professional standards authority
for Health and Social Care

Government consultation *Regulating healthcare professionals, protecting the public*

Three things to get right for public protection

May 2021

Let's take this long-awaited opportunity to improve regulation

This consultation is a rare opportunity to influence how healthcare professionals are regulated. We will be submitting and publishing our full response before the deadline on 16 June.

We support much of what is in the consultation, but also have **serious concerns** about some proposals that we believe could inadvertently **reduce public protection**.

We see advantages in giving the regulators new duties to **cooperate** with other regulators, and to be **transparent** and **proportionate**. {Questions 1, 2, 3}

The plans to give them the same legislation would bring more **consistency** to how their registers work and what information they make available to the public on them. {Questions 24, 25}

Removing the **arbitrary rule** that prevents many complaints where the events took place more than **five years** earlier from being taken forward through fitness to practise is a most welcome development. {Question 49}

Providing registrants and complainants with a **less adversarial** alternative to panel hearings, known as accepted outcomes, would help to **reduce the negative impacts** on all involved. And the money saved could then be diverted to other things regulators do that help to prevent harm. {Question 53}

Some proposals could inadvertently reduce public protection

But if these reforms are to create a regulatory framework that protects the public, some simple yet important changes will need to be made.

Three things to get right for public protection

In our ***First Look*** at the consultation, we set out some success and failure measures against which the reforms could be judged. We have used them to pick out, among the range of comments we will include in our full response, the three changes we think are most needed to make these reforms a success.

ONE:
Apply the public protection safety net we have now to all final fitness to practise decisions, and not just those that are made by panels

The Government does not want accepted outcomes (a new consensual way of dealing with concerns about a registrant without a hearing) to be underpinned by an independent appeal power to catch decisions that don't protect the public (paragraphs 354 to 364). Instead, there would be a complaints process, through which 'anyone' could ask the regulator's registrar – usually the chief executive – to review a decision. Only those complaints that met the strict criteria would be successful. We think that this would create a public protection gap.

First of all, the regulator itself would be deciding whether a complaint had any merit, making it not only investigator, prosecutor, and adjudicator, but also appeal body. This would represent a return to previously criticised ways of regulating, removing the external checks and balances that help to keep regulation transparent, accountable, and safe.

ONE: (cont) Apply the public protection safety net we have now to all final fitness to practise decisions, and not just those that are made by panels

Second, we think the proposals would be unfair on harmed patients or their families, who would be expected to challenge the regulator's decision. Responsibility for protecting patients from harmful practice or behaviour should rest with a public body with the powers to do this, rather than with patients themselves.

The Professional Standards Authority already does the job of appealing decisions that don't protect the public for cases decided by the regulators' panels, and will continue to do this for cases that reach this stage. But we believe this power should apply to accepted outcomes too. You can read more about these concerns in our *First Look* paper.

How we will answer the consultation questions

- **We will be disagreeing with Questions 61 and 62, because we believe these proposals will lead *to lower levels of public protection, public confidence, and professional standards; and less transparency and accountability for regulators.***

- **We will be recommending that our current appeal powers (section 29 of our legislation) are allowed to apply to accepted outcomes because this would enable *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; and 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.***

Three things to get right for public protection

TWO:
Keep the powers regulators have now to handle health concerns about a professional if there is a risk to the public

What is being suggested at paragraphs 258 to 266 about reducing the grounds for action could make it harder for regulators to restrict the practice of professionals with a health condition. This would apply especially if they haven't yet harmed a patient but may do so, based on an expert assessment. Unlike now where it is enough to establish that the professional poses a risk to patients that needs to be managed, regulators would have to prove that the health condition made them incompetent.

The Government is offering what may seem like an alternative at paragraph 209, which is an option for professionals to be removed, or to have their practice restricted through an administrative process if they have a health condition. We know from experience that having parallel, compartmentalised processes like this causes unnecessary complications. They can lead to unfairness where different processes produce different outcomes. They can also increase risks to the public if cases are sent down the wrong route, because this can be a deterrent to the concerns being explored more fully. We also question when these powers might be used, given that the grounds for action are intended to make regulators 'focus on the most serious concerns; those that could put patients or the public at risk or affect the public's confidence in the profession.'

TWO: (cont) Keep the powers regulators have now to handle health concerns about a professional if there is a risk to the public

Mainly though, we don't think there is a problem to solve with either of these proposals. We don't think regulators are dealing with health cases too harshly now, and cannot see any reason why the grounds for action need to be changed – especially if this could make it harder for regulators to protect the public.

We acknowledge that the current system, and its language, such as allegations and sanctions can seem overly punitive, and take their toll on professionals. But accepted outcomes are a solution to this. They will provide a quicker, less onerous option for dealing with all sorts of cases, including health. There is no need for a parallel administrative process, which will only confuse matters for complainants, registrants, and even regulators.

How we will answer the consultation questions

- **We will be disagreeing in part with question 37, and with question 44 in full. This is because we believe they will lead to *lower levels of public protection; and more complexity from the perspective of the public, employers, and professionals.***

- **We will be recommending that the legislation includes a standalone ground for action about health, and that the proposals for powers to take administrative action in these cases are removed. This is so that health concerns can be, and are always, dealt with under the fitness to practise process. This would enable *a proportionate, and less adversarial way of dealing with concerns about professionals with the necessary public protection safeguards.***

Three things to get right for public protection

THREE:

Keep some independent checks and balances to make sure that the way regulation works is safe and consistent across professions where it needs to be

The Government wants to give regulators more freedom so they can decide how they use the duties and powers they will be given in law. In principle we agree, as regulatory agility is important, though much depends on how this freedom is balanced with accountability.

The reforms will do two specific things to increase regulators' autonomy:

1. Much of what is in law now will be moved to what are called regulator rules. This will automatically increase flexibility because rules, unlike legislation, don't have to be approved by Parliament.
2. The checks that exist on rules at the moment in the form of Privy Council oversight would be removed. Instead regulators would sign off their own rules.

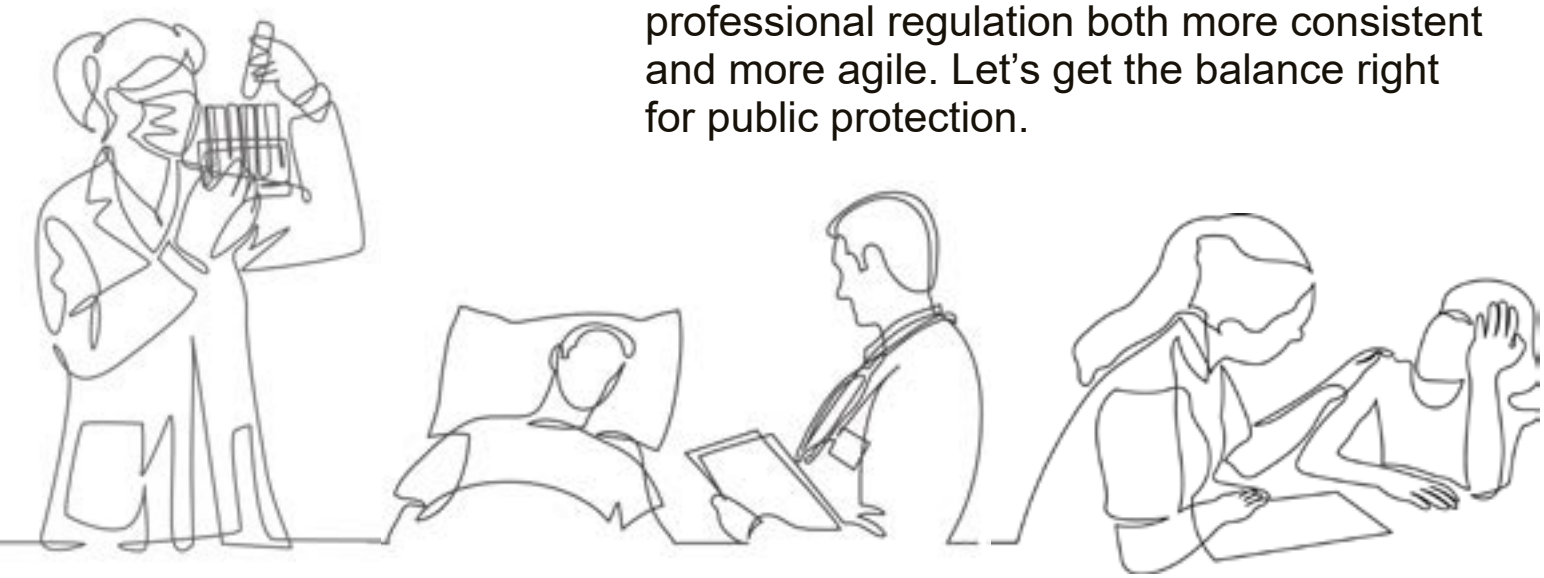
We worry that this could lead to processes that are expedient for regulators but do not protect the public as well as they should. The consultation suggests there will be a reliance on regulators consulting publicly on rules to check that processes serve the public interest. While we of course agree that consultation is essential, this will place a huge expectation and burden on patients and their representative bodies. As with the plans for oversight of accepted outcomes, it seems that responsibility for public protection checks and balances are being pushed onto the public.

THREE: (cont) Keep some independent checks and balances to make sure that the way regulation works is safe and consistent across professions where it needs to be

These new freedoms could also enable major differences to emerge between the different regulators' ways of working. This is a problem because it can lead to real or perceived unfairness between how professionals are treated under different regulators. But also because it creates more complexity, making it harder for people to navigate the regulatory system and for it to work together as a whole. Healthcare provision is moving towards closer, more flexible working between professions, and regulation needs to change to support this.

It is undoubtedly tricky to strike the right balance between autonomy and accountability. In their review of the law underpinning professional regulation in our sector in 2014, the Law Commissions recommended a specific role for the Professional Standards Authority to check that rule-making was being done properly.

A proportionate power for the Authority to check how rules were made would guard against unjustifiable inconsistency and unsafe processes, while still giving the regulators more autonomy and a quicker process than what they have now. These reforms are an opportunity to make professional regulation both more consistent and more agile. Let's get the balance right for public protection.



THREE: (cont)

Keep some independent checks and balances to make sure that the way regulation works is safe and consistent across professions where it needs to be

- **We will be making these points in our general comments (there is no question about this), as well as in our response to specific questions about powers to make rules which we think might lead to problematic inconsistency or public protection risks. This is because the proposals as they stand could lead to *less transparency or accountability for regulators; the same or more complexity from the perspective of the public, employers, and professional; continuing difficulties for regulators in working together, and continuing challenges to closer working between professions.***

- **We will be recommending that the Professional Standards Authority is given a role in checking that regulators are putting safety and consistency first when developing new rules. This would enable *greater coherence of the regulatory system to support modern, multi-disciplinary health and social care; a safe and appropriate balance of accountability and flexibility in the work of the professional regulators; and 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.***

These reforms are an opportunity to bring some coherence to a fragmented system. Let's not waste it.

Helping you to respond to the consultation

The consultation closes on 16 June 2021. What should these reforms 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.

What to do next

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

Useful resources/helpful information

Guest blogs

Read what other organisations would like the reforms to achieve/and how the Authority's section 29 power to appeal adds value. We have guest blogs from: the Patients Association, the Pharmacists' Defence Association, the Council of Deans of Health, the Medical and Dental Defence Union of Scotland, Action against Medical Accidents, Sarah Ellson of Fieldfisher's Regulatory team

Frequently asked questions

We also have a set of frequently asked questions that help explain our concerns in more detail.

The value of our section 29 power

Find out more about how our double-check and power to appeal regulators' final fitness to practise decisions adds value to the fitness to practise process and makes a difference to public protection.

Read our related research

We have commissioned independent research to help inform our thinking on reform:

- *Does consistency between regulators matter?*
- *Patient and public perspectives on future fitness to practise processes*

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.

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*.

2020-2021...

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. In March 2021, the Government publishes its consultation on *Regulating healthcare profesionals, protecting the public.*