



The Law Commission and The Scottish Law Commission

**(LAW COM. No. 183)
(SCOT. LAW COM. No. 121)**

OPTICIANS BILL

REPORT ON THE CONSOLIDATION OF LEGISLATION RELATING TO OPTICIANS

*Presented to Parliament by the Lord High Chancellor and
the Lord Advocate by Command of Her Majesty*

July 1989

LONDON

HER MAJESTY'S STATIONERY OFFICE

£1.70 net

The Law Commission and the Scottish Law Commission were set up by the Law Commissions Act 1965 for the purpose of promoting the reform of the law.

The Law Commissioners are—

The Honourable Mr. Justice Beldam, *Chairman*
Mr. Trevor M. Aldridge
Mr. Jack Beatson
Mr. Richard Buxton, Q.C.
Professor Brenda Hoggett, Q.C.

The Secretary of the Law Commission is Mr. Michael Collon and its offices are at Conquest House, 37–38 John Street, Theobalds Road, London WC1N 2BQ.

The Scottish Law Commissioners are—

The Honourable Lord Davidson, *Chairman*
Dr. E. M. Clive
Professor P. N. Love, C.B.E.
Sheriff C. G. B. Nicholson, Q.C.
Mr. W. A. Nimmo Smith, Q.C.

The Secretary of the Scottish Law Commission is Mr. K. F. Barclay and its offices are at 140 Causewayside, Edinburgh EH9 1PR.

THE LAW COMMISSION
AND
THE SCOTTISH LAW COMMISSION

Opticians

Report on the Consolidation of Legislation Relating to Opticians

To the Right Honourable the Lord Mackay of Clashfern, Lord High Chancellor of Great Britain, and the Right Honourable the Lord Fraser of Carmyllie, Q.C., Her Majesty's Advocate

The Opticians Bill which is the subject of this Report consolidates the legislation relating to the opticians' profession. In order to produce a satisfactory consolidation it is necessary to make the recommendations which are set out in the Appendix to this Report.

The Department of Health, the Privy Council and the General Optical Council have been consulted in connection with the recommendations and agree with them.

ROY BELDAM, *Chairman, Law Commission*

C. K. DAVIDSON, *Chairman, Scottish Law Commission*

3 July 1989

APPENDIX

RECOMMENDATIONS

1. Section 15(1) of the Opticians Act 1958 empowers any party to proceedings before the Disciplinary Committee to sue out writs of *subpoena ad testificandum* and *duces tecum*. This, by its terms, applies solely to England and Wales and implies that the Disciplinary Committee will meet only there. There is, however, nothing in that Act that would preclude the Committee from sitting in Northern Ireland or Scotland if it chose and section 16(1) refers to the possibility of an advocate being a legal assessor.

More recent legislation makes provision for the Northern Ireland and Scottish equivalents of these English procedures. (Compare paragraph 4 of Schedule 3 to the Dentists Act 1984). We recommend that similar provision be made here.

Effect is given to this Recommendation in clause 21(2) and (3).

2. Sections 20(5) and 21(5) of the Opticians Act 1958 provide for criminal offences with identical penalties. The former makes it an offence for anyone other than a registered medical practitioner or registered ophthalmic optician to test sight, and the latter makes it an offence for anyone other than such a practitioner or a registered optician to sell or supply any optical appliance. Section 2 of the Health and Social Security Act 1984 inserted a section 20A, subsection (5) of which makes it an offence for anyone other than a registered medical practitioner or registered optician to fit contact lenses. Section 23 of the 1958 Act is devoted to what happens when a registered optician dies or becomes bankrupt. Subsections (1) and (2) allow for his business to be carried on in his name. Subsection (3) provides that if an offence under section 20(5) or 21(5) is committed when a business is being carried on in these circumstances the General Optical Council can take action to prevent the person carrying on the business from doing so any longer. It seems obvious that the Council ought to have the same power when an offence under section 20A is committed. The 1984 Act failed to include a reference to section 20A in section 23(3), but we do not believe that Parliament can have intended to treat this offence differently in this connection.

We therefore recommend that a reference to the offence in section 20A of the 1958 Act should figure in the provision which corresponds to section 23(3) of that Act.

Effect is given to this recommendation in clause 29(3).

3. Section 4 of the Opticians Act 1958 refers to "bodies corporate" and that term appears throughout the Act. A Scottish partnership is not a body corporate but it is a separate legal *persona* and there is nothing in the Act which prevents a partnership from carrying on the business of opticians.

We recommend that account should be taken of the Scottish partnership.

Effect is given to this recommendation in clause 36(1).

4. Paragraph 3(2) of the Schedule to the Opticians Act 1958 provided that the persons chosen to represent registered opticians on the General Optical Council after the retirement of those nominated by the Privy Council on the creation of the Council should be elected in accordance with a scheme made by the Council and approved by the Privy Council. Such a scheme was made but has since been replaced. The present scheme was made in 1974, and has itself been amended on several occasions. But on one interpretation paragraph 3(2) might be argued to have envisaged the making of a scheme which could never be replaced or amended since it referred to a scheme made by the Council, submitted by them to the Privy Council, within two years of the establishment of the Council.

We do not think that that is what Parliament can have intended.

If one is compelled to say that there was no power to vary or revoke the original scheme, the position is very odd. Parliament would have enacted a provision allowing the Council to produce a scheme, while at the same time giving nobody any opportunity

to correct any mistake that emerged once the scheme had been approved by the Privy Council. One could perhaps understand this if the 1958 Act had indicated how elections were to be organised. Then there might have been an argument that, if it was felt that there was something wrong with the original arrangements, the Council ought to go back to Parliament to get the Schedule amended. But in fact Parliament delegated to the Council the power to organise elections. It would be very strange if they could not exercise it from time to time. We think therefore that the object of the two-year provision was simply to ensure that the original scheme should be ready in time for the first election and not to deprive the Council and the Privy Council of any power to amend the scheme or make a new scheme in the future.

In addition, paragraph 13(1) of the Schedule gives the Privy Council a very wide power to amend the membership of the General Optical Council and the numbers and qualifications of members. The Privy Council has exercised this power several times. There is nothing in paragraph 13 to suggest that the powers of the Privy Council are limited to amendments which can be made without necessitating an amendment of the original scheme for elections. It is only too clear that there could be a clash between paragraphs 3 and 13 of the Schedule unless the former is read as permitting of amendments of the initial scheme.

In addition to the problems of substance discussed above, there is a procedural anomaly in paragraph 3(2). That did not provide that the approval of the Privy Council was to be given by the making of an order. This contrasts with the other provisions of the 1958 Act giving powers to the Privy Council, which require orders. The Council have in effect always given their approval under paragraph 3(2) by order.

We therefore recommend that paragraph 3(2) should make it clear that the General Optical Council can vary or revoke and replace the scheme from time to time and that the approval of the Privy Council is to be given by order. Such an order is in its nature similar to an order approving rules made under the Act by the General Optical Council. Such an order should therefore be governed by similar procedural requirements. It should be subject to negative Parliamentary procedure, which applies to most of the orders approving rules.

Paragraph 3(2) of Schedule 1 to the Bill gives effect to the substantive part of this recommendation. The portion relating to procedure is given effect in clause 34(1), (2), (3), (6) and (7).

5. The members of the General Optical Council include, by virtue of paragraph 1(d) of Schedule 1 to the 1958 Act, six persons nominated by examining bodies. These bodies were listed in paragraph 4 but the original list has been altered by orders of the Privy Council under paragraph 13. One of the bodies on the current list is the University of Wales Institute of Science and Technology: see Article 4 of the General Optical Council (Membership) Order of Council 1983 (S.I. 1983 No. 1842). The University of Wales Institute of Science and Technology has been amalgamated with the University College of Cardiff. The Charters of the constituent colleges were surrendered and a new Charter issued to the resulting amalgamation in the name of University of Wales College of Cardiff.

The Council also includes six registered medical practitioners. Paragraph 5 of the Schedule (which is not affected by any order of Council) provides that four shall be ophthalmologists and shall be nominated by the Faculty of Ophthalmologists. That body merged in 1988 with the Society of Ophthalmologists to form a new College of Ophthalmologists, another body incorporated by Royal Charter.

It seems clear to us that the Bill ought to refer to these new bodies. We recommend accordingly.

Effect is given to this Recommendation in paragraphs 4, 5 and 6(1) of Schedule 1.

6. Paragraph 13 of Schedule 1 to the 1958 Act gives the Privy Council power to alter membership of the Council and numbers and qualifications of members. But there is no power to amend the Schedule. Anyone who wishes to discover the law has to consult a series of orders. A power of amendment of the Schedule appears to us to be justified, as

being purely ancillary to the already existing power to alter membership. It would merely enable the Privy Council to supplement the exercise of the power which Parliament conferred on them in 1958. There would be no substantive extension of that power.

We recommend that there should be a power of amendment.

Effect is given to this Recommendation in paragraph 13(1) of Schedule 1.

7. We believe that the Privy Council should have an express power to revoke any previous membership order. Several of these are extant. The power should be wide enough to deal not only with orders that need to be revoked in consequence of new orders, but also with orders that have become obsolete for other reasons.

We recommend the inclusion of a suitable provision in the consolidation.

Effect is given to this recommendation in paragraph 13(3) of Schedule 1.



HMSO publications are available from:

HMSO Publications Centre

(Mail and telephone orders only)

PO Box 276, London SW8 5DT

Telephone orders 01-873 9090

General enquiries 01-873 0011

(queuing system in operation for both numbers)

HMSO Bookshops

49 High Holborn, London, WC1V 6HB 01-873 0011 (Counter service only)

258 Broad Street, Birmingham, B1 2HE 021-643 3740

Southey House, 33 Wine Street, Bristol, BS1 2BQ (0272) 264306

9-21 Princess Street, Manchester, M60 8AS 061-834 7201

80 Chichester Street, Belfast, BT1 4JY (0232) 238451

71 Lothian Road, Edinburgh, EH3 9AZ 031-228 4181

HMSO's Accredited Agents

(see Yellow Pages)

and through good booksellers