Insights from the British approach –
A paper submitted to the Bills Committee on Medical Registration (Amendment) Bill for discussion by the Hong Kong Democratic Foundation

- The question of how the Medical Council of Hong Kong should be formed has been contentious.
 - A 2007 British Government White Paper on reforming the regulation of health professionals, including doctors, nurses, dentists, pharmacists and others may provide insights into this question and help clarify the issues involved.
 - The White Paper is entitled: “*Trust, Assurance and Safety – The Regulation of Health Professionals in the 21st Century*”.
 - This submission will first relate the White Paper’s understanding and handling of the question of how councils for regulating health professionals should be formed; it ends with a list of issues that needs to be addressed when designing a new method for forming Hong Kong’s Medical Council.
 - We hope this submission will help put the deliberation in perspective and facilitate the search for a good method of forming the Medical Council
1. *Functions of councils for regulating health professionals*
- At the outset of the White Paper, the Chief Medical Officer for England states that the “primary purpose of professional regulation is to **ensure patient safety.**”
 - To the end of achieving this primary purpose, the White Paper lays out a number of core functions for health professional regulatory councils in Britain:
 - set and promote standards for health professionals
 - ensure that health professionals continue to meet the standards set
 - administer procedures that deal with health professionals whose fitness to practise has been called into question
 - ensure high standards of education for health professionals
2. *Independence as a necessary condition for discharging the core functions*
- To ensure that health professional councils fairly and effectively discharge the said core functions, the White Paper enjoins that the councils **must not only be independent in their actions but must also be seen to be independent in their actions.**
 - Regarding the essence of independence, the White Paper points to a number of manifestations that can be observed:
 - “[P]atients, the public and health professionals need to be able to take it for granted that

香港民主促進會

Hong Kong Democratic Foundation

Unit 7, 5/F, Eastern Harbour Centre, 28 Hoi Chak Street, Quarry Bay, Hong Kong

Tel: (852) 3104 2767 Fax: (852) 2187 2305

E-mail: hkdf@hkdf.org Web site: <http://www.hkdf.org>

the councils act dispassionately and without undue regard to any one particular interest, pressure or influence”

- The councils “must be separate from the Government, constitutionally insulated from day-to-day political pressures”
- The councils “must be independent of those who employ health professionals ...to ensure that employer interests are not perceived to weaken safeguards for the public or undermine the fair conduct of regulation”
- The councils “must be independent of health professionals themselves, so that they are not thought to be beholden to a perceived natural esprit de corps with professional colleagues”
- The councils must sit outside “those differences and day-to-day disagreements” arising from viewpoints and perspectives of different stakeholders and “be guided solely by the role that Parliament has agreed for them on behalf of society”

3. *Independence hinges on how councils are formed*

- The White Paper is of the view that **councils’ independence hinges on how they are formed.**
- There are two dimensions to this problem:
 - **composition of councils**
 - **mechanism for returning council members**

3.1 *Professional majorities on councils undermine independence*

- The White Paper observes that all councils at the time (around 2007) had a professional majority in their membership, ranging from 52% to 100%:
 - Health Professions Council 52%
 - Nursing and Midwifery Council 52%
 - General Medical Council 60%
 - General Dental Council 66%
 - Royal Pharmaceutical Society of Great Britain 67%
 - General Osteopathic Council 67%
 - General Optical Council 68%
 - General Chiropractic Council 70%
 - Pharmaceutical Society of Northern Ireland 100%
- The White Paper argues that “[t]he **existence of professional majorities undermines councils’ independence, and their perceived independence**, by allowing doubt to be expressed about the weight of opinion they carry in council discussions and decisions, and the perceived reluctance of some [health professionals] to the ending of professional majorities.”

3.2 *Electing council members undermine independence*

- Regarding the mechanism for returning council members, the White Paper is rather critical of elections lest they undermine the independence of the councils.
- Elections are a mechanism which incentivizes those elected to be responsive to the interests and concerns of their electorate.
- Thus, if professional members of councils are elected by their peers, it is very likely that they will be responsive above all to the particular interests and concerns of the latter. It will then be very difficult for councils to be perceived as independent.

- The White Paper makes this comment on the impact of elections on independence: “[some councils] are seen to be partial because [they] are thought to be elected to represent the particular interests of health professionals.”
- In this connection, we would also like to draw the Bills Committee’s attention to Dame Janet Smith’s comments in the Fifth Report of the Shipman Inquiry (2004) on the impacts of elections on England’s General Medical Council (GMC) in the discharge of its duty and the mistaken perception many doctors held regarding the representative role of the GMC:
 - “For an organisation like the GMC, issues are bound to arise in which there is a conflict between the interests of doctors and those of patients and of the public. Members [of the GMC] have to deal with that conflict. **To do their work properly as members of a regulatory body, they have to put the public interest first. That is very difficult for a member who depends for his/her position on an electorate of doctors. ... At present, the GMC is effectively controlled by elected members. It seems to me that one of the fundamental problems for the GMC is the perception, shared by many doctors, that it is supposed to be ‘representing’ them. It is not; it is regulating them.**”
- By the same token, we may add that if lay members of the councils are elected by certain preordained sectors of society, they are also very likely to be responsive above all to the particular concerns of those sectors. In such a scenario, unless the concerns of the chosen sectors overlap with those of society at large, members of the public who are excluded from electing lay members to the councils may see their concerns at risk of being overlooked. The independence of the councils may thus be similarly in jeopardy.
- However, “[i]t is not practicable to hold elections to the governing councils of the regulators based on the broad and inclusive electorate that would be needed to ensure confidence in the independence of the regulators”, the White Paper reasons,

3.3 *British approach to ensuring independence*

3.3a *On the composition of councils*

- The British approach to ensuring the independence of all councils in this regard is to require that **“all councils should be constituted to ensure that professionals do not form a majority.”**
- At the minimum, the White Paper says, the proportions of professional members and lay members on the councils must be equal.
- If councils adopt this minimum option in their memberships, the White Paper requires that “they will put in place packages of measures to demonstrate to the public, patients and Parliament their commitment to conducting their responsibilities in a manner that commands public confidence and puts an end to accusations of partiality.”
- To fully realize the spirit of lay participation, the White Paper further adds that lay members must not be “perceived to be deliberately drawn from groups that might be naturally sympathetic to professional interests, such as retired members of the profession”, or else members thus drawn will risk compromising the original intent of increasing the numbers of lay members on the councils.
- Lay members should reflect the society at large, which the councils are supposed to serve.

3.3b *On the method of returning council members*

- The British approach to ensuring the independence of all councils in this regard is to have all

members of the councils appointed independently through an independent process against clearly specified criteria and competencies.

- The White Paper nonetheless has not spelled out the details of the appointment process. Details are left for later determination.
- As of present, the appointments to council membership are made in the following ways:
 - The power of appointment to healthcare professional councils in Britain rests with the Privy Council (advisory body to the Monarch, members appointed by the Queen on Prime Minister's advice).
 - Prior to Privy Council appointment, however, the authority of setting the processes and principles for recruiting suitable candidates for appointment is in the hands of the Professional Standards Authority for Health and Social Care, an independent body overseeing all healthcare professional councils in Britain.
 - Individual health professional councils are responsible for several matters:
 - Developing their own recruitment processes that suit local needs
 - Demonstrating to the Professional Standards Authority that their processes meet the required principles
 - Recruiting suitable candidates as they see fit
 - Recommending such candidates for Privy Council appointment
 - To gain the confidence of the Privy Council regarding their recommendation of candidates for appointment, the recruitment processes of health professional councils are expected to be **a publicly-advertised, merit-based open competitive selection process and are required to meet the four following principles of a good appointment process** (these are stated in “*Good practice in making council appointments: Principles, guidance and the scrutiny process for regulators making appointments which are subject to section 25C scrutiny*” published by the Professional Standards Authority for Health and Social Care in 2017):
 - **Merit** – All selection decisions must be based on evidence of candidates' merit. This means appointing and reappointing individuals whose skills and experience have been judged to best meet the needs of the regulator and, where appropriate, recommending the removal or suspension of individuals where there is a strong case for doing so.
 - **Fairness** – Processes used in appointments must be objective, impartial and applied consistently. Processes must promote equality and are free from discrimination, harassment and victimization.
 - **Transparency and openness** – Public appointments must be advertised in a way that is designed to attract a strong and diverse field of suitable candidates. Information about posts and appointment processes is publicly available. The reasons for any recommendations made to the Privy Council arising from these processes must be clear.
 - **Inspiring confidence** – The regulator's processes and systems must promote public confidence in regulation and take into account external perspectives where appropriate. All processes must meet the requirements of the regulator's legislative framework.

4. *Issues needed to be addressed*

- While the merits and demerits of the British approach to forming councils for regulating

health professionals remain to be debated, the approach highlights a number of issues that should be considered when looking for new ways to form health professional regulatory councils:

- **Is independence a necessary condition for councils in discharging their primary function of ensuring patient safety?**
 - **Is parity between professional members and lay members on councils a minimum requirement for establishing and sustaining confidence in councils' independence?**
 - **Does recruiting council members by election undermine councils' independence?**
 - **Can recruiting council members via open, merit-based competitive selection ensure councils' independence?**
 - **Is recruitment by open, merit-based competitive selection feasible in a non-democratic system?**
 - **Are there any alternative methods for forming healthcare professional councils so that their independence can be assured?**
- In the search for a new method of forming the Hong Kong Medical Council, advocates of different proposals should inform the public of how their proposals address the issues listed above or alternatively, why their proposals need not address the issues.

Hong Kong Democratic Foundation

22 June 2017