

PART 10

THE PROFESSIONAL STANDARDS AUTHORITY

Question 10-1: How effective is the Professional Standards Authority in performing the role of scrutinising and overseeing the work of the regulators?

- 10.1 A slim majority felt that the Professional Standards Authority was effective.¹ For example, most of the regulators were positive in this regard. The General Medical Council felt that the Authority “provides a vital oversight role and is an important component in the system for ensuring the accountability of health regulators”. The Health and Care Professions Council described the Authority as “effective in scrutinising and overseeing the work of the regulators”. The Nursing and Midwifery Council noted that the Authority “has contributed positively to the regulatory landscape and the effectiveness of the regulators”. The General Dental Council argued that the Authority’s “approach to scrutiny has been constructive and proportionate”.
- 10.2 The Department of Health argued that the Professional Standards Authority has “successfully improved the performance of professional regulators, and created greater alignment across the sector”.
- 10.3 The Scottish Government argued that the Authority “has provided an important function in overseeing and scrutinising the regulators” but also expressed concern regarding the Authority’s “ongoing capacity” to undertake reviews and “to perform the increased responsibilities that the new system would bring”.
- 10.4 Several consultees expressed concerns about the Authority’s annual performance review process. For example, the General Osteopathic Council argued that the current way in which the review is conducted “means that every regulator is scrutinised in the same way every year”. It said “it would be more useful to take a risk-based approach to individual regulators and a more targeted or thematic approach to key areas of performance”. Similarly, the General Optical Council argued that:

There are still areas in which the annual performance review process could be made less onerous and more targeted around risks and performance issues, particularly for smaller regulators.

- 10.5 The McTimoney Chiropractic Association commented:

The evidence we have seen thus far seems to indicate that regulators carry out their own self-assessment on behalf of the Professional Standards Authority, which is effectively a tick box exercise. We do not regard this to be effective oversight of a regulator.

¹ Of the 192 submissions which were received, 39 expressed a view on this question: 21 said it was effective, 7 said its powers were not extensive enough, 3 said that its remit was confusing or too large, whilst 8 made other comments.

- 10.6 Unite argued that the reports are “comprehensive and helpful but unfortunately sometimes ignored”.
- 10.7 The Department of Health, Social Services and Public Safety for Northern Ireland argued that the Authority’s:
- culture has changed remarkably in recent years from a challenging function to one that appears much more benign, concerned more with relationships than with rigorous challenge. [It seems] to be sensitive to political dimension and not prepared to speak with an authoritative voice.
- 10.8 Several consultees accused the Authority of failures in respect of the crisis at the Nursing and Midwifery Council. For example, the Institute of Health Visiting argued that the Authority’s response had been:
- disappointing, especially when ultimately one whistle blower was forced to stand down from her position of Vice Chair of Council following complaints made to the Department of Health about internal bullying behaviour at the Nursing and Midwifery Council. These concerns should have been picked up by the Professional Standards Authority as they had recently reviewed the Nursing and Midwifery Council.
- 10.9 The Royal College of Nursing argued that the Authority “could have acted sooner to prevent the severity of the issues which the Nursing and Midwifery Council now faces”.
- 10.10 Several further issues were raised by consultees. The Royal Pharmaceutical Society of Great Britain described the role of the Authority as being “the lynchpin to successful regulation” but expressed concern that it “could grow disproportionately relative to its roles and function”.
- 10.11 The Medical Defence Union was concerned that the Authority fails to represent the interests of registrants. It felt that:
- It is inequitable that in future registrants will provide funding for the Professional Standards Authority through a levy on their annual registration fees but they have no interest in or control over an organisation that does not represent their interests in its oversight role.
- 10.12 The Royal College of Nursing expressed concern at the “lack of accountability of the Professional Standards Authority” which is no longer “under the ambit of the Department of Health or any other department whatsoever and will no longer be a non Departmental Body”.
- 10.13 The Committee of Contact Lens Educators argued that the Authority’s role was “unnecessary” and merely duplicated the role of the regulators. The Royal College of Midwives felt that the Authority’s interventions “seem against simplification and in cases unduly punitive in approach”.

- 10.14 The British Osteopathic Association argued that the Australian Health Practitioner Regulation Agency model “has many benefits that we could learn from, which in the UK could be translated into extending the remit of the Professional Standards Authority”.

Provisional Proposal 10-2: The current powers and roles of the Professional Standards Authority (including those introduced by the Health and Social Care Bill 2011) should be maintained in as far as possible.

- 10.15 The vast majority agreed that the current powers and role of the Professional Standards Authority should be maintained.² For example, South Staffordshire and Shropshire Healthcare NHS Foundation Trust (Social Care) thought that the Authority’s “current powers should be retained” and its role “should be enhanced through the numerous provisions within the [consultation paper]”.
- 10.16 The General Dental Council argued that the Authority’s role “should not be expanded to make it into a regulator; this would alter the fine balance achieved at present and would be more expensive”.
- 10.17 However, the General Pharmaceutical Council stated that the role of the Authority is “confusing” due to its wide range of functions, and that this:

is reflected by the lack of clarity about whether the Professional Standards Authority is a meta-regulator (for example section 29 appeals and the proposal to bring into force its powers to investigate complaints about the regulators under section 28) or whether it is carrying out what the consultation refers to as a “systemic model” of oversight rather than regulation. We have concerns about how any organisation which has such a wide array of functions and responsibilities, particularly as they grow with an enhanced role in quality assuring voluntary registers, can develop a truly strategic role.

- 10.18 Some consultees commented on the Authority’s new role of ensuring the quality of voluntary registers. The Association for Nutrition was critical of the “costs and regulatory burden of assured voluntary registers” which “provide little incentive and no public protection”. The Nursing and Midwifery Council called for the development of a voluntary register in the field of “nursing care”.
- 10.19 The Health and Care Professions Council and the Professional Forum of the Pharmaceutical Society of Northern Ireland felt that the Authority’s remit should be extended to cover the regulation of social workers by the Care Councils in Scotland, Wales and Northern Ireland.
- 10.20 The Authority was generally supportive of its existing powers and role. The only exception was in respect of its section 28 power to consider complaints about regulatory bodies (see provisional proposal 10-6).

² Of the 192 submissions which were received, 34 expressed a view on this proposal: 34 agreed, whilst 3 held equivocal positions.

10.21 However, some consultees thought that the Authority's powers and roles required further consideration. The Patients Association argued that the Authority needs "sufficient powers and 'teeth' to make a genuine and tangible impact when regulators are failing". The Professional Standards Authority itself argued that "with stronger powers" it could have been "more effective in overseeing the regulators", for example:

with powers to require people to cooperate with investigations we have been asked to undertake, or in certain circumstances to require the regulators to act in particular ways.

10.22 The Institute of Health Visiting said that the Authority's:

non-response to correspondence, lack of attention to whistle-blowers and view that concerns about the public served by health visitors represent 'sectional interests' only mean that we have little confidence in the Professional Standards Authority as it is currently constituted.

Provisional Proposal 10-3: Appointments to the Professional Standards Authority's General Council should be made by the Government and by the devolved administrations. Appointments would be made in accordance with the standards for appointments to the health and social care regulators made by the Professional Standards Authority.

10.23 A large majority agreed with this proposal.³ For example, Optometry Scotland said that it "would accept this proposal subject to suitable safeguards for review and scrutiny of appointees".

10.24 The Scottish Government supported the proposal that "each devolved administration should appoint one member" of the Council. It argued that the Authority should be required to "make and publish rules on the appointment of its members" with the requirement that "such rules have first been approved and ratified by the Government and the devolved administrations". It also disagreed with any suggestion that the Authority "should be allowed to regulate its own constitution as this would not afford the requisite degree of transparency and accountability", and would provide the Authority "with almost unfettered discretion to exercise its duties".

10.25 However, some argued for additional Parliamentary oversight. The Registration Council for Clinical Physiologists expressed "deep concerns" over this proposal "as this would seriously compromise the body's independence from political interference". It argued that all Council appointments should be approved by the Health Select Committee. The General Pharmaceutical Council stated that:

As the Professional Standards Authority is to be accountable to Parliament, it would seem more appropriate that its Council Members' appointments should be scrutinised by Parliament itself as well as the

³ Of the 192 submissions which were received, 31 expressed a view on this proposal: 27 agreed, whilst 4 disagreed.

Scottish Parliament and Welsh Assembly and Northern Ireland Assembly for UK regulators.

10.26 The Professional Standards Authority stated that:

If there is to be an increased and more explicit line of accountability to Parliament, and if the Professional Standards Authority has a strengthened role in oversight of the regulators, we believe our chair appointment should be subject to a hearing by the Health Committee (or other Parliamentary Committee as decided).

10.27 The Department of Health argued that because the Professional Standards Association is a UK-wide body, the Privy Council should undertake appointments. Otherwise, it argued that the Authority should be allowed to make its own appointments.

10.28 The Patients Association argued for a “firm constitution for the Professional Standards Authority” so that it is “protected from day to day policy changes and changes of Government”.

10.29 The Association of Regulatory and Disciplinary Lawyers felt this proposal would have implications for the Authority’s perceived independence, and therefore argued that an independent office should be established to undertake such appointments. The Nursing and Midwifery Council and Royal College of Midwives argued that – in line with our proposed approach for the regulators – the Authority should be given the power to appoint its own members.

Provisional Proposal 10-4: The Professional Standards Authority’s general functions should be retained, but modernised and reworded where appropriate.

10.30 The vast majority agreed that the Professional Standards Authority’s general functions should be retained.⁴ For example, the Nursing and Midwifery Council said:

Given the Professional Standards Authority’s overarching role, we feel that it is appropriate that the description of its powers is broad and high-level. We feel that the current wording is clear and would support an updating of the statement of the Professional Standards Authority’s general functions to reflect recent changes to its powers.

10.31 The Patients Association argued that the existing functions of the Authority are “still necessary though we are concerned about the hesitancy sometimes shown to use these powers to compel the regulator to perform its duties”.

10.32 The Professional Standards Authority stated that:

We consider that the general functions and powers of the Authority give us scope for interpretation and for taking appropriate action to protect the public and improve regulation; we wish to retain these

⁴ Of the 192 submissions which were received, 36 expressed a view on this proposal: 35 agreed, whilst 1 held an equivocal position.

general functions and powers. We agree, however, that our overall aim, particularly in the light of our power to accredit voluntary occupational registers, needs to be revised and modernised. This may even more be the case if the Authority were to acquire an enhanced role in the accountability framework for the regulators.

- 10.33 The Pharmaceutical Society of Northern Ireland also noted that “any modernisation or rewording should reflect the final structures and processes resulting from this consultation”.

Question 10-5: Is the Professional Standards Authority’s power to give directions still necessary?

- 10.34 A large majority agreed that the Professional Standards Authority’s power to give directions is still necessary.⁵ For example, the British Psychological Society considered it important to maintain the power “even if it is utilised only occasionally”. An individual consultee (Jacqueline A Wier) thought that the “additional power has meant that the regulators are given extra assistance when necessary”.

- 10.35 The Health and Care Professions Council stated that:

Although such directions should rightly only be made as a “last resort” ... such powers may still be needed, particularly given that the new legislative framework would mean a greater degree of discretion for the regulators in addressing some matters in rules that have hitherto only been specified in primary or secondary legislation.

- 10.36 Similarly, the Royal College of Midwives argued that “once health regulators have greater freedom to determine the governance, processes and rules, there could be a future need for this power”.

- 10.37 The General Medical Council said:

We share the Law Commission’s view that this power should be retained since it is an important means by which regulators can be held accountable. The effectiveness of the Professional Standards Authority in such areas is also important in reinforcing the case for the independence of the regulators from Government intervention.

- 10.38 The Department of Health suggested that the power to give directions could be augmented to “require regulators to comply with anything the Professional Standards Authority considers necessary” and that the Privy Council be given an order-making power to provide for whether and how this power is used.

- 10.39 The Scottish Government thought that the “power should be the subject of careful monitoring, scrutiny and analysis to ensure that it has been exercised appropriately and consistently”.

⁵ Of the 192 submissions which were received, 36 expressed a view on this question: 28 said that the power was still necessary, 5 disagreed, whilst 3 held equivocal positions.

10.40 The Department of Health, Social Services and Public Safety for Northern Ireland agreed that the general functions should be retained and that the power to give directions is necessary “but the Professional Standards Authority appears reluctant to use it”.

10.41 However, the Nursing and Midwifery Council felt that “the mature and effective relationship that exists between the Authority and the regulatory bodies would preclude this power (if ever enacted) from being used” and it should be discontinued.

10.42 The Association of Regulatory and Disciplinary Lawyers questioned whether this power is necessary given that “the Secretary of State would retain a power to intervene”. The General Chiropractic Council also thought that the power to give directions was no longer required.

10.43 The General Osteopathic Council argued that:

As this power has not been switched on it is not clear that it is required. We believe that the power to give directions should rest with the Secretary of State ... [who] should seek the advice of the Professional Standards Authority before making a direction. In any case, we envisage that in most circumstances where the Secretary of State considers giving a direction it is likely to be at the prompting of the Professional Standards Authority.

10.44 The General Dental Council argued that the legal framework must be clear “that this has a different function from any direction of last resort which can be given by the Secretary of State”.

10.45 The Professional Standards Authority stated that this power:

has an important symbolic value and would be important if used, although in practice it is far more likely that change can be achieved by consent. Any power to give directions should be considered a last resort. There are circumstances in which the advice we have given has failed to be acted on by regulators. This limits our effectiveness as we have no further means of ensuring that reforms and improvements are made.

Provisional Proposal 10-6: The existing power for Government to make regulations for the investigation by the Professional Standards Authority into complaints made to it about the way in which a regulator has exercised its functions should be retained.

10.46 An overwhelming majority agreed with this proposal.⁶ For example, the Nursing and Midwifery Council argued that this power “will enable the Authority to address issues of concern in the performance of a regulator’s functions in a more formal way than at present”.

⁶ Of the 192 submissions which were received, 33 expressed a view on this proposal: 32 agreed, whilst 1 held an equivocal position.

10.47 An individual consultee (Benita Rae Smith) commented that:

There is a problem with democratic accountability, as there is no mechanism whereby registrants can formally complain of unjust treatment by the Health and Care Professions Council either to the Professional Standards Authority or to any other body.

10.48 Some felt that the power should be circumscribed. The Pharmaceutical Society of Northern Ireland argued that the Professional Standards Authority's remit should be limited to complaints specifically about "the way in which a regulator has exercised its functions ie the process" rather than "specific decisions given for example in fitness to practise cases". Similarly, the Nursing and Midwifery Council argued that the power should not be used "to challenge or undermine properly-made fitness to practise decisions by regulators". The Royal College of Midwives argued that it is important to ensure that the Authority "is not seen as another source of redress for aggrieved individuals except where a regulator has failed to perform its functions adequately".

10.49 The General Dental Council argued that "an Ombudsman service as such is not appropriate for the service provided by regulators" since this would "add another, inappropriate, tier of complaint or quasi-appeal to registrants or patients aggrieved by the outcome of fitness to practise proceedings".

10.50 The Patients Association argued that "public awareness of complaints procedures within the regulators will be essential for such a system to work" and "many patients and service users are simply not well enough aware of the regulators or their function at present".

10.51 The Medical Protection Society said it was important that:

Professional Standards Authority staff should have and demonstrate the necessary competencies to deal with complaints fairly, looking at the issues dispassionately and without bias. We believe that there is scope for considerable improvement and are concerned that the Professional Standards Authority must set a high standard if it is to command the respect of the regulators which are subject to its oversight.

10.52 The Pharmaceutical Society of Northern Ireland felt that the power to make regulations should rest with the Northern Ireland Executive in relation to the Society's responsibilities. This was supported by the Professional Forum of the Pharmaceutical Society of Northern Ireland.

10.53 The Professional Standards Authority expressed concern about the statutory wording of this power but nevertheless felt there was "value in a limited power to investigate matters of maladministration".

Question 10-7: Should the Professional Standards Authority's power to refer cases to the High Court in England and Wales, the Court of Session in Scotland and the High Court in Northern Ireland: (1) be retained and exercised alongside a regulator's right of appeal, in cases when the regulator's adjudication procedure is considered to be sufficiently independent; or (2) be removed when a regulator's right of appeal is granted in such circumstances; or (3) be retained and rights of appeal should not be granted to regulators, although regulators should have a power to formally request the Professional Standards Authority to exercise its power?

10.54 This question divided opinion at consultation. However, most consultees favoured options one and three.⁷

Option one

10.55 This option was supported by the General Medical Council which stated that:

The two rights of appeal need not be seen as mutually exclusive. For the Professional Standards Authority it provides an important tool for practical oversight of the operation of the regulators and for helping to ensure appropriate outcomes. For the General Medical Council it is both a consequence of and reinforces the separation of the investigation and adjudication functions and the independence of the Medical Practitioners Tribunal Service ... [and] provides a solution in cases where fitness to practise panels make decisions which do not stand up.

10.56 The Nursing and Midwifery Council also argued:

While mindful of the potential for duplication, we would support the right of regulators to appeal the decisions made by their adjudication panels, in the same circumstances as appeals made by the Professional Standards Authority under section 29, in order to reflect and underline the separation of function.

10.57 The Professional Standards Authority agreed that it should retain the right of appeal in addition to that exercised by the General Medical Council, but expressed the following concerns:

- (1) two levels of appeal will be more complicated and increase costs;
- (2) General Medical Council appeals may not be independent or enhance public confidence;
- (3) there will be different appeal processes for different regulators which may be confusing the public and registrants;

⁷ Of the 192 submissions which were received, 41 expressed a view on this question: 15 supported option 1, 4 supported option 2, 18 supported option 3, whilst 4 held equivocal positions.

- (4) any change should be part of a longer term strategy to create a coherent and cost effective appeal process;
- (5) there are legal and technical problems which need to be resolved if any new process is to work; and
- (6) the proposal is not consistent with Government policy to simplify regulation and reduce its cost.

10.58 The Department of Health was attracted by a model “whereby the Professional Standards Authority’s right to appeal should be retained and exercised alongside a regulator’s right of appeal”, but the Authority’s power should only be exercised if the regulator has decided not to appeal. However, if the regulator does bring an appeal, the Authority should still be able to intervene. The Department stated that it is still exploring this issue and has not yet reached a final view, but that it may legislate before the introduction of any legislation resulting from our review.

10.59 The Scottish Government favoured option one since this would “reinforce the regulator’s central role in establishing and ensuring standards and the Authority’s role in overseeing the actions and decisions of regulators”. It said that:

As is currently the case, this power should only be used when the imposition of a relevant sanction is considered to have been unduly lenient or, in relation to a decision not to impose sanctions or to restore a person to the register, when the decision should not have been made. It must also be desirable for the protection of members of the public

Option two

10.60 The Association of Regulatory and Disciplinary lawyers favoured this option on the basis that “it is unnecessary to provide for two routes to challenge a decision” and “it is best if challenges are made within the statutory framework”. Charles Russell LLP argued that this option “will remove the expense and uncertainty of both regulators attempting to refer the same decision”.

Option three

10.61 The Health and Care Professions Council supported this option and argued that:

The Professional Standards Authority as an independent oversight body is in a better position to assess which cases should be referred to the Court, not the regulator given that they are a party to the proceedings.

10.62 An individual consultee (Jane C Hern) agreed that the right to appeal should be conferred on the Professional Standards Authority to ensure independence. She noted that:

The difficulty for any regulator in exercising such a power is that the decision, although made by an independent committee, or even the new General Medical Council tribunal, is still made under the aegis of the regulator, who inevitably has a vested interest in the outcome. It is inevitably still the regulator that still has to deal with any adverse [publicity], whether dissatisfaction is expressed by the public or the profession or both.

10.63 The Patients Association argued that “the protection of patients and service users overrides the concerns about double jeopardy in these circumstances” and that option three would “provide an independent and impartial forum for appeals from all parties concerned, including patients and service users”. The British Association for Counselling and Psychotherapy also thought that option three would have a positive impact, by lessening “the danger that the public will suspect professional protectionism”.

10.64 The General Osteopathic Council felt that if the preferred approach is to be option three, then the Professional Standards Authority should be required to justify “why it chose not to exercise its right of appeal following a request from a regulator”.

Other comments

10.65 The Medical Defence Union felt that the “the right of review/appeal should be exercised by only one body” (but expressed no preference between options two and three) since it would be:

unfair to expose registrants to further jeopardy in circumstances where both parties would in effect be seeking the court’s view on the same matter and on the same facts.

There is of course the further cost point because whichever body brings the appeal, it will be ultimately be funded principally by registrants through registration fees. The appeals process must be reasonable and proportionate to the perceived risk to the public.

10.66 The Society of Chiropractors and Podiatrists felt that the “greater concern” is that the Professional Standards Authority can only refer cases to the High Court where it feels a regulator has been too lenient. The Society suggested that, “in the interests of fairness”, the Authority should also be able “to refer cases where they feel a regulator has been too severe”. A similar point was made by the British Osteopathic Association.

10.67 The General Dental Council commented that “if a different model of independent adjudication from that currently used by the regulators were to be introduced, then the necessity for the power should be revisited”. The General Optical Council also said that the answer to the question would “depend on the approach taken to the separation of investigation and adjudication”.

10.68 The Medical Protection Society proposed an alternative solution, which would provide for “the regulator to be granted the right to formally request a review by the Professional Standards Authority which will then proceed under the procedures and precedents” applicable to its section 29 power.