

## **PART 3**

# **MAIN DUTY AND GENERAL FUNCTIONS OF THE REGULATORS**

**Question 3-1: Should the statute specify the paramount duty of the regulators and the Professional Standards Authority is to: (1) protect, promote and maintain the health, safety and well-being of the public by ensuring proper standards for safe and effective practice; or (2) protect, promote and maintain the health, safety and well-being of the public and maintain confidence in the profession, by ensuring proper standards for safe and effective practice?**

- 3.1 This issue provoked the biggest response at consultation. A significant majority argued that the paramount duty should contain express reference to maintaining confidence in the profession.<sup>1</sup>

### ***Support for maintaining confidence in the profession***

- 3.2 Many supported this option on the basis that ensuring confidence in the profession was seen as an important aspect of professional regulation. For example, the British Chiropractic Association described the maintenance of confidence as “an essential component of statutory regulation”, and an individual consultee (Dr Anton E A Joseph) agreed that it was a “high priority”. A common concern was that the lack of an express reference to maintaining confidence might narrow the ability of the regulators to intervene.
- 3.3 Some took this point further and argued that confidence in the profession is a legitimate and separate basis for regulatory intervention. The General Medical Council argued that it is not appropriate for regulators to intervene in essentially private matters but “there are undoubtedly behaviours unconnected with a doctor’s professional conduct which would undermine public confidence in the profession”. The following examples were provided:
- (1) a doctor found guilty of certain offences – for example, rape, using child pornography, dangerous driving causing death or committing fraud against a vulnerable person – seeking to resume medical practice once their criminal sentence had been served; and
  - (2) a doctor involved in non-criminal activities such as publishing homophobic materials.
- 3.4 The Council drew a distinction between direct issues of “patient protection” and issues of “public protection insofar as the behaviour, if it appears to be condoned by the regulator, undermines public confidence in the profession as a whole”. Therefore, it argued that:

<sup>1</sup> Of the 192 submissions which were received, 100 expressed a view on this question: 18 supported a public protection focused duty, 77 agreed with an express reference to maintaining confidence, whilst 5 held equivocal positions

While we recognise that the notion of public confidence is neither fixed nor binary, regulators should be able to act in a way which protects the public by enabling them to have confidence in the profession.

- 3.5 The Nursing and Midwifery Council used the example of a professional who has downloaded child abuse images. It argued that, in itself, this behaviour does not impede safe and effective practice. Without the requirement to maintain confidence in the profession, it could be difficult to stop the registrant practising.
- 3.6 A small number of responses linked the issue of maintaining confidence in the profession with a representational and development role for the regulators. For example, the General Osteopathic Council argued that:

There remain considerable developmental needs within some of the more recently regulated professions to ensure that practice is of a uniformly high standard and that there is confidence in these professions not just from the public but also other professions and the commissioners of health care.

- 3.7 Newcastle City Council argued that the reference to maintaining confidence in the profession would enable the regulators to work in partnership with professional bodies and other organisations that represent the profession to promote a positive image of the profession. An individual consultee (Jane C Hern) went further and argued that since registrants fund the regulatory bodies:

it is important that the regulators do all they can to maintain the confidence of the profession, particularly if appointment is to replace election of Council members from the profession, as there will in effect be taxation without representation.

- 3.8 However, the Patients Association took a different approach and argued that the lack of an express reference to maintaining confidence has contributed:

to the perception in some patients' and service users' minds that regulators "look out for their own" rather than working to improve the standard of the profession as a whole.

- 3.9 Similarly, the Optical Confederation felt that reference to maintaining confidence in the profession would:

act as a rein on any regulator which pursued egregious ideas about promoting, protecting and maintaining the health of the public which would undermine confidence in the profession.

- 3.10 An individual consultee (Andrew Colman) argued that:

The retention of maintenance of public confidence in the profession as part of the paramount duty is [therefore] not about protecting an outmoded code of professional conduct but forms an integral part of protecting, promoting and maintaining the health, safety and well-being of the public.

- 3.11 The Royal College of Nursing supported the inclusion of maintaining confidence in the profession but only “reluctantly”. Its position was based on the fact that public protection and maintaining confidence have become so “interlinked in the minds of the regulators, courts and the public that it can be very difficult for these concepts to now be looked at entirely separately”. The College suggested that concerns about regulatory intervention based on maintaining confidence should be addressed by alterations to the concept of impaired fitness to practise and the criteria for interim orders in the statute.

***Support for a public protection focused duty***

- 3.12 Most who supported this option argued that a public protection focused duty would provide clarity about the purpose of health and social care professional regulation. For example, the Medical Defence Union argued that this option:

best encapsulates the primary role of the regulators and maintaining confidence in the profession may not be consistent with ensuring proper standards for safe and effective practice.

- 3.13 Bupa recognised that maintaining confidence is an “important standard”, but it should be a regulatory aim only in relation to public protection. It was critical of the Nursing and Midwifery Council for frequently pursuing professionals on the basis of non-public protection related conduct.

- 3.14 Several consultees drew a distinction between public protection which was the proper role of the regulators and maintaining confidence which was viewed as a matter for professional and other representative bodies and the profession itself. The British Society of Hearing Aid Audiologists felt that “it is the responsibility of the profession, through its professional body, to maintain confidence in the profession”.

- 3.15 The Royal Pharmaceutical Society of Great Britain stated that:

Regulation is effectively a shared responsibility between professional leadership bodies setting standards for professional activity and the enforcement role of the regulator. This approach ensures that the regulator maintains public confidence in the regulatory process and achieves a safe environment for the public to access their pharmaceutical care. The professional leadership body has the role of demonstrating to the public that pharmacy is a trusted profession whose members deliver safe pharmaceutical care.

- 3.16 Many who supported a public protection focused duty did so on the basis that maintaining confidence in the profession was implicit. RadcliffesLeBrasseur argued that confidence in the profession was a “natural consequence” of ensuring proper standards and there is no need for its maintenance as a separate element. The Royal College of General Practitioners suggested that a public protection focused duty might be preferable in terms of public perception and the need to avoid any suggestion of the profession looking after its own interests.

- 3.17 The Department of Health and the Scottish Government supported a public protection focused duty. The Scottish Government also recognised “that the perception that the professions are self-interested could potentially arise” and therefore commented:

It would be useful to identify which external objectives would be used, if any, to determine how level(s) of public confidence in the professions would be assessed, and by whom any such analysis would be carried out.

- 3.18 Others were critical of the extent of “regulation-creep” into the private affairs of individuals. For example, an individual consultee (Trevor Williams) argued that the regulators’ primary purpose is public protection and maintaining confidence in the profession is a secondary “public policy” responsibility. He thought that this secondary purpose is:

often used as a guise to basically punish professional people who actually pose no threat whatsoever to the public but who have done something which incurs general opprobrium. People are being deprived of their careers in order to protect the reputation of the profession when there is no real substance to the idea of a profession's reputation being damaged.

- 3.19 Mr Williams also questioned the assumptions behind the links made between public protection and maintaining confidence. He suggested that people are not put off seeking help from a profession because certain individuals have been struck off but if they have been treated badly by a professional they will avoid that individual. He was critical of panel decisions which “frequently” justify erasure on the basis that a strong message needs to be sent to the profession that such behaviour will not be tolerated, when such decisions are not reported widely or publicised, and most professionals are not interested in disciplinary matters.

- 3.20 Some responses provided specific examples of what they saw as inappropriate attempts by regulators to police private matters. UNISON pointed to a case involving a nurse who was investigated after participating in the Greenham Common protests. An individual consultee at a consultation event referred to a doctor being investigated by the General Medical Council following a complaint about their behaviour at a Parent-Teacher Association meeting. In addition, the Royal College of Nursing provided the following examples:

the striking off of a registrant with an impeccable background as a nurse, who has inadvertently allowed video footage of herself having sexual relations at a party to appear on the internet, or a registrant who admitted engaging in her own time in prostitution being removed from the register. We are currently defending a case for a nurse who had formerly treated a family, who then many years later strikes up a friendship with family members outside a school gate (where both parties’ children attend). She now faces charges of forming an inappropriate friendship even though there is no sexual element to it.

- 3.21 The Guild of Healthcare Pharmacists reflected on its previous experience when the regulatory body for pharmacy also represented the profession. It said that:

In practice regulation became over-zealous with an excessive focus on maintaining confidence in the profession due in part to the commercial nature of the majority of the profession rather than the need for public safety.

- 3.22 The British Association for Music Therapy felt that the inclusion of maintaining confidence in the profession may encourage the regulators to impose more severe sanctions on individual registrants, risking “unfairness to individual registrants in unusual or highly publicised fitness to practise cases”.
- 3.23 The Society of Chiropractors and Podiatrists argued that in order to prevent inappropriate investigations by the regulators, the duty should be “to maintain confidence in the profession in addition to the duty to protect the public, but with a specific exception for matters of private conduct and belief”.
- 3.24 Many responses felt that the concept of maintaining confidence in the profession was too vague to form the basis of a statutory duty. The Royal College of Surgeons of Edinburgh argued that maintaining confidence is a subjective concept and very difficult to quantify, and is affected by events outside the control of the regulator. Thus, it was “difficult to see how the regulators’ performance in this respect could be adequately ascertained and monitored”. Similarly, an individual consultee (Trevor Williams) argued that:

The "reputation of a profession" is an abstract concept which cannot be measured, cannot even be known, so if it is damaged in some way nobody knows and frankly nobody outside the Royal Colleges cares about, yet it is being used daily to deprive people of their right to work.

- 3.25 RadcliffesLeBrasseur expressed concern that in practice “the yardstick of a public confidence standard will be the most recent tabloid headline which would be entirely inappropriate”.
- 3.26 The Department of Health, Social Services and Public Safety for Northern Ireland supported a public protection focused duty and suggested that the duty should include “a discipline dimension ‘by ensuring compliance with and intervening where practice behaviour falls short of expected standards’”.

#### ***Ensuring proper standards for safe and effective practice***

- 3.27 Some consultees commented on the inclusion of the wording “by ensuring proper standards for safe and effective practice” in the duty. For example, the Department of Health expressed concerns that the inclusion of “by ensuring proper standards for safe and effective practice” would narrow the current duty:

We would prefer if it provided that this was to be done “*primarily* by ensuring proper standards for safe and effective practice” but allowed for other methods too, to avoid any possibility that the new definition might inadvertently narrow the regulators’ scope for application of their powers. The legislation needs to be clear that the main duty

does not include promoting the professions an organisation regulates.<sup>2</sup>

- 3.28 The Scottish Government agreed with the proposed amendment.
- 3.29 The Nursing and Midwifery Council was concerned that this additional wording was unnecessary because it could be misinterpreted as limiting the current functions of the regulators. In other words, the reference to “standards” would be interpreted as meaning the specific tasks of issuing codes of conduct or standards of proficiency. The Professional Standards Authority also warned that the proposed wording might lead people to think that regulators are primarily concerned with setting standards and have little role in taking action when people fail to adhere to them.
- 3.30 Some said that the wording required amendment to cover the full functions of the regulators, such as establishing a register and setting standards for education.
- 3.31 The General Medical Council argued there will be cases where public confidence is not strictly a matter of safe and effective practice for individual patients, (such as convictions for fraud). It felt, therefore, that it may be better to use a broader formulation such as “ensuring proper standards in the practice of the profession”. The Patients Association suggested that “ensuring proper standards” did not go far enough and preferred “guarantees proper standards”. The Royal Pharmaceutical Society of Great Britain also felt that the wording needed strengthening and suggested “maintenance of accepted standards of behaviour”.

***Alternative formulations of the main duty***

- 3.32 A number of consultees suggested amendments to the proposed wording of the public protection element of the paramount duty. Some felt that a requirement that the regulators must “maintain” the health, safety and well-being of the public was not achievable. The British Dental Association suggested that instead the duty should be to “promote” these matters, while the Nursing and Midwifery Council felt the duty should be to “safeguard” these matters. Other responses expressed concern that the term “well-being” is imprecise, and the General Dental Council suggested that the term was more relevant to the context of social care. At a consultation event organised by 39 Essex Street, a participant suggested that “welfare” was more appropriate.
- 3.33 Some consultees suggested amendments to the proposed wording of the maintaining confidence element of the paramount duty. For example:
- (1) the duty should apply to the “public’s confidence in the professions” rather than the confidence of the professions in the work of the regulators (General Optical Council);
  - (2) the duty needed to refer to maintaining confidence in the “professions” in order to take into account multi-professional regulators (Health and Care Professions Council);

<sup>2</sup> Emphasis in the original.

- (3) the duty should be to “develop and maintain high confidence in the profession” because maintaining confidence suggests that “confidence is there in the first place and that there is no room for improvement, thus risking complacency” (NSPCC);
- (4) it would be impossible for a regulator alone to maintain confidence in the profession since this will depend on a range of factors and therefore the duty should be to “take account of its responsibility to uphold public confidence in the profession as far as is in its power” (Care Council for Wales); and
- (5) the maintaining confidence in the profession element should not apply to the Professional Standards Authority (Medical Protection Society).

3.34 An individual consultee (Don Brand) suggested that “the public” would need to be carefully defined, and recognised that there will be occasions where the interests of service users conflict with those of the wider public.

3.35 Some put forward alternative main duties. While the precise wording varied, most sought to require the regulators to maintain confidence in the *system* of regulation. A participant at a consultation event with the General Social Care Council pointed out that there is a precedent for this approach: the Police Complaints Commission is required to secure public confidence in the complaints system.<sup>3</sup> The Professional Standards Authority suggested the duty should be “to protect, promote and maintain the health, safety and wellbeing of the public and maintain confidence in the profession and its regulation.”

**Provisional Proposal 3-2: The statute should not include a statement setting out the general or principal function(s) of the regulators.**

3.36 A majority agreed that the statute should not include a statement setting out the general or principal functions of the regulators.<sup>4</sup>

3.37 Many thought that such a statement would simply be repetitious. For example, the Health and Care Professions Council said that “such statements are unnecessary and duplicate the functions of the regulators set out elsewhere in statute”. The Institute of Health Visiting felt that the paramount duty was sufficient.

3.38 However, the General Medical Council disagreed and felt it was important to include such a statement in order to set parameters within which the regulators operate and for public expectation. The Department of Health, Social Services and Public Safety for Northern Ireland supported a statement setting out general or principal functions on the basis that they “need to be communicated/transparent to the public”.

<sup>3</sup> Police Reform Act 2002, s 10(1) (d).

<sup>4</sup> Of the 192 submissions which were received, 44 expressed a view on this proposal: 30 agreed and 14 disagreed.

- 3.39 The Patients Association accepted that general functions were “superfluous” from a legal perspective, but felt they performed an important policy role by emphasising the regulators’ duties and functions. It pointed to the example of the Care Quality Commission where general or principle functions were not in place and argued that, consequently, the Commission’s inspection function has been underused.
- 3.40 The Association of Clinical Biochemistry felt that the inclusion of a statement of general functions would improve “clarity and general understanding by the public”. UNISON’s opposition to the proposal was based on its belief that “a statement could help to ensure a level of consistency across the regulators”.

**Question 3-3: Should the statute include guiding principles which would apply to all decisions made by the regulators, and if so what should they be?**

- 3.41 A majority felt that the statute should include guiding principles.<sup>5</sup> For example, the Equality and Human Rights Commission said that it “would welcome a set of general principles for decision-making”, and suggested that the public sector equality duty could be a useful starting point. The General Osteopathic Council, British Psychological Society and a number of individual consultees (Lucy Reid and Jacqueline A Wier) were amongst others who supported the proposal.
- 3.42 The Scottish Government supported the inclusion of guiding principles based on timescales for communicating with third parties and responding to allegations of impairment.
- 3.43 The Department of Health, Social Services and Public Safety also supported the inclusion of a statement of principles which it suggested should include “proportionality, gravity, equity and fairness”.
- 3.44 However, the General Chiropractic Council argued that guiding principles would make the Act unwieldy and are, in any event, legal principles which would apply anyway. The General Medical Council argued that such principles easily slip into vacuous statements of the obvious. The Nursing and Midwifery Council felt that guiding principles are unnecessary since the regulators are already subject to the Equality Act 2010 and Human Rights Act 1998. The Professional Standards Authority considered that given the existing work in this area, including its paper on right-touch regulation, there is no need to create anything new.
- 3.45 The Medical Defence Union, Optometry Scotland and the Department of Health were amongst the consultees who opposed the inclusion of guiding principles in the statute.

<sup>5</sup> Of the 192 submissions which were received, 50 expressed a view on this question: 36 agreed that the statute should include guiding principles, whilst 14 disagreed.



**Question 3-4: Should the statute include a general power for the regulators to do anything which facilitates the proper discharge of their functions?**

- 3.46 A majority agreed that the statute should provide a general power for the regulators to do anything which facilitates the proper discharge of their functions.<sup>6</sup> The General Osteopathic Council argued that this kind of power enables regulators to adapt their operations to the individual professions they regulate.
- 3.47 The Department of Health supported a general power for the regulators, whilst the Scottish Government felt that the inclusion of a general duty would assist the regulators in carrying out their functions. It suggested that the use of this power should be monitored by the Professional Standards Authority.
- 3.48 The Department of Health, Social Services and Public Safety also supported the inclusion of a general duty and felt it should be expanded “to include the need to follow due process and that any action that is taken under this power must be listed and reported in annual accountability reviews”.
- 3.49 However, several consultees were concerned about the breadth of such a power. The Professional Standards Authority reported that in the past, it has been concerned that regulators have strayed beyond their remit, and so was uneasy about this proposal.
- 3.50 The Association of Directors of Adult Social Services thought that the wording in the question was “too vague”, and the Medical Protection Society agreed that a general power would be “too broad and has the potential to lead to inconsistency”.

<sup>6</sup> Of the 192 submissions which were received, 48 expressed a view on this question: 33 said there should be such a power, whilst 15 disagreed.