

Council meeting 1 & 2 August 2006

**PUBLIC BUSINESS**

## **Revised Regulation 1: Election of Council members**

### **Election regulations review -- revisited**

#### **Purpose**

To consider suggestions for change to the election regulations.

#### **Strategic objective domain**

An organisation that consistently performs as a regulator, professional representative leader and publisher

#### **Recommendations**

- a) On the recommendation of the Governance Committee, the Council is asked to agree the following policy changes which have informed the draft regulations at Appendix C:
  - (i) *the regulations should provide powers for the Returning Officer to deal with a challenge at any stage during or up to 28 days after an election.*
  - (ii) *the regulations should provide that a candidate should live or work wholly or mainly in the constituency in which they are standing, and that a candidate should be able to stand in only one constituency (the guidance should make clear that the candidate's statement should set out where the candidate lives and where the candidate works).*
- b) The Council is asked to approve the draft regulations for gazetting.

#### **1. Background.**

The Society made a number of changes to the composition and governance of its Council in 2005. Once the first election had been carried out and the dust had settled, a review of the process was initiated, to see whether the regulations and procedures could be improved. An external consultant gave advice on these matters and a paper was brought to the Governance Committee. The Governance Committee made a number of decisions (see Appendix B) which in turn informed the preparation of new draft election regulations.

The Governance Committee's proposals for change and the draft new election regulations were submitted to the Council for approval in October 2005. However, Council agreed that the discussion of the proposed amendments be referred back to the Governance Committee for consideration in the light of comments from the Officers, and from any interested Council members, and be brought forward in time for implementation for the 2007 Council election.

A list of comments received since October 2005, together with explanatory notes, was submitted to the Governance Committee in May of this year, and the committee was

asked to consider its previous policy decisions in the light of the comments. These comments and notes, and the Committee's ensuing recommendations, follow in section 2 of this paper.

The Governance Committee's recommendations were submitted to Privy Council Advisers for initial comment. Their response is summarised in section 3.

The new draft election regulations that were originally submitted to Council in October 2005 have been revised in line with the Governance Committee's May 2006 recommendations, and Privy Council advisers' subsequent comments, and are attached as Appendix C.

These have also been re-numbered in line with the format now being used for all regulations. This format will also be applied to the regulations relating to appointed Council members.

The existing regulations are attached as Appendix D.

## **2. Issues**

### **2.1 Returning Officer**

- i) *We feel that the Returning Officer should not be the Secretary & Registrar as there is a clear conflict of interest, especially in the incidence of a complaint being made. We feel that this is a governance issue that should be resolved. (Officers' unofficial comments March 2006)*
- ii) *...the overwhelming power of the returning officer is underlined [in the regulations dealing with challenge to election results], making me wonder whether the Secretary and Registrar should perform this role (Council member)*

Presumably the same comment would apply if the Returning Officer was any other Society employee, as all employees are accountable to the Secretary & Registrar and through her to the Council.

The external consultant advised that the role of Returning Officer should not be outsourced and should continue to be undertaken by the Secretary & Registrar. He did so on the grounds that, while there are good reasons for outsourcing, as we do now, the bulk processes of distributing, receiving and counting voting forms, the Secretary/Returning Officer should have ultimate control and authority over the conduct of the Society's elections. The Society has regulatory authority over the profession: it needs to be able to demonstrate high standards in handling its own internal affairs, and it would be undesirable, should any major challenges, problems or wrongdoing occur, for their resolution to lie outside the Society.

The Governance Committee discussed the consultant's advice in September 2005. It was accepted that it was important that the Society be able to demonstrate high standards in handling its internal affairs and it would be undesirable, should any major challenges occur, that their resolution would lie outside the Society. Accordingly the committee accepted that the Secretary & Registrar should continue to perform the role of Returning Officer for the Council elections.

It is also relevant that the Council has agreed that the Returning Officer may, in consultation with the candidate, issue a statement of clarification if, in his opinion any part of an election statement refers to matters outside the current functions, powers and duties of the Society. It is not clear how an external person could have the knowledge to make such a judgement. Also, it is not clear where the potential conflict of interest lies. The Returning Officer works to ensure that the election is conducted in a robust and transparent way which is fair to candidates and which safeguards the reputation of the Society; this should not be in conflict with the interests of candidates.

The Governance Committee noted that the Returning Officer took advice as required including external legal and expert advice. It considered that this should be made explicit, both in this Council paper and in the guidance for candidates.

The Governance Committee accordingly proposes no change to the Council's existing policy on this issue.

## **2.2 Term of Office**

- i) *We would like to challenge the current regulation that no Council Member can be elected for more than three consecutive terms of office, each of up to three years. (Officers' unofficial comments March 2006)*
- ii) *I am still opposed to the limit on terms of office. Members will be just getting into their stride when they have to go. I know they can come back. But why force them to go and possibly lose the thread (Council member)*
- iii) *Agree with governance committee limit should be removed. (Council member)*

The Society had previously sought the views of Privy Council (PC) advisers on this point in September 2005. At that time their comments were that DH Ministers would not be likely to support a proposal that there should be no limit to the consecutive terms of office, as this would take the Society away from the common model for regulators and other public bodies in which Council members (of any kind) do not serve for more than 10-12 years, as recommended by the Office of the Commissioner for Public Appointments, whose Code of Practice states that 'the maximum period in office must not exceed 10 years on the same board'. PC advisers said that, while this guidance was not legally binding on the regulators of health professions, the Government had sought to follow it as a matter of policy. They added that this policy is followed by many bodies that the PC regulates in other fields, including higher education.

However, the Officers' unofficial comment above, and also the fact that the issue was raised again under Any Other Business at the April 2006 Council meeting, prompted the Chairman of the Governance Committee to ask the office to seek the views of Privy Council advisers once more on whether there should be a limit on consecutive terms of office served by a Council member. PC Advisers confirmed that, after careful consideration, they have nothing to add at the present time to their previous views.

A limit on terms of office in the prevailing political climate was considered a facet of good governance. The Governance Committee recognised that returning yet again to the Privy Council with a proposal for unlimited terms of office was a risk to the credibility of the Society. The Committee felt that Council should consider whether there was a realistic

prospect of achieving unlimited terms of office, and that careful thought should be given to when and how to make any future approach the Privy Council on this matter.

The Governance Committee accordingly proposes no change to the Council's existing policy on this issue.

### **2.3 Rotation of reserved/unreserved places**

- i) *Consideration should be given to the number of unreserved places in the election each year. (Officers minutes 311005)*
- ii) *Consideration should be given to 'a perceived inequity in the three national places on Council being elected at the same time, not in rotation' (Governance Committee Sept 05 mins).*

It is not clear exactly what the perceived inequity is but it is assumed here that it concerns the fact that, in the year when national constituency elections are held, each pharmacist has the opportunity to vote for four candidates, as opposed to voting for up to five or six in the other years. The views of Electoral Reform Services (ERS), who administer the elections for the Society, have been sought on whether they saw any inequity in our arrangements in this respect. They do not, and have commented that our procedures for staggering of reserved and unreserved places are in line with those of other organisations, and contain nothing unusual or unorthodox.

ERS were also asked for an estimate of any increase in costs if the Society were to move to holding an election to unreserved places and one national constituency election each year. They estimated that the cost of extra ballot papers would be something in the order of £3,000-4,000 a year. The possible increase in size of the candidates' booklet was harder to quantify but, in all, they would envisage that such a move would lead to a cost increase of several thousand pounds each year.

In order to change to a situation where there was an election to one national constituency place each year plus an election to four or five unreserved places, the Council would have to provide in the regulations that, in the next 'national constituency' elections, one person would be elected for one year, one for two years and one for three years. This would presumably have to be allocated by the drawing of lots: it would not seem fair to base it on the numbers of votes given the unequal populations in the constituencies. It would also be necessary to allocate shorter terms of office to some people elected to unreserved places in 2007, so as to divide the unreserved places on a 5, 5, 4 basis rather than 3, 6, 5. That would seem unfortunate for those Council members who happened to be due for election that year.

The Governance Committee accordingly proposes no change to the Council's existing policy on this issue.

### **2.4 Election statements**

- i) *I believe that the proposed powers -- which would give the Returning Officer (ie, the Secretary & Registrar) carte blanche to edit or withhold candidates' statements of policy without consultation -- are unjustified. I believe that they are:*
  - *An infringement of freedom of speech*

- *A conflict of interest for the Secretary & Registrar, giving him or her direct influence in the outcome of the election*
- *Acting against natural justice, with no appeal being possible until it is too late (ie, after the election)*
- *Against the interests of the Society and its members, as they act as a deterrent to change on Council. Without change there will not be new ideas and innovation. Incumbents must be kept on their toes*

*I am not saying that there should be no constraint on what is included in statements of policy. Libellous statements cannot be allowed (although this is already covered by existing law in the UK) and clear factual errors should be corrected or pointed out.*

*However, it is for candidates (including those seeking re-election) to set out how they feel that the Society should be run and what they would like to see changed should they be elected. The governance code frees existing Council members from having to toe the party line at the time they are seeking re-election (and rightly so). It is then up to the appropriate electorate to decide whether they wish to see this person elected having read these views. Interference with, or editing of, these statements imposes someone else's views over those of the candidates themselves. This is wrong (Council member)*

- ii) *I am worried about the returning officer exercising too many powers of censorship. In the past a number of candidates have been accused of saying we will do things that council members cannot. This was a matter of opinion. Would we have been censored? I would be interested to know that if our returning officer was to look over the previous 3 years of statements how many would have been altered. That being said I see why you want the power in. But I could only agree if the guidelines for its use were such that it was only used in extreme circumstances (Council member)*
- iii) *This gives the returning officer great power, particularly if the rule about publishing matter that is outwith the Society's powers is carried forward. This is a subjective area, making discussion with the candidate even more important. I believe it essential that any "editing" is done in full consultation with the candidate (Council member)*
- iv) *[referring to an earlier proposal that a candidate should sign a form agreeing to indemnify the Society against all liabilities and legal proceedings arising out of publication of his election statement] Indemnity undertakings would lead to candidates taking on an uninsured risk. At the moment, the Society's insurance policy should cover this sort of publication. I doubt that many pharmacists will have such indemnity cover. Some candidates might be put off by this condition. Defamatory material should be removed from a statement of policy in consultation with the candidate, with a lawyer's advice if necessary (Council member)*

The Society's insurance does not currently provide the Society with indemnity against comments made by candidates (who might or might not be current members of Council) in the candidates' booklet, and the Society's Director of Resources does not believe that such cover would be achievable.

It has been suggested above that such an indemnity requirement might deter candidates and that defamatory material should be removed in consultation with a candidate, with legal advice if necessary. But, consultation notwithstanding, a decision has to be taken whether or not to publish.

It is not envisaged that the Society would seek to enforce an indemnity provision if a claim arose as a result of an error in editing by the Returning Officer. Another option might be to restrict the indemnity provision to claims arising from election statements that are published as provided by the candidate (i.e. unedited): if the Returning Officer edits the statement, the Society gives up the right to enforce the indemnity provision. Another option would be to say that the indemnity provision would not apply to claims arising from election statements that are edited other than in agreement with the candidate – but this could be less helpful than the existing provisions that allows the Returning Officer to publish a statement of clarification. There is unlikely to be sufficient time to enter into lengthy discussions with candidates about their statements – nor can candidates be forced to take part in such discussions.

Concern is expressed above about the Returning Officer exercising “powers of censorship”: *“In the past a number of candidates have been accused of saying we will do things that Council members cannot. This was a matter of opinion. Would we have been censored?”* It could be argued that whether something falls within the powers, duties and functions of the Society is a matter of fact, not opinion. Nonetheless, there will always be a judgement to make about exactly where the line should be drawn. The Governance Committee recognised that the Returning Officer’s discretion could only be exercised within the guidelines agreed by the Council. Such guidelines might, for example, state that the Returning Officer could omit part/s of a statement but could not add anything.

A Council member has commented *“I see why you want the power in. But I could only agree if the guidelines for its use were such that it was only used in extreme circumstances”*. It will, however be necessary to ensure that any guidelines would be practicable for the Returning Officer to operate within: a reference to ‘extreme circumstances’ would not seem practicable.

The Governance Committee considered it preferable to retain the current arrangement whereby a statement of clarification may be published following consultation with the candidate. Hence it is not proposing any new power for the Returning Officer to edit election statements or to require candidates to sign an indemnity agreement. It would be important to avoid any situation where a candidate can avoid any editing or clarification of their statement by simply not replying to messages from the office, allowing them to say there has been no consultation with them.

The Governance Committee accordingly proposes no change to the Council’s existing policy on this issue.

## **2.5 Nominations**

- i) *I would like applications processed within 5 working days. Once stamped approved the application should be deemed valid even if something is found to be incorrect at a later date (Council member)*

It is the candidate's responsibility to submit a valid nomination form, with the required information, by the deadline. The Society is not required to look at any nomination in advance of the deadline, and other organisations, for example the Nursing & Midwifery Council, take a harder line, in that they will not check any nomination material until the deadline is passed and hence there is no opportunity to rectify any problem.

However, the Society makes it clear in its guidance for candidates that the office will make every effort to assist to the best of its ability, and to contact candidates ahead of the deadline if anything is incomplete or incorrect. Nominations are processed in the order in which they are received in the office. Therefore, the earlier nomination material is submitted, the greater the likelihood that the office will be able to help if there are any problems. However, it would not seem appropriate to fix an arbitrary and inflexible deadline for checking nominations after receipt – the regulations already stipulate other time limits to be complied with.

The Governance Committee confirmed its view that it was not appropriate to set an arbitrary and inflexible deadline for checking nominations after receipt. It accordingly proposes no change to the Council's existing policy on this issue.

## **2.6 Eligibility for election**

- i) *Para 5(1) of the regulations states that three places on the Council shall be reserved for pharmacists who are normally resident in each of three national constituencies. The Governance Committee said in Sept 05 that it wanted clarification of the term 'normally resident' from the Society's legal adviser.*

Discussions with the Society's Legal Adviser have indicated there is no clear definition and any challenge on this point would need to be examined in the light of the latest case law.

One solution might be to amend the requirement in the regulations so that it refers to the registered address rather than normal residency. This would be easier to understand and check, and less open to interpretation.

- ii) *As long as [a candidate is a] GB resident you can stand to represent any national constituency. You could live one side of the border but work the other. By all means stamp the candidate's statement "NOT A RESIDENT OF THIS CONSTITUENCY" but let the electorate decide who represents them best. I know the present Welsh Executive already has the problem of one/two of its members living the wrong side of the border. They still do a good job? (Council member)*

This would seem to go against the principle of having national constituencies, whereby a candidate is elected by and from voters in that constituency. However, the Council may wish to consider whether such an approach would be beneficial. It has already been agreed for the English Pharmacy Board that candidates could either live or work in that country. The Council should bear in mind that it would be impracticable to check on this and that candidates would simply have to sign a declaration to this effect. The Council would also have to consider whether it should be made clear to voters when a candidate was not normally resident/had a registered address in the constituency.

**The Governance Committee** considered that a candidate should live or work wholly or mainly in the constituency in which they were standing; should be able to stand in only one constituency and that the guidance should make clear that the candidate's statement should set out where the candidate lived and where the candidate worked. It therefore **recommends that the Council approve the suggested change to para 5(1) of the Regulations in Appendix C.**

## **2.7 Voting**

- i) *We feel that disclosing the address of the candidate is unnecessary and that a photo would be preferable (Officers' unofficial comments March 2006)*
- ii) *The voting form should state the candidate's region (Council member)*

The current regulations require the voting form to disclose the candidate's full registered address. The paper that went to Council in October 2005 had recommended that the voting form should only give the area (by reference to a local government district, city, town or district) in which a candidate lives, not his actual address. In the past, the Council has felt that voters would wish to have this information as they might feel that a candidate from the same area as themselves would have a better understanding of their local concerns/issues and would be easier for them to contact/lobby. Given the devolved nature of health service policy, it seems likely that voters would at least wish to know whether a candidate resided in England, Scotland or Wales but this could be included in the election booklet and not on the voting form. It is not clear whether the addition of a candidates' region would add anything to what is already required.

The regulations currently provide that candidates will be invited, but not obliged, to provide a photo. In practice, all candidates provide a photograph. The ERS have informed us that if the Society were to decide to include black and white photos on the voting form the costs would increase by approximately £750; if colour, by about £1,200. A photograph could help voters to identify candidates that they know by sight and not by name but it would not seem too onerous to expect voters to look at the photos in the booklet without having them on the voting form as well. It would also seem important not to encourage voters to select candidates on the basis of their looks.

The Governance Committee considered the above but agreed that the voting form (ballot paper) should continue to include the full registered address of the candidates. The Committee also felt that inclusion of a photograph on the voting form was not desirable and that candidates should continue to be invited to supply a photograph for inclusion in the candidate information booklet. It was noted that the inclusion of age on the voting form might have to be reviewed at a future date following the coming into force of age discrimination legislation.

The Governance Committee accordingly proposes no change to the Council's existing policy on this issue.

## **2.8 Challenges and the effect of non-compliance with these Regulations**

- i) *We feel that should any complaint result in costs being incurred, the complainant should be responsible for those costs if their complaint is not upheld. (Officers' unofficial comments March 2006)*

The Officers have not asked whether the reverse should apply; in other words, whether the person complained about should be liable for costs if the complaint is upheld. In any case, it should be borne in mind that making complainants responsible for costs if their complaint is not upheld might be a disincentive to people bringing complaints. As a body which performs duties of a public nature it is in the Society's interests to have an open and easily accessible complaints procedure in relation to Council elections. Furthermore, the awarding of costs could open the Society to legal challenge as it could be *ultra vires* our statutory powers.

- ii) *Any problem regarding [the accuracy or perceived misleading nature of an election statement or declaration] should be brought to the attention of the returning officer prior to closure of the ballot. (not extended to 28 days after). This information will have been censored and approved by the returning officer and will have been in the public domain for 4 to 6 weeks. SOUR grapes after the result declared. (Council member)*

It could be argued that such a restriction would be unreasonable. Someone might be aware of a potential problem with the election but might not wish to make a formal complaint until they could judge whether it may have affected the return of any candidate in the election. This could not be judged until after the results were known.

- iii) *[The paper outlining the consultant's approach – see Appendix A para 8(b)] is not clear whether a challenge to the validity of an election should be signed by 10 pharmacists or 10 technicians or 10 comprising both descriptions (ie, 10 in total) [Council member]*

The draft regulations do not in fact make any specification about the number of pharmacists/pharmacy technicians required to sign a challenge to the validity of an election.

- iv) *[The paper outlining the consultant's approach – see Appendix A para 8(b) – makes reference] to representations about being declared ineligible without saying who the representations are to be made to and how they might be dealt with (Council member)*

The consultant's advice was taken into account in the drafting of the proposed new paragraphs 22(3)(b) and 22(4) of Regulation 1. These read:

- (3) Before taking any action in relation to a challenge or complaint relating to an election, the Returning Officer shall—
- (a) provide details of the challenge or complaint to the candidate(s) concerned; and
  - (b) afford the candidate(s) concerned the opportunity to make representations on the allegations and on any subsequent action to be taken by the Returning Officer.
- (4) Upon considering any representations received from the candidate(s) concerned, the Returning Officer may take such action as he considers necessary in the interests of fairness and all the circumstances of the case, which may include—
- (a) declaring the results of any candidate, or of the whole election, a nullity;
  - (b) disqualifying a candidate or candidates;
  - (c) rerunning any ballot or election.

The Governance Committee accordingly proposes no change to the Council's existing policy on this issue.

## **2.9 Eligibility of non-practising pharmacists or pharmacy technicians to be Council members** (issue arising from Council's proposed response to the s60 Order consultation)

The Society had previously sought the views of Privy Council advisers on this point in September 2005. At that time advisers' comments were that registrant Council members should be on the practising register for the following reasons:

- People who keep up to date with pharmacy as it develops, in order to stay on the practising register, will give better quality contributions to decision-making;
- People who opt for the practising register will, on the whole, be doing so because they want to actively practise one branch of pharmacy or another. Current practice of the profession will make their contributions better-informed;
- The profession and public will be likely to respect the Society and its decisions more.

The Chairman of the Governance Committee asked the office to seek the views of Privy Council advisers once more on this issue. Again, PC advisers replied that their views remained unchanged. They expressed surprise at the suggestion that their views might have changed on this head, at a time when they were currently in the midst of a public consultation which included in article 5(4) of the draft Order the provision that if an elected pharmacist or pharmacy technician member ceased to be entered in the practising part of the register they should be removed forthwith from office as a Council member.

The Governance Committee noted the very clear views of PC advisers, while acknowledging that some Council members had strong views on the issue. The Committee felt that, in considering this matter, Council should consider if there was a realistic prospect of achieving change at this time and the risks to the credibility of the Council and Society.

The Governance Committee accordingly proposes no change to the Council's existing policy on this issue.

## **2.10 Declaration of adverse decisions**

The draft Regulations state that candidates should sign a Declaration of Adverse Decisions setting out, where appropriate, details and particulars of any criminal convictions, police cautions and findings, penalties or censures issued by the Council, a Committee of the Society or any other regulatory or public body received by him, and any other decision by any person or body that the candidate considers relevant.

The Society's Legal Adviser has suggested that this should be expanded to require candidates to provide details of actions taken by the Infringements/Investigating Committee or its equivalent within other regulators (e.g. warnings, acceptance of undertakings, 'Taken Into Consideration' letters).

Guidance to candidates points out that no list of relevant adverse decisions could be considered comprehensive and the onus is on the candidate to exercise judgment. The

candidate will bear any consequence of being found not to have declared a relevant adverse decision. Candidates who are unsure whether an adverse decision might or might not be relevant are directed to ask the Registrar.

The Committee was asked whether it would wish to propose such an amendment to the Council. However, the Committee confirmed its view that the candidates for election to the Council should only supply details of decisions by final determining bodies. The Committee did not consider it necessary to expand the requirements to include details of actions taken by Infringements or Investigating committee or its equivalent in other regulators.

However it was considered that the guidance should point out clearly that the onus was on the candidate to seek advice from the Registrar if they were unsure as to whether a decision should be declared.

The Governance Committee accordingly proposes no change to the Council's existing policy on this issue.

### **3. Privy Council advisers' comments**

The Governance Committee's proposed changes to the Election regulations were submitted to Privy Council advisers for initial comment.

In the light of these comments, the following changes have been proposed to the Regulations (and have been included in the draft at Appendix C):

- a definition of 'Scrutineer' has been inserted in regulation 2 (Interpretation), saying that 'Scrutineer' shall be construed in accordance with regulation 19;
- 3(3) has been deleted from the regulations. This provided that the Deputy Secretary could act as Returning Officer if the Secretary were unable to do so. PC advisers pointed out that this was not needed as it was covered by the definition of 'Secretary' in regulation 2;
- the wording of 15(5)(a)-(c) has been slightly reworded to make it clear that the details of the candidate himself are required.

In addition, the draft has been amended at 6(2), 6(6) and 7(1) to take account of the PC advisers' earlier comments on the National Pharmacy Boards regulations that the term "simple majority" should be used in place of "first past the post" to describe the election mechanism.

### **4. Risk implications**

The current regulations are sparing in what they say about complaints, challenges, problems or alleged irregularities, and the powers of authority they give to the Returning Officer are insufficiently explicit. The 2005 elections encountered a number of challenges and, while all these were resolved it would be unwise to rely on this always being the case. Should a complaint against the process be upheld, the Society could potentially be placed in a difficult and contentious position.

### **5. Resource implications**

A complaint against the Society's handling of an election could conceivably result in costly legal proceedings.

The consultant's work was funded from existing budget in 2005 There are no further significant resource implications.

### **Recommendations**

- (a) On the recommendation of the Governance Committee, the Council is asked to agree the following policy changes which have informed the draft regulations at Appendix C:
- (i) *the regulations should provide powers for the Returning Officer to deal with a challenge at any stage during or up to 28 days after an election.*
  - (ii) *the regulations should provide that a candidate should live or work wholly or mainly in the constituency in which they are standing, and that a candidate should be able to stand in only one constituency (the guidance should make clear that the candidate's statement should set out where the candidate lives and where the candidate works).*
- b) The Council is asked to approve the draft regulations for gazetting.

Christine Gray  
Head of Corporate Governance

Elaine Mulingani  
Internal Governance Co-ordinator

### **The consultant's approach – as provided to the Governance Committee in September 2005**

1. The existing Regulations are sparing in what they say about complaints, challenges, problems or alleged irregularities, and events earlier this year showed that the Secretary (who acts as Returning Officer) needed more explicit powers and authority. The consultant has accordingly suggested that more explicit powers are needed to deal with challenge, response and decision.
2. The consultant was asked to advise whether the Secretary as Returning Officer should outsource more of the election process than currently happens. He advised against this on the grounds that, while there are good reasons for outsourcing, as we do now, the bulk processes of distributing, receiving and counting voting forms, the Secretary/ Returning Officer should have ultimate control and authority over the conduct of the Society's elections. The Society has regulatory authority over the profession: it needs to be able to demonstrate high standards in handling its own internal affairs, and it would be undesirable, should any major challenges, problems or wrongdoing ever occur, for their resolution to lie outside the Society.
3. The existing regulations place the Returning Officer under no obligation whatsoever to check the validity of candidates' nominations and supporting documentation before the deadline for acceptance. Should she receive a nomination, or supporting documentation, in good time, she may at her discretion, and if she has time, check these and inform the candidate of any problems so that they may rectify these in advance of the deadline. But it is the candidate's responsibility to ensure that their submission is accurate. Should the Returning Officer not check the documentation until after the deadline has passed, any invalidity in an application will mean that the candidate will not be entered for the election. Candidates may, of course, contact the office in advance of the deadline if they have any questions about their nomination, and staff will help if time permits. The consultant has suggested that this should be clarified in the regulations.
4. It should be borne in mind that other regulatory bodies (for example the Nursing & Midwifery Council, which has recently agreed its election rules) take a harder line than this, in that they will not check any nomination material until the deadline is passed and there is no opportunity to rectify any problem. This approach was considered for the Society but was rejected as being unhelpful. Furthermore, on the basis of past experience, such an approach would cause the Society – which has a much narrower field of possible candidates to draw on than does the NMC – to face a by-election on a regular basis due to an insufficient number of candidates submitting valid documentation first time around. For example, in the Society's 2005 elections, 34 nominations were received for 14 places. Of these, 9 were correct first time.
5. A review of the Society's guidance on standing for election is under way, with the intention of making it as clear and unambiguous as possible. They will clearly outline the risks involved in (a) not checking submissions properly and (b) not getting them to the Returning Officer in good time. However, it should be noted that by no means all of the problems this year appeared to be related to misunderstanding of the guidance.

**Appendix A**

6. In the main, the consultant has thought it inappropriate for the Society's Council to have any authority over the process by which its own members are elected (beyond the making of the regulations); this reflects public election law and best practice.
7. Finally, the consultant was asked to consider the appropriate level of detail required in the regulations. He felt that there was a balance to be struck; it is usually a mistake to think that you can provide for every eventuality, but likely or plausible situations or ambiguities must of course be covered.
8. The suggested approach would not involve substantial major changes to the content of the current regulations. In the most part they consist of clarifications and tightening up of ambiguities, and are all within existing Council policy, with the exceptions noted below. These are:

a) **Election statements**

Currently candidates are not deemed to indemnify the Society against any liability to any third party arising from the issue of their election statement. It has been suggested that this should be changed.

Also, current Council policy states that "The Society, in consultation with the candidate, should be able to issue a clarifying statement in any case where all or part of the policy statement of a candidate for election to the reformed Council appears to be outside the current functions, powers and duties of the Society." It is suggested that the Returning Officer should be able to determine whether the election statement meets the guidelines for form and content and should have discretion to edit the statement accordingly.

***Suggested policy changes:***

- (i) *the Returning Officer should determine whether the election statement meets the guidelines for form and content and has discretion to edit the statement accordingly*
- (ii) *every candidate shall be deemed to have agreed that the decision of the Returning Officer to edit or not to issue a statement (in full or part) is final*
- (iii) *candidates should be deemed to have indemnified the Society and the Returning Officer against any liability to any third party which arises from the issuing of a statement.*

b) **Provisions to deal with challenge**

It has been suggested that the regulations should provide more explicit powers for the Returning Officer to deal with challenge occurring at any stage during or up to 28 days after an election. Examples of challenge would be if the Returning Officer:

- receives any information, representation or complaint, or becomes of the opinion for any reason that a candidate or Council member –
  - (a) was or has become ineligible for election; or
  - (b) has made significantly inaccurate or misleading declarations, statements of personal or professional information or

- qualifications, or submitted a significantly factually false or misleading election statement;
- or believes that for any reason there has been or may be a significant breach of the regulations.

The Returning Officer should not declare any candidate ineligible to be elected, or to serve as a Council member, without first giving that person an opportunity to make representations about whatever action is proposed.

Within 28 days after the publication of the result of any election, any ten pharmacists or pharmacy technicians eligible to vote in it should be able to send to the Returning Officer a signed challenge that the election or any ballot was invalid. Any such challenge should state the grounds for the challenge, and the Returning Officer should send copies to the Council and to the candidates. The only grounds should be that the election was –

- (a) not substantially in accordance with the provisions of the Regulations; or
- (b) furthered by corrupt practice by way of bribery, treating or undue influence as set out in sections 113, 114 or 115 of the Representation of the People Act 1983

The Returning Officer should on receiving any such challenge as soon as practicable take such action as thought fit, and determine whether the election should be declared void. The Returning Officer should also have the power to re-run any election or ballot, in whole or part, if it was considered that the original was void, or that it was necessary or desirable to do so in the interests of the reputation and integrity of the Society.

***Suggested policy change:***

- (iv) *the regulations should provide powers for the Returning Officer to deal with a challenge occurring at any stage during or up to 28 days after an election.*

**c) Candidate's address on voting papers**

Currently, candidates' addresses are disclosed in full on the voting paper. Since the Governance Committee meeting, it has been suggested that this seems unnecessary and could potentially raise data protection issues for the Society.

***Suggested policy change:***

- (v) *the regulations should provide for voting papers to disclose the area (by reference to a city, town or district) in which the candidate lives*

**9. Term of office**

The current regulations provide that no person may be elected as a member of Council for more than three consecutive terms of office, each of up to three years. Also, no person who has served as a Council member for three consecutive terms of office shall

**Appendix A**

be eligible for re-election until a period of three years after leaving office has expired.

The Governance Committee felt that there should be no limit to the number of consecutive terms of office served by an elected Council member - in the same way that there is no limit to the number of consecutive terms a person may serve as a Member of Parliament.

The Committee instructed the office to seek the views of the Privy Council's advisers on this proposal. Mr Paul Atkinson of the Department of Health has replied as follows:

“Thank you for seeking DH's views on this. I do not think that DH Ministers would support the change being considered. It would take the Society away from the common model for regulators and other public bodies in which Council members (of any kind) do not serve for more than 10-12 years. This is part of the good practice recommended by the Office of the Commissioner for Public Appointments. While this guidance is not legally binding on the regulators of the health professions, the Government has sought to follow it as a matter of policy.

In paragraph 3.10 of the Commissioner's Code of Practice it states that "the maximum period in office must not exceed 10 years on the same board". We had this in mind when Ministers agreed to elected members serving three (three-year) terms but not more, when approving byelaws last year. Having reviewed this relatively recently I don't think they would be likely to go further just now.”

**Appendix B****Except from Governance Committee Minutes September 05****05/06 Revised Regulation 1: Election of Council members**

As the paper had been circulated late, the Chairman asked the committee's agreement to discuss it. This was agreed.

The Head of Corporate Governance introduced paper 05/09/CG/05(a) which had been circulated.

After the election earlier in the year, the staff involved met to review the process. Several areas of concern were identified. A consultant with 35 years experience of elections in local authorities and the European Parliament had been asked to review the Regulation and put forward recommendations. The paper set out the consultant's approach and highlighted policy decisions on which the committee was asked to make recommendations to the Council.

Following the committee's discussion, the Society's legal officer would draft the Regulations, which would go to Council with the committee's policy recommendations in October. It was also the intention to remove some articles in the Regulations which related specifically to the first election of the new Council.

It was noted that any changes to the regulations needed to be agreed by Council in October, to allow for the gazetting to be complete and Privy Council approval achieved in order to start the election in 2006. If amendments were not agreed in October, the extant Regulations would apply for the 2006 election.

The position of the lay members of Council in considering the election regulations was queried. It was clarified that the governance of the Society was the responsibility of all Council members. The final decision on the election Regulations would be for the Council.

The Chairman commented that, from a lay member point of view, the policy proposals in the paper seemed sensible.

The committee discussed the consultant's advice that the role of Returning Officer should not be outsourced and should continue to be undertaken by the Secretary & Registrar. It was accepted that it was important that the Society be able to demonstrate high standards in handling its internal affairs and it would be undesirable, should any major challenges occur, that their resolution would lie outside the Society. Accordingly the committee accepted that the Secretary & Registrar should continue to perform the role of Returning Officer for the Council elections.

The committee also accepted the remainder of the points underpinning the approach to change which had been proposed.

The committee then discussed the recommendations on policy changes. In discussion the following points were noted:

- It was important to have election regulations which were robust and could withstand challenge in order to best protect the Society

- Within the regulations it was important to clarify that the Returning Officer had discretion in regard to the statements provided by candidates;
- The guidance to candidates on the form and content of the information in standing for election set the parameters within which the Returning Officer exercised discretion
- That the final decision on any matter in relation to the election lay with the Returning Officer, who was able to take appropriate advice as s/he saw fit;
- That the appeal route for candidates was ultimately through the Courts, by means of judicial review.

The committee

**agreed**

The following recommendations to Council

- i. that a pharmacist candidate for election to Council should continue to be required to obtain ten (10) nominators;
- ii. that the Returning Officer should determine whether an election statement met the guidance as to the form and content of the election statement, and should have discretion to edit the statement accordingly;
- iii. that every candidate should be deemed to have agreed that the decision of the Returning Officer to edit or not to issue a statement (in full or part) is final;
- iv. that candidates should be deemed to have indemnified the Society and the Returning Officer against any liability to any third party which arises from the issuing of a statement; and
- v. that the regulations should provide powers for the Returning Officer to deal with a challenge at any stage during or up to 28 days after the declaration of the result of an election.

The committee also

**agreed**

that at the August meeting each year, the Council should receive a report of the election from the Returning Officer highlighting any areas of concern which had arisen. The report would be anonymised as to candidate identity.

The Chairman asked if there were other issues in relation to the election Regulations which members wished to discuss. The following were raised.

- 1.8(1) the requirement that a member standing for election to Council was required to be on the Practising register. It was explained that the Privy Council had insisted on that provision. This was linked with the definition of practising which would be reviewed by the S60 consultation response working group.

- 1.8.8(2) clarification of “normally resident” was requested from the Society’s legal adviser and would be brought to the May meeting of the committee.
- 1.8(8) three consecutive terms of office, each of up to three years. It was explained that the limit on consecutive terms of office was in line with the government’s policy on service on public bodies. It was agreed to ask the Department if there was the possibility of changing the policy. To be considered at the May meeting of the committee.
- 1.2 the coming into office of Council members at midnight on the day of the AGM – it was clarified that it had been a once only provision for the new Council to take office. The drafting of the regulations allowed for reversion to the previous arrangement.
- 1.6 a perceived inequity in the three national places on Council being elected at the same time, not in rotation. To be discussed at the July meeting of the committee.
- 1.11 deadline for nominations and supporting material to be received and the need for assistance. It was clarified that there was no obligation to validate nominations before the deadline nor to assist candidates with submitting a correct nomination. It was not possible to make exceptions to the deadline and candidates who submitted nominations late ran the risk of not having the opportunity to make amendments. This would be highlighted in the information sent to candidates in 2006.
- 1.13(2) despatch of voting papers 14 days before the closing date. It was clarified that this was the final date for despatch; in practice, the actual date was much earlier.
- 1.15 casual vacancies. It was clarified that the by-election process was a decision of the Council.