Department of Health

HEALTH PROFESSIONS REGULATION

Proposal for Legislative Change

March, 2004

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INTRODUCTION:

The Department of Health has prepared the following discussion paper in order to outline its position on the regulation of health professions, including its proposal for change, and to afford interested parties an opportunity to provide input.

THE NEED TO REGULATE HEALTH PROFESSIONS:

An open market operating freely provides consumers with the best combination of cost and choice for many services. In such cases, the principle of caveat emptor (buyer beware) applies. However, health care is different from most other services in important ways. First and foremost, health care is not usually an optional, but instead, is a necessary service. Moreover, there can be a large discrepancy between the service provider's and consumer's knowledge of a health discipline, placing the consumer at a distinct and, possibly, dangerous disadvantage. While health professions often undertake voluntary regulation of their practices, such voluntary regulation cannot ensure sufficient public protection. Therefore, government has a responsibility to protect the public by regulating health professions, where there is a significant risk that the improper performance of those professions could result in harm.

Since the chief goal of professional regulation in health care is to protect the public by controlling both the nature and quality of the services provided, regulation has an impact on health care throughout the province. In addition to protecting the public from harm, regulation of health professions can, and should, provide for high quality care and make professionals and their governing bodies accountable for their actions.

SELF-REGULATION:

While the provinces and territories have expressed some variations in their approach to regulation of health professions, regulation generally has been achieved by delegation of authority to professions to regulate themselves. There are several reasons

self-regulation has been chosen by governments as the most appropriate way to regulate. Since much of the work undertaken by health practitioners is complex and specialized, they themselves have the best understanding of their professions. Additionally, since the path to regulation frequently begins with voluntary self-regulation, professions acquire the experience of self-regulation, while governments lack that experience. Furthermore, governments usually lack the infrastructure, as well as the interest, in expanding their regulatory role.

Because self-regulation is a statutory delegation of authority to practitioners of a profession, self-regulation is a privilege, not a right. Government not only needs to ensure that self-regulation is necessary, but that it is carried out in the public interest.

It is not always possible to achieve regulation of a health profession through self-regulation. There can be cases where regulation of a health profession would be appropriate, but self-regulation would not be practicable. For example, a profession that provides invasive services, or services that would otherwise involve a significant risk of harm, could have too few members in a jurisdiction to fulfil the human resource and financial requirements of self-regulation. In such cases, it may be necessary to achieve regulation by other means.

HEALTH PROFESSIONS REGULATION IN NOVA SCOTIA:

At present, Nova Scotia has sixteen health statutes governing seventeen health professions, which are the responsibility of the Department of Health. There is legislation governing the practices of chiropractic, dentistry, dental assisting, dental hygiene, dental technology, denturism, dietetics, medical laboratory technology, medical radiation technology, medicine, nursing, occupational therapy, optical dispensing, optometry, pharmacy, physiotherapy, and psychology (see Appendix). In addition, several other professions are seeking regulation.

The existing statutes were developed by different health professionals and public employees at different times and are, consequently, inconsistent. Statutes have been enacted that prescribe scopes of practice exclusive to particular professions. Because the Department understands the benefits of consistent legislation, new health professions statutes, and older statutes that have been amended in recent years, have used the *Medical Act*, which was revised in 1996 and embodies widely accepted policy principles, as a model. In recent years the Department also has, as a matter of policy, attempted to apply consistent criteria to the determination of the appropriateness of regulation, when responding to requests for self-regulation.

Although the existing legislation is generally inconsistent, several of the recently

enacted or recently revised statutes have been improved, and made alike. For example, many older statutes included a complaints and disciplinary process that allowed only two options; a complaint either could be dismissed, or dealt with through a full hearing. Some of these statutes have been amended to include a process that can deal with less serious complaints in a measured manner, short of a full hearing. Under the former process, such complaints might have been dismissed. Also, some older statutes provided for disciplinary appeals to be considered by the regulatory body. In order to avoid the possibility that someone with previous knowledge of a case would be involved in adjudicating the appeal, amended statutes provide for appeals to the courts.

It has been the practice of the Department to maintain what would best be described as arm's-length relationships with the regulators of health professions. The existing statutes generally have no requirements for continuing accountability of regulators to government and, by extension, to the public. Consequently, the Department cannot be sure how well the existing legislation is achieving the objectives of professional regulation.

DEFICIENCIES OF EXISTING LEGISLATION:

Several significant deficiencies in the existing health professions framework have been identified.

focus of legislation

Some of the current health professions legislation, particularly the older statutes, could be described as profession-centered. Health professions legislation should advance and protect the public interest, while minimizing any possible negative consequences, such as increased costs of health services.

scopes of practice

One of the most important components of health professions legislation is the scope of practice. Early Nova Scotia statutes prescribed scopes of practice exclusive to particular professions, without much consideration of the impact on health care delivery. While this approach might have worked where there were few regulated professions, it has become strained as the number of regulated professions has increased. Maintaining exclusive scopes in legislation can have the undesirable results of rigidity, limited choice, and high costs. As well, exclusive scopes can increase the difficulty of health human resources planning, and can generate disputes between professions.

The desire for greater flexibility in choice, as well as for lower costs for consumers and the health system, supports consideration of overlapping scopes of practice.

policy

Co-ordinated policy direction is hindered by an increasing number of unique health professions statutes. Every time a statue is enacted or amended, there is a new set of variables involved (i.e. proponents, interested parties, priorities), which can produce different results. Invariably, professions seek to maximize their autonomy in legislation, with the result that it is increasingly difficult to hold the line on policy principles.

criteria for decision-making

The existing legislation does not prescribe criteria for determining which professions should be provided with the authority to self-regulate. An attempt to implement consistent criteria, without statutory authority, has met with limited success. As long as criteria are not prescribed by law, there is the possibility that subjective criteria, perhaps unrelated to protection of the public, could be considered.

volume of legislative items

The Department of Health deals with a large number of complex matters, many of which involve legislation. Consequently, the Department is responsible for a great many statutes. With two annual sittings of the House of Assembly, there are limited opportunities to advance legislative items. The fact that health professions are regulated by separate statutes makes it difficult to keep pace with the backlog of necessary new and amended legislation, due to the time required to deal with so many separate items and the limitation on the number of items that can be advanced.

accountability

Self-governing health professions have delegated authority, and are accountable to the government and the public. A significant deficiency of the existing health professions statutes is that they lack specific oversight and accountability provisions. For example, annual reporting by regulatory bodies to government is generally not required, and government never reviews the activities of regulatory bodies.

Existing legislation does provide a degree of accountability through the participation of public members on regulatory boards and committees, and in the requirement for Governor in Council approval of public interest regulations. However, it should be noted that the accountability provided by these measures is limited, since public

representatives, once appointed, are not obligated to maintain contact with government, and changes to regulations must be initiated by the professions.

ADDRESSING DEFICIENCIES:

The experience of working with the existing legislative framework for the regulation of health professions, with its numerous and significant deficiencies, has caused the Department of Health to consider options for improvement.

Since the chief goal of health professions legislation is to protect the public, it is important that the most efficacious means be used to achieve such protection. Using many statutes to regulate professions has resulted in an abundance of different provisions being employed. With time and experience, it has been learned that some provisions are better than others. The public should benefit from the best possible legislation for all regulated health professions.

omnibus legislation

Some of the deficiencies of the existing legislative regime could be addressed while maintaining separate statutes for all regulated professions. Perhaps omnibus legislation, to amend all existing statutes, could be enacted. Nevertheless, this approach would not easily resolve the scopes of practice issue, or the matter of determining which new professions should be regulated. As well, it would provide only a temporary solution, since many separate statutes would continue to exist, with the risk that individual amendments would eventually make them different again.

umbrella legislation

Deficiencies in the existing legislative regime could better be addressed through the enactment of uniform, or umbrella, legislation for health professions. Umbrella legislation is a single statute that applies to many, or all, of a jurisdiction's regulated health professions. It could include widely accepted policy principles, prescribe a process for determining which new professions should be regulated, and deal with scopes of practice in a co-ordinated manner.

other Canadian jurisdictions

Ontario, Alberta, and British Columbia have extensive experience with umbrella

legislation for health professions. While the common law intent of the legislation and the policy principles embodied in it is the same for all three provinces (e.g. registration, quality assurance, accountability, scopes, complaints and discipline), the approach is somewhat different in each case.

Most regulated health professions in Ontario have their own statutes, which work in conjunction with the *Regulated Health Professions Act, 1991*. Instead of having exclusive scopes of practice assigned to individual professions, a limited number of high risk "controlled acts" are assigned to professions, where appropriate.

In 1999, the Alberta Legislative Assembly passed the *Health Professions Act*, to regulate all self-governing professions. This legislation built on many years of experience with the *Health Disciplines Act*, which applied to eight regulated professions. When the Act is fully implemented, its provisions will apply to all regulated professions, each of which will have its own regulation dealing with profession-specific details. The Act eliminates exclusive scopes, and replaces them by a system based on "restricted activities".

The first *Health Professions Act* in British Columbia was enacted in 1990. Again, the umbrella statute applies to all regulated professions while, in this case, a unique regulation applies to each. Instead of using exclusive scopes of practice, in British Columbia high risk "reserved actions" can be performed only by the profession(s) authorized to perform them.

The deficiencies of the existing legislative framework for regulating health professions in Nova Scotia, and the successful experience with umbrella legislation in other jurisdictions, has led the Department of Health to conclude that the enactment of such legislation would be advisable.

BENEFITS OF UMBRELLA LEGISLATION:

Umbrella legislation provides an efficient means by which to standardize the regulatory process through the application of proven, efficacious provisions to the regulation of the range of health professions. Should it be necessary to change a legislative provision, amendment of the umbrella statute produces the change for all regulated professions. With umbrella legislation, the risk of implementing inconsistent legislative provisions for various professions is virtually eliminated.

A common statute prescribing uniform processes and functions, for all professions, enhances the transparency and understanding of professional regulation. Improved

understanding, in turn, can be expected to increase public confidence in such regulation. Umbrella legislation would clarify that regulation is an area of public policy concerned with protection of the public, not with the issues relating to any specific health profession. Additionally, it would emphasize that all health professions are part of a single health care system, with the same accountability to government and, ultimately, to the public. Accountability is needed for public confidence. Specific provisions could be incorporated that would improve government's oversight of and accountability for the regulation of health professions.

The rights of consumers who receive services from members of different disciplines would be the same, and would more likely be recognized by the courts as being intended to be the same. Additionally, this would be expected to improve the decisions made in situations of dispute, as jurisprudence develops.

Umbrella legislation that prescribes the process and criteria to be used for determining which professions should be regulated facilitates fairness, consistency, and openness in decision-making. It also would enable government to respond in a more timely manner, where a need to regulate a profession has been established.

The consistency of umbrella legislation could improve understanding, simplify matters for those who deal with the legislation, and discourage arbitrary actions. Also, it could provide professions with opportunities to more easily work together in seeking solutions to common problems. As well, with umbrella legislation, the old exclusive scopes model of regulation could be re-considered, thus potentially increasing flexibility and consumer choice in the health system. Finally, umbrella legislation could bring about regulatory equality for health professions, with all regulated professions being required to follow the same policy principles.

VIEW OF THE DEPARTMENT OF HEALTH:

Having approached the limits of improving health professions regulation within the existing framework, and understanding that improvement is necessary, the logical next step in addressing deficiencies is to implement a different legislative framework. The Department of Health believes that enactment of umbrella legislation for health professions, based on policy principles embodied in pertinent Ontario, Alberta, and British Columbia legislation, would be the best way to ensure that regulation is improved, in the public interest.

The chief goal of health professions regulation is public protection, and the Department wants to improve that protection through uniform legislative provisions and increased accountability to government. The Department needs to ensure that regulation serves

the public interest, so that the public can be justly confident in it. As well, the Department understands that, for regulation to work as intended, health care practitioners need to support the legislation governing their practices. Therefore, it is important for regulated professionals to understand that individual professions will continue to regulate themselves separately, even with uniform legislation.

The legislation envisioned by the Department would, for the first time in Nova Scotia, prescribe the criteria and process used in making decisions respecting which health professions would be provided with the authority to regulate themselves. Additionally, in order to provide the conditions for flexibility and consumer choice, there would be a replacement of exclusive scopes with assignment of high risk activities to appropriate professions. While the Department also supports legislation that would establish a health professions advisory board to provide advice to the Minister on matters referred by the Minister, it is not yet known if this is feasible.

Initially, the umbrella statute would be applied to any newly regulated professions, with a view to leaving, for a later date, the evaluation of its application to those professions that are already regulated.

One of the Department's chief purposes in developing umbrella legislation is to improve understanding. The legislative structure should support this goal. Therefore, the Department favours a single statute applying to all regulated professions, with a separate regulation for each profession addressing matters of significant public interest, approved by government, as well as a separate bylaw for each profession dealing with administrative matters, approved by the pertinent professionals.

GUIDING PRINCIPLES FOR CHANGE:

The following principles are provided to elucidate further the direction in which the Department of Health wishes to advance this project:

public interest

A profession should be regulated only when necessary for public protection. Only professions that satisfy prescribed consistent criteria should be regulated. Regulation should protect health care consumers from the incompetent practice of a profession, but those consumers should also have their choice of profession, where possible. Therefore, legislation should restrict only those activities that place the public at high risk of harm.

Professional practices need to be restricted to those persons with the required competencies, and those who practise a profession must be licensed. The requirements to practise should be primarily related to competence.

Although health professionals assume responsibility for regulation, they do so for the benefit of the public.

promotion of high-quality health care

Government and regulated health professions are responsible for ensuring that the care provided, both by newly licensed and experienced practitioners, is of high quality. To achieve such care, there need to be statutory and regulatory quality assurance provisions. Understanding that the most efficacious means of ensuring high quality care may vary from one profession to another, pertinent provisions could include continuing education programs, practice hours requirements, peer review, and/or practice visits.

transparency

For regulation to be successful, the public must understand it and have confidence in it. By having the criteria and process for determining which professions will be regulated prescribed in legislation, significant public participation in the regulatory process through government appointed public members, and public disciplinary hearings, the public can develop greater understanding of, and confidence in, professional regulation.

accountability

Government needs to increase its attention to the accountability of self-regulating health professions. Ways this could be achieved are through a statutory requirement for annual reporting, regular review of activities of colleges, continuing government approval of rules, government ability to make rules, and access for the public to an ombudsman.

fairness

While health professions legislation needs to be in the public interest, it needs to deal with both consumers and practitioners fairly, especially respecting complaints and discipline. For legislation to be effective, it is important that both the public and regulated professionals have confidence in the regulatory system. Licensing criteria and the application process need to be fair, with appropriate appeal rights for unsuccessful applicants. The complaints process needs to be able to deal appropriately with the full range of infractions and, again, appeals must be available.

regulatory equality

All unregulated professions should be treated equally when requesting that government delegate regulatory authority to them. All practitioners should be regulated by the same provisions.

PROPOSED LEGISLATIVE FRAMEWORK:

Government has not yet prepared draft legislation. However, it can be stated that Nova Scotia's legislation, undoubtedly, will be informed by umbrella legislation governing health professions in other jurisdictions. Therefore, legislative provisions will likely be constructed on a framework as follows:

Definitions

This is a standard part of legislation, in which the meanings of words or phrases found in the text are clarified.

Establishment of advisory board

The Minister of Health currently is advised by department staff, without a formal advisory body. While the feasibility of such a body will need to be explored and considered, such a board could greatly assist in implementing a new regulatory framework, by providing objective advice (e.g. concerning which professions to regulate and proposed statutory or regulatory amendments).

The advisory board could be completely external (i.e. no government members), completely internal (i.e. all government members), or a combination of both external and internal (i.e. non-government and government members). Regardless of its composition, the board would advise the health minister, while operating in a transparent manner and undertaking consultation, where appropriate.

Designation of health professions

The new legislation would prescribe a process used to determine whether regulation would be in the public interest, as well as criteria to be considered in making the determination.

In provinces where the criteria considered in determining the appropriateness of regulation already are prescribed in legislation or regulation, the underlying principles are consistent. The cardinal criterion concerns the degree of risk of harm to the public that the practice of a profession poses. Other important criteria relate to the existing regulatory context, the ability and willingness of the profession to undertake regulation in the public interest, the demonstrated ability of the profession's leadership, and the educational and other entry to practice requirements. The Department of Health has, for several years, used such criteria, which would now be placed in legislation or regulation.

Governance - establishment of professional college

This section would deal with the establishment of colleges for professions that are designated.

Objects of a college

The public interest goals of colleges would be elaborated, as they are in sections of some existing Nova Scotia health professions statutes.

Requirements for public representation

A widely accepted policy principle in health professions regulation is the participation of the public in the regulatory process. While such participation is not new in Nova Scotia, the minimum would be standardized at a level of one- third.

Scope of practice

Exclusive scopes would be eliminated. Scope of practice, for each profession regulated by the umbrella statute, would be defined by a scope statement combined, if appropriate, with specific high risk health care activities members of that profession would be permitted to undertake.

A scope statement would be relatively general, indicating what a specific health profession does, how the profession does it, and what the profession is attempting to achieve by doing it.

All high risk activities could be prescribed in the umbrella statute, or the statute could provide the authority for them to be prescribed in regulation. High risk activities assigned to a specific profession would be prescribed in that profession's separate regulation, along with any pertinent limitations.

Power to make regulations

This section would provide the authority to make regulations respecting public interest matters, with Governor in Council approval, similar to sections in existing statutes.

Existing health professions legislation relies on professions to initiate rule-making, which places government in a passive role. Since such passivity may not always be in the public interest, the new legislation would provide government with authority to make rules.

Power to make bylaws

Professional colleges would be provided with the authority to make bylaws, respecting administration, for the matters prescribed in this section.

Code of ethics and requirement for profession-specific ethical requirements

A code of ethics is standard for regulated health professions.

Transitional regulation

The authority to make regulations to facilitate transition of a profession from unregulated status, or regulation under another statute, to this legislation would be provided.

Mandatory registration/entry to practice; appeals

Registration would be required in order to practise, or to hold oneself out as practising, a regulated profession. Applicants for registration would be subjected to fair and objective entry to practice requirements, and would have a right to appeal registration decisions.

Reserved titles; use of titles

Protecting titles is a measure that serves the public interest, by providing the public with information about which health care practitioners are regulated and which are not. The assignment of titles and their use by a profession would be provided for, as would a prohibition of use by non-registrants.

Quality assurance

There would be an obligation to monitor and promote continuing professional competence. It would allow professions latitude in determining the best manner in which to fulfil the requirement including, but not limited to, continuing education, practice hours requirements, peer assessment, and practice visits.

Complaint and disciplinary process; appeals

Complaints and discipline would be dealt with though an open process, similar to that in recently enacted health professions statutes. The process would be designed to be straightforward, in order to facilitate understanding among both complainants and registrants. Means of dealing with a complete range of possible infractions would be provided. It would prescribe separate investigative and adjudicative bodies, and provide for appeals.

Accountability/oversight requirements

Oversight is essential to an effective regulatory system. It would continue to be a requirement that cabinet review and approve public interest regulations. In addition, a new provision, which already exists in other Canadian jurisdictions, would allow cabinet to make rules.

The public would have access to certain documentation, including registration information, regulations, bylaws, and disciplinary decisions of colleges. The public would also be permitted to refer concerns about a college to an ombudsman.

Annual reports, including information regarding complaints and discipline, as well as finances, would be required by the Minister of Health.

There would be a process for regular review, and for special review in cases of known problems, of activities of colleges. As well, there would be provisions respecting the minister of health assuming a regulatory role, in extraordinary circumstances.

Incorporation of professional practices

Incorporation provisions, similar to those included in some existing health professions statutes, would ensure that professionals are not inappropriately shielded against the liability claims of patients.

CONCLUSION

The Department of Health believes that, with the support of health professionals and other interested parties, improvements to the legislative framework for health professions can be made that will be beneficial for the public and health professions alike.

Appendix

REGULATED HEALTH PROFESSION	LEGISLATION
Chiropractic	Chiropractic Act
Dentistry	Dental Act
Dental Assisting	Dental Act
Dental Hygiene	Dental Act
Dentures	Denturists Act
Dental Technology	Dental Technicians Act
Dietetics	Professional Dietitians Act
Medical Laboratory Technology	Medical Laboratory Technology Act
Medical Radiation Technology	Medical Radiation Technologists Act
Medicine	Medical Act
Nursing	Licensed Practical Nurses Act, and Registered Nurses Act
Occupational Therapy	Occupational Therapists Act
Optical Dispensing	Dispensing Opticians Act
Optometry	Optometry Act
Pharmacy	Pharmacy Act
Physiotherapy	Physiotherapy Act
Psychology	Psychologists Act