professional standards authority
for Health and Social Care

Our first look at the Government consultation *Regulating healthcare professionals, protecting the public*

Let's get it right for public protection

April 2021

Public protection
above all else

The UK Governments are consulting on major reforms to professional regulation in health and care. We welcome this consultation, and much of what is in it. The framework now in place needs to be simplified and made more coherent. Giving the regulators the same legislation paves the way for more consistent ways of regulating. Combined with the proposals in the recent Health and Care White Paper to review the number of regulators and who needs to be regulated, this consultation could mark the start of a new era for professional regulation.

We are worried, though, that some of the proposals could inadvertently reduce public protection, transparency, and accountability.

The Government wants to bring in a new system called 'accepted outcomes' for dealing with concerns about professionals, without a public hearing, and by agreement between the professional and the regulator. This could be a positive step, speeding up processes and reducing the burdens on complainants, witnesses, and healthcare professionals. It fits with the ideas that we put forward in *Right-touch reform*.

As the Kennedy and Shipman Inquiries have done in the past, Paterson and Cumberlege have shown the weaknesses in the current patient safety framework. We cannot rest on our laurels.

Public protection
above all else

With a few simple changes, these reforms could be put back on track.

However, the Government does not plan to have an independent body responsible for challenging any unsafe accepted outcomes. This is a departure from the way the system works now, and from what we have recommended. Instead, the new model would allow 'anyone' to ask for a review. What this would mean in all likelihood is that patients and service users would have to do this themselves.

In addition, the final say about whether an outcome should be changed because it is unsafe would sit with the regulator, rather than with the courts as it does now. This new model would make the regulator not only investigator, prosecutor, and judge, but also appeal court – a return to the system of 20 years ago which was widely criticised. This concentration of powers could mean that mistakes are not spotted or challenged.

This approach to fitness to practise would seem to put the regulators' flexibility ahead of what is needed for public protection.

We want to work with the UK Governments, patients, and all interested groups through this consultation and beyond. Together, we can make these reforms work for professionals, for regulators, and most importantly for the public that regulation is there to protect.

Removing the safety net

9/10

Our usual success rate for appeals

At the moment, almost all final decisions about the conduct or competence of health and care professionals, known as fitness to practise decisions, are made for the regulators by panels at hearings. We have powers in law (under section 29 of our legislation) to challenge any that seem insufficient to protect the public. We use this power sparingly – between 15 and 20 times a year – because the legal test we have to pass sets the bar high. But when we are successful, which we are in around nine out of 10 cases, each one can help protect many hundreds of patients and service users. These powers are a public protection safety net when mistakes have been made – you can see a couple of examples on page 5. In addition, this power brings transparency and accountability to the processes, and encourages better decision-making.

Relying on patients to request a review of an accepted outcome puts the burden of public protection on the shoulders of the people regulation is meant to serve.

'**Accepted outcomes**' would be made by agreement between the regulator and the registrant without a public hearing, although decisions would be published. We think they are a useful improvement. It is important to remember, though, that they would be available for even the most serious concerns about professionals. Only cases that cannot be resolved in this way would be referred to a panel hearing, and it is only these panel decisions that we would be able to appeal.

With accepted outcomes, the Government wants to lessen the impact on registrants, regulators and members of the public who have brought complaints. But relying on patients to request a review of an accepted outcome puts the burden of public protection on the shoulders of the people regulation is meant to serve. And they will be expected to do this without access to the confidential information about the case that is essential in our section 29 work.

Alongside this, handing responsibility for these review decisions over to the regulators themselves would remove the last remaining layer of independence from the process. This could be bad news for public protection.

A simple solution
To redress the balance and protect the public

There are other potential weaknesses in what is being proposed, which we will set out in detail in our full response. But what is clear to us now is that many of these weaknesses would be addressed by a simple solution: using the safety net of the Authority's section 29 powers to challenge decisions in the courts for accepted outcomes.

Our section 29 powers are tried and tested. Applying them to accepted outcomes under the new model would:

- give us the flexibility to appeal as few or as many cases as are needed to protect the public
- cost no more than what is in place now
- increase transparency, accountability and public protection
- be simple to bring into law
- be consistent with the Government's objectives for reform.

The difference our appeals make to public protection

We can challenge a decision made by a panel of any of the 10 regulators we oversee, if it is 'insufficient to protect the public.' This test is defined in law, and means that the decision falls short on any of these three factors:

- **Protecting the public from harm**
- **Maintaining the confidence of the public in the profession**
- **Supporting minimum professional standards.**

Our appeals are decided through a legal process by the courts. When the courts agree with us, they can either send the case back to the regulator for a new hearing, or replace the original decision with their own.

We can also come to an agreement with the regulator and professional, if they are willing, and get this approved by the courts.

Here are some examples of how we have used these powers to protect the public

A NURSE WHO MISTREATED A VULNERABLE PATIENT

This case involved a nurse working at a short-term assessment and treatment centre for adults with learning difficulties, who also have mental illness or present serious behavioural challenges. The NMC panel found that the registrant had struck a vulnerable patient around the head with a broomstick several times, stopping only when another staff member came into the room and then carrying on after they left. The original hearing suspended the nurse for 12 months with a review.

Why we appealed

We argued that the nurse's actions were fundamentally incompatible with her continued registration. We also believed that the panel had not taken account of the fact that the nurse disputed the charges, lied about her behaviour and showed little understanding about the impact of her actions on her patient.

The court upheld our appeal and the nurse was struck off the NMC's register.

Find out more:

- Read more case studies highlighting how our power to appeal contributes to protecting the public
- Find out more about the wider benefits of our power to appeal and the value it can add to the regulatory landscape.

A SOCIAL WORKER WHO SEXUALLY HARASSED HIS JUNIOR, FEMALE COLLEAGUES

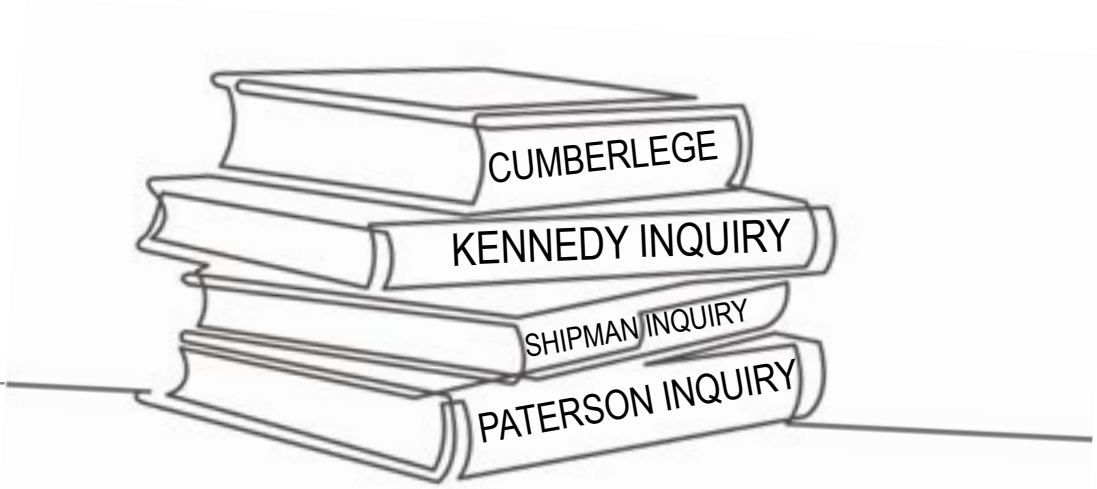
This case involved a male social worker who subjected several junior, female colleagues to sexual comments, and persistently crossed professional boundaries. This resulted in his colleagues feeling 'uncomfortable, confused, vulnerable' – one of his colleagues went as far as reporting his behaviour to the police. The HCPC panel concluded though that the registrant's conduct did not amount to harassment and was not sexually motivated and cautioned him.

Why we appealed

We were worried that the registrant might repeat this sort of behaviour and that this could have a very serious effect on other junior colleagues. The sanction did not address the seriousness of his behaviour, including the sexual motivation and the risk of him repeating this behaviour.

The court agreed with us – saying that the panel had failed to 'engage with the facts of any of the witnesses'. They found that the conduct did amount to harassment and was sexually motivated. We are waiting for the case to be heard again by a Social Work England panel (who have taken over responsibility for social workers in England from HCPC).

The road to regulatory reform



The current reforms should address the failings identified in the Paterson and Cumberlege inquiries.

Two recent public inquiries have brought to light worrying gaps in the regulatory frameworks designed to protect patients.

The Paterson Inquiry argued for a more coherent regulatory system in stark, compelling terms. It asked for more powers for the Authority to hold the professional regulators to account, saying that it was 'not assured through the evidence [it] heard, that the PSA has the mandate or power fully to grip the system.'

The Cumberlege Review, First Do No Harm, was equally critical in pointing out some of the failures of the regulatory bodies to take responsibility for protecting patients.

Some of these failings are historical and have already been addressed, but many are not. We cannot afford to be complacent – there is a lot that needs improving in professional regulation to make sure that harmful mistakes are not repeated.

These reforms need to build on, rather than undermine, improvements to professional regulation made through earlier reforms.

It is essential that these plans preserve the major improvements made over the last 20 years in response to earlier high-profile failings, like Shipman, and the child deaths at Bristol Royal Infirmary.

The changes made have increased independence, transparency and accountability of decision-making. They have produced fairer and more just decisions that can be challenged effectively. And they have created the all-important separation between investigation, adjudication, and appeal, of which our section 29 powers are an essential part.

It has been possible for regulators to protect the public more effectively, secure greater levels of public confidence, and do more to uphold professional standards. These reforms need to build on this foundation.

What do we think these reforms can and should achieve?

What would success look like?

If the reforms are to be a step forwards for professional regulation, they should create:

- Greater coherence of the regulatory system to support modern, multi-disciplinary health and social care
- More interprofessional working and flexibility between professions
- A safe and appropriate balance of accountability and flexibility in the work of the professional regulators
- A proportionate, and less adversarial way of dealing with concerns about professionals with the necessary public protection safeguards
- Overall, a more effective public protection framework, that listens to patients and responds to their concerns, and has the confidence of the public and professionals.

What would failure look like?

These reforms will have failed the public if they lead to:

- Lower levels of public protection, public confidence, or professional standards
- Less transparency or accountability for regulators
- The same or more complexity from the perspective of the public, employers, and professionals
- Continuing difficulties for regulators in working together
- Continuing challenges to closer working between professions
- Significantly increased costs that are not justified by public protection.

These reforms need to find the right balance between lots of different things.

Let's make them about prioritising improvements to patient safety and supporting the delivery of high quality care in good times and bad. We believe this can be achieved alongside reducing bureaucracy, costs, and burdens on systems and individuals.

What to do next

Help us shape regulation for the 21st century

If you want this round of reforms to produce a system that is simpler, safer and more supportive, you can:

1 Read

Through our concerns - you can find more details on our dedicated web page

2 Review

If you would like more information, we would be happy to talk to you. Get in touch with us by emailing engagement@professionalstandards.org.uk

3 Respond

To the government's consultation. You can find the consultation here

GOVERNMENT CONSULTATION
Regulating healthcare professionals, protecting the public

The concerns in this briefing relate to the Government's **proposals on pages 79 to 81, and to questions 61, 62, and 63 of the consultation document**. We will be disagreeing with these proposals in our full response.

We encourage anyone with an interest to respond to this important consultation, and particularly groups that represent the interests of patients and service users.

We've got other things to say on this consultation, and will publish our full response before it closes.

Keep an eye on our website and social media for more information, such as why we think reducing the number of grounds for impairment could be detrimental to public protection, or why the new legal framework might need shoring up to deliver on the promise of consistency.

www.professionalstandards.org.uk

Between 2010 and 2020, the Authority has published a series of thought-papers on regulatory reform using right-touch principles, you can find them all on our website here.

The road to regulatory reform

Regulation of professions as we know it has evolved in a piecemeal fashion over the past 150 years. From mediaeval guilds to the emergence of Victorian-era professional bodies focusing as much on the interests of the trade as on the quality of the service, there have been many changes. See below for some of the key milestones:

1998-2004

Into the modern era: the Kennedy reforms

Alongside other key events during this period, the Kennedy Report into failings in children's heart surgery at Bristol Royal Infirmary led to significant reforms. This included the creation of the Council for the Regulation of Health Professionals (predecessor body to the Authority), to coordinate the regulators and ensure greater focus on the public interest. The report also recommended a duty of candour for professionals.

2004-2010

From self-regulation to shared regulation: post-Shipman reforms

Strong criticism of regulation arising from the report into Harold Shipman's crimes established the importance of lay involvement in the fitness to practise process, the separation of investigation and adjudication and the need for ongoing competence checks which lead to the introduction of revalidation for doctors.

2010-2015

NHS is redesigned, but regulatory reform stalls

Government White Paper *Enabling Excellence* is published drawing on right-touch regulation principles (influenced by the Better Regulation agenda) and leading to the creation of the Accredited registers. Structural change to the NHS occurs, however, the Law Commissions' Bill to simplify professional regulation is not taken forward. The Francis Report into the failings at Mid-Staffs criticises the fragmented nature of the regulatory system and leads to the introduction of the duty of candour.

2015-2020

Rethinking regulation

The Authority and all regulators are given the overarching objective of public protection. Government announces reforms based on *Rethinking regulation* and the Law Commissions' proposals. The Government response to the reform consultation is published in 2019 outlining reforms to regulators' fitness to practise processes, governance and rulemaking powers.

2020...

To be continued

Work on proposals for regulatory reform continues with the background of the Covid-19 pandemic. The Paterson and Cumberlege reports both describe a fragmented regulatory system with patient safety concerns falling through the gaps and the patient voice being lost.

You can read our full summary of developments in professional regulation in *Learning from the past: two decades of regulatory reform in health and care professional regulation*.