

June 2021

MPS response to the DHSC consultation on Regulating healthcare professionals, protecting the public

Introduction

Medical Protection Society (MPS) strongly welcome the publication of this consultation and the plan to advance a range of reforms to improve the regulation of healthcare professionals.

MPS is the world's leading member-owned, not-for-profit protection organisation for doctors, dentists and healthcare professionals. Our in-house experts assist members with the wide range of legal and ethical problems that can arise from their professional practice. Of particular relevance to this consultation, we provide assistance to doctors and dental professionals in the UK who are being investigated by the GDC and GMC. Our response to this consultation reflects both the view of Dental Protection and Medical Protection.

We have long argued for reform to the legislation that underpins the professional regulators. Following this consultation, we would urge the government to stick to the proposed timescales for passing secondary legislation to amend the Medical Act by Spring 2022. We strongly urge the government to also prioritise reforms to the Dentists Act.

We particularly recommend that the following reforms be prioritised:

- **Regulators are given the discretion to decide whether and how to investigate a fitness to practise concern.** Such a reform would help to address the current situation where thousands of health professionals go through an investigation each year even when it's apparent very early on that there will not be any regulatory action.
- **Remove the GMC right of appeal against MPTS decisions.** Acting on the government's commitment in 2018 would help to reduce fear across the medical profession and increase confidence in the GMC.

We welcome many of the broader range of proposals in principle and look forward to these progressing also. Whether these proposals are a success or not will however be dependent on getting the details right and we will work on these with the DHSC and the regulators. This is especially the case for the proposal to introduced agreed outcomes.

There are also a number of areas where we have strong reservations about the proposals, in particular the proposal that health should not be retained as a category of impairment, and the end to the five year rule for conducting investigations. In our view:

- **Health should be retained as a separate category of impairment.** We have significant concerns about the unintended consequences this could have for professionals with health concerns who end up under investigation by their regulator, given such health concerns can be greatly exacerbated by the stress and anguish caused by being subject to such an

investigation, and this could be even more the case if they are to be categorised as having a 'lack of competence'.

- **The five year rule should be retained.** The current system already ensures there are appropriate limitations while allowing regulators to investigate older allegations where there are exceptional reasons for doing so. There is a public interest in concerns being raised quickly so that they can be properly investigated and result in a fair outcome, and the removal of the 5 year rule could encourage would-be complainants to not raise a concern sooner.

Governance and Operating Framework

1. Do you agree or disagree that regulators should be under a duty to co-operate with the organisations set out above?

In principle, MPS agrees with this proposal. As noted in the consultation report, recent inquiries have recommended that regulators work closely with one another and the broader health and care system to provide better public protection. We would expect regulators to do so and can see that it would be logical for there to be a consistent duty that applies across the different professional regulators.

However, we have concerns surrounding what this duty would mean in practice; how and when should cooperation be given; and whether it would result in duplication of effort and stress for all involved, especially the registrant.

2. Do you agree or disagree that regulators should have an objective to be transparent when carrying out their functions and these related duties?

Yes, MPS would agree and would expect professional regulators to be transparent when carrying out their functions and can see the benefit in enshrining this in legislation. The functioning of the regulator should be transparent and open to scrutiny, in the same way that most of its disciplinary hearings are.

However, there are of course limitations in some areas where a balance between transparency and confidentiality need to be weighed up, for example there are instances where a regulator should not share or disclose sensitive material about the registrant to the complainant and/or wider public without their consent.

3. Do you agree or disagree that regulators should be required to assess the impact of proposed changes to their rules, processes and systems before they are introduced?

Yes, MPS agrees and would expect professional regulators to assess the impact of proposed changes to their rules, processes, and systems before they are introduced and can see the benefit in enshrining a requirement to do so in legislation.

Any concerns we have in this area would relate to how the regulators do this and what reassurance will there be that they do it properly.

Additional comment on questions 1-3

As mentioned above, we support in principle the three proposed additions to the statutory purpose of each professional regulator. The new requirements proposed should adequately enshrine best practice.

We do however believe that the government should consider a more fundamental approach to rethinking the purpose of regulation.

At present, professional regulators' over-arching objective is to protect the public, and are tasked with doing so in line with the following duties:

- *protect, promote and maintain the health, safety and well-being of the public;*

- *promote and maintain public confidence in health and care professionals; and*
- *promote and maintain proper professional standards and conduct for members of those professions.*

MPS' view is that the professional regulators should be freed from their requirement to promote and maintain public confidence in health and care professionals.

A wide range of polls show that public confidence in the healthcare professions has remained consistently high over many years. This is a result of the continuing professionalism, expertise, patient focus and hard work of the vast majority of healthcare professionals. The maintenance of this position of confidence is also enhanced by having a regulator that is focused on protecting the public and maintaining proper professional standards.

Continuing public confidence in the professions should be one of the desired outcomes from having a regulator focused on protection of the public; ensuring 'public confidence' in the professions should not form part of the purpose of the regulator that guides their actions.

This is not an issue of semantics. We question whether it is fair and appropriate for individual health professionals to face a sanction being imposed by their regulator on the basis of what action it thinks is needed in order to maintain public confidence in the wider profession. We also question whether it fair and realistic to expect a professional regulator to sufficiently understand what actions it can and should take in order to help maintain public confidence in the professions.

4. Do you agree or disagree with the proposal for the constitution on appointment arrangements to the Board of the regulators?

MPS does not have a position as to whether it would be preferable for professional regulators to have a unitary board or to retain the current two-tier governance model.

We do however have concerns that this change could result in the governing board not having a sufficient understanding of the profession it regulates, not least because it would likely lead to less than half of the governing board no longer being registrants. As a result, this could lead to the non-professional members of the board not fully appreciating the contextual and situational aspects of an investigation.

This could in turn result in the regulator not having the confidence of its registrants or the wider public, making it difficult for them to achieve the overarching objective. We therefore believe there should remain a requirement for 50% of non-executive members of the governing board be registrants. We also believe that there must be a majority of non-executive members and that there should be a non-executive member from each of the UK countries.

5. Do you agree or disagree that regulators should be able to set their own fees in rules without Privy Council approval?

MPS has no comment on this question.

6. Do you agree or disagree that regulators should be able to set a longer-term approach to fees?

MPS has no comment on this question.

7. Do you agree or disagree that regulators should be able to establish their own committees rather than this being set out in legislation?

MPS agrees that regulators should be able to establish their own committees rather than this being set out in legislation, subject to consultation by each regulator when creating or removing a committee. In general, it would be best practice for the legislation to set out what it wants the regulator to achieve and it should be for the regulator to decide – and to be able to change its mind – how it sets itself up to achieve this.

8. Do you agree or disagree that regulators should be able to charge for services undertaken on a cost recovery basis, and that this should extend to services undertaken outside of the geographical region in which they normally operate?

MPS agrees that regulators should be able to charge for services provided to non-registrants, but there would need to be transparency around what they are charging, who they are charging and for what. All income received must be used to offset the cost of regulation and not be a profit-making venture.

9. Do you agree or disagree that regulators should have the power to delegate the performance of a function to a third party including another regulator?

MPS agrees with the proposal but there would need to be safeguards to ensure that this does not result in inconsistent decision making/outcomes. This also raises the question of whether the regulator seeking to delegate a function to another regulator will be responsible for the entire cost.

We agree that the examples of collaboration given in point 83 are beneficial. However, activity outside of these examples could be a cause for concern. For instance, to permit another regulator to conduct an investigation and/or hearing into a health care professional registered at a different regulator would not be appropriate as it could result in an abdication of duty and accountability. FTP investigations require making an assessment of a professionals' practice and that as the consequences of such investigations can have a profound impact on the health professional concerned therefore they should only be conducted by a the regulator which has been set up to do this and which should have an understanding of the profession it regulates. We would expect to see the development of a quality assurance framework that would ensure activity is clearly defined and restricted to activities that are universal to prevent duplication.

10. Do you agree or disagree that regulators should be able to require data from and share data with those groups listed above?

MPS disagrees with this proposal and has significant concerns about this. Providing regulators with a power to obtain, process and disclose information to or from any organisation or person where it is required to fulfil their wider statutory objectives would be a significant extension of their power. This huge power could have significant consequences for personal data, and an individual's right to privacy. It would be unrealistic to think that regulators would always use this power reasonably; it could also be used by some to go on fishing expeditions.

We do not think that strong enough evidence or examples are given to demonstrate why such a significant extension of powers is needed.

11. Do you agree or disagree that regulators should produce an annual report to the Parliament of each UK country in which it operates?

In principle, MPS agrees with the proposals of regulators being required to produce an annual report to each of the four parliaments/assemblies.

This would still be a relatively passive way in which the regulators would make themselves available for scrutiny by each of the legislatures, and further measures for improving parliamentary accountability and scrutiny could be developed.

We acknowledge that it would not be for the government department to determine other measures for how a legislature holds an independent regulator to account, but would encourage the departments of health to work with the health committees in each parliament to determine what further processes could be put in place to enhance scrutiny and accountability. We also suggest that the PSA could be required to write to each of the relevant health committees on an annual basis outlining their assessment of the professional regulators.

More broadly, we would like to make the comment that this consultation does not sufficiently emphasise the importance of independence of regulators from government. It is vital that regulators are able to operate independently of governments in delivering the statutory objectives laid down by the UK Parliament. We would in particular like to request assurances that the title of this section of the consultation is an error. The title of this section suggests that it is being proposed that the regulators should have 'accountability to the UK Government and Devolved Administrations', which would compromise the independence of the regulatory bodies.

12. Do you agree or disagree that the Privy Council's default powers should apply to the GDC and GPhC?

MPS agrees with this proposal. It is important that processes are in place to direct a regulator should they fail to carry out their statutory functions, and it is right that these apply equally across each of the regulators.

Education and Training

13. Do you agree or disagree that all regulators should have the power to set:

- standards for the outcomes of education and training which leads to registration or annotation of the register for individual learners;
- standards for providers who deliver courses or programmes of training which lead to registration;
- standards for specific courses or programmes of training which lead to registration;
- additional standards for providers who deliver post-registration courses of programmes of training which lead to annotation of the register; and
- additional standards for specific courses or programmes of training which lead to annotation of the register?

MPS has no comments on this question.

14. Do you agree or disagree that all regulators should have the power to approve, refuse, re-approve and withdraw approval of education and training providers, qualifications, courses or programmes of training which lead to registration or annotation of the register?

In relation to dentistry, MPS agrees with proposals that regulators should have the power to approve, as it will be a mechanism to quality assure the content and delivery of the curriculum. Ultimately, this should lead to attendees' confidence in the providers, as well as the outcomes for patients. On balance, our experience suggests that there are tangible benefits to quality assure the content and delivery of education and training curriculums.

15. Do you agree that all regulators should have the power to issue warnings and impose conditions?

MPS has no comment on this question.

16. Do you agree or disagree with the proposal that education and training providers have a right to submit observations and that this should be taken into account in the decision-making process?

MPS would agree with this proposal. Education and training providers should have the right to submit observations as part of the regulators' approval decision-making processes as it mitigates the concern of the powers the regulator is given will be used effectively and fairly.

17. Do you agree that:

- education and training providers should have the right to appeal approval decisions;
- that this appeal right should not apply when conditions are attached to an approval;
- that regulators should be required to set out the grounds for appeals and appeals processes in rules?

MPS has no comment on this question.

18. Do you agree or disagree that regulators should retain all existing approval and standard setting powers? Please provide a reason for your answer.

MPS has no comment on this question.

19. Do you agree or disagree that all regulators should have the power to set and administer exams or other assessments for applications to join the register or to have annotations on the register? Please provide a reason for your answer.

MPS agrees with this proposal.

20. Do you agree or disagree that this power to set and administer exams or other assessments should not apply to approved courses or programmes of training which lead to registration or annotation of the register?

MPS has no comment on this question.

21. Do you agree or disagree that regulators should be able to assess education and training providers, courses or programmes of training conducted in a range of ways?

MPS has no comment on this question.

22. Do you agree or disagree that the GMC's duty to award CCTs should be replaced with a power to make rules setting out the procedure in relation to, and evidence required in support of, CCTs?

MPS has no comment on this question.

23. Do you agree or disagree that regulators should be able to set out in rules and guidance their CPD and revalidation requirements?

MPS agrees with the proposal and the requirement for regulators to consult when proposing changes. We welcome the aim of ensuring that a practitioner continues to be fit to practise beyond inclusion on the register.

Registration

24. Do you agree or disagree that the regulators should hold a single register which can be divided into parts for each profession they regulate?

MPS does not see an issue with holding a single register, as long as regulators are able to continue to appropriately differentiate the list into different parts for each branch of the profession that they regulate, and also have the ability to hold a specialist list or to differentiate specialists in some way.

Within the dental register, the roles of registrants must be clearly defined and linked to their scope of practice. We believe there is value in acknowledging specialist status within this register for patients and the profession.

25. Do you agree or disagree that all regulators should be required to publish the following information about their registrants:

- **Name**
- **Profession**
- **Qualification (this will only be published if the regulator holds this information. For historical reasons not all regulators hold this information about all of their registrants)**
- **Registration number or personal identification number (PIN)**
- **Registration status (any measures in relation to fitness to practise on a registrant's registration should be published in accordance with the rules/policy made by a regulator)**
- **Registration history**

MPS agrees with this proposal broadly, with the exception of registration history.

Clearly there is a need to achieve an appropriate balance between the need to be transparent and open with the public, with the regulator's duty to be fair to the healthcare professional. Our view is that historical fitness to practise concerns or outcomes should not be indefinitely published and available for all to see. In the case of concerns that date back a long time, this could needlessly undermine patient confidence in the registrant's ability, which could itself result in the registrant making, or being perceived to be making, errors. We believe this is particularly relevant when it references the registrants' health.

26. Do you agree or disagree that all regulators, in line with their statutory objectives, should be given a power allowing them to collect, hold and process data?

MPS agrees with the regulators having the power to collect, hold and process data, however, this should be restricted to the required information held on the register at the time according to the statutory purpose of the regulator.

The proposals suggest that regulators will be able to add to the list of things it publishes if it wishes to, including CPD status, and a registrant can be erased for refusing to provide such information, which we would oppose.

We do have some concerns about the ability to maintain meaningful data, in relation to CPD status, and would not want administrative duties to add an additional bureaucratic burden on registrants.

There must be guidance provided on how long after a registrant leaves the register that the data continues to be processed and/or publicly available, which must be proportionate. Currently there is nothing expressed about that that is consistent across the regulators and there should be.

27. Should they be given a discretionary power allowing them to publish specific data about their registrants?

MPS disagrees with this proposal. This goes against the principal of having equitable information across the profession and the outcome sought. There should also be controls on what additional information a regulator can then require a registrant to provide in the future (as additional material not currently provided) in order that it may be published. That power should not just be given to the regulator to decide for itself.

28. Do you agree or disagree that all regulators should be able to annotate their register and that annotations should only be made where they are necessary for the purpose of public protection?

MPS partially agrees to this proposal, as it must be limited to what is legally required or necessary for the purpose of public protection. What is included on the register must be linked to the regulator's statutory purpose and not be extended to a broader "find a dentist or doctor" resource.

That information should be consistent across the regulators and agreed that it is not just left open ended and subject to scrutiny where revised in the future (as per our response to 27).

On the issue of indemnity, healthcare professionals currently have both a statutory and professional duty to ensure they have adequate indemnity or insurance. We are supportive in principle of the case for there being more transparency around what indemnity arrangements an individual has in place. We are however unsure that the register maintained by professional regulators would be the best place to provide such information, and we question whether such a change could provide the detail or be frequently updated enough to be a workable solution without creating a disproportionate administrative burden.

MPS disagrees with the proposals (point 162 of the consultation document) of regulators charging a fee for making annotations. We question why a registrant should be charged for the regulator to publish the most correct and up-to-date information about them, and how much extra would this cost the regulator to update. If registrants are paying for these things to be added, it could be in the financial interest of the regulator to encourage registrants to apply for such changes by, for example, extending the list of possible annotations. Were the list of possible annotations to increase over time, this could result in greater confusion for the public. The data must be clear, accurate, proportionate and meaningful. CPD, for example, is unlikely to pass that criteria.

29. Do you agree or disagree that all of the regulators should be given a permanent emergency registration power as set out above?

MPS agrees. This is a proportionate response to emergencies, and only following notification by the Secretary of State.

30. Do you agree or disagree that all regulators should have the same offences in relation to protection of title and registration within their governing legislation?

MPS believes that it is important for protected titles to remain. In dentistry, for example, it is important that only an appropriately qualified GDC registrant can use the titles 'dentist', 'dental surgeon' or 'dental practitioner'. Therefore, it would seem appropriate that all regulators should have the same offences in relation to protection of title and registration within their governing legislation.

31. Do you agree or disagree that the protection of title offences should be intent offences or do you think some offences should be non-intent offences (these are offences where an intent to commit the offence does not have to be proven or demonstrated)?

MPS agrees that the protection of title offences should be intent offences only. The important thing for patient safety is that anyone inappropriately using a protected title and/or the circumstances around this, should be investigated.

Our concern primarily relates to tooth whitening in dentistry.

32. Do you agree or disagree with our proposal that regulators should be able to appoint a deputy registrar and/or assistant registrar, where this power does not already exist?

MPS agrees with this proposal. It is a sensible step to take to ensure that a regulator's activity proceeds uninhibited. However, those acting in these roles must be identifiable in all correspondence and accountable for decisions made.

33. Do you agree or disagree with our proposal that regulators should be able to set out their registration processes in rules and guidance?

MPS agrees with this proposal, as long as the process is applied equally and fairly across all applicants regardless of their country of qualification.

34. Should all registrars be given a discretion to turn down an applicant for registration or should applicants be only turned down because they have failed to meet the new criteria for registration?

MPS does not have strong views on this provided there is an adequate appeal process.

35. Do you agree or disagree that the GMC's provisions relating to the licence to practise should be removed from primary legislation and that any requirements to hold a licence to practise and the procedure for granting or refusing a licence to practise should instead be set out in rules and guidance?

MPS has no comment on this question.

36. Do you agree or disagree that in specific circumstances regulators should be able to suspend registrants from their registers rather than remove them?

MPS agrees with this proposal as set out in points 205, 206 and 207 of the consultation document.

37. Do you agree or disagree that the regulators should be able to set out their removal and readmittance processes to the register for administrative reasons in rules, rather than having these set out in primary legislation?

MPS would agree, provided there is adequate consultation prior to the removal and readmittance processes changing.

38. Do you think any additional appealable decisions should be included within legislation?

MPS does not think any other appealable decision should be included.

39. Do you agree or disagree that regulators should set out their registration appeals procedures in rules or should these be set out in their governing legislation?

MPS does not have strong views on this, however we do not see the need for this to be set out in legislation.

40. Do you agree or disagree with our proposal that the regulators should not have discretionary powers to establish student registers?

MPS agrees with this proposal. There would be limited benefit in holding student registers but this would add a cost that is required to be covered by the profession. It is not in the public interest and there is no guarantee the student will succeed in their studies nor is there a requirement for the student to seek a career in line with the vocational training course.

While universities' exercise of fitness to practise processes are very variable and any engagement with such must be declared by the new graduate in their application to the register. On balance, we believe it is still better for the universities to be accountable for their students' practice.

41. Do you agree or disagree with our proposal that the regulators should not have discretionary powers to establish non-practising registers?

MPS agrees that the regulators should not have discretionary powers to establish non-practising registers. We think this would be confusing to the public and will likely be insufficiently responsive, such that the register would be inaccurate and potentially misleading.

42. Do you agree or disagree that the prescriptive detail on international registration requirements should be removed from legislation?

MPS believes that this requirement should stay in legislation.

Fitness to Practise

43. Do you agree or disagree with our proposal that regulators should be given powers to operate a three-step fitness to practise process, covering:

- **1: initial assessment**
- **2: case examiner stage**
- **3: fitness to practise panel stage?**

MPS agrees in principle with the proposal of a 3 stage process for all regulators.

However, we have concerns over the proposals that case examiners will be able to impose a decision when a registrant does not respond. In these cases, we believe that the lack of engagement should not be interpreted as agreement to the findings or the decision by a case examiner. Imposing a sanction (conditions, suspension etc.) in these circumstances may run the risk of making this system appear punitive, which could undermine the purpose of agreed outcomes.

44. Do you agree or disagree that:

- **All regulators should be provided with two grounds for action – lack of competence, and misconduct?**
- **Lack of competence and misconduct are the most appropriate terminology for these grounds for action?**
- **Any separate grounds for action relating to health and English language should be removed from the legislation, and concerns of this kind investigated under the ground of lack of competence?**
- **This proposal provides sufficient scope for regulators to investigate concerns about registrants and ensure public protection?**

MPS has strong concerns about the proposal to not retain health as a separate category and the potential unintended consequences that could arise.

A significant proportion of professionals who end up under investigation by their regulator have health concerns. These health concerns can be greatly exacerbated by the stress and anguish caused by being subject to such an investigation. Tragically, this is demonstrated by the deeply concerning number of health professionals who die by suicide each year while under investigation. It is therefore very important that regulators and other bodies continue to do everything possible to minimise the impact of those under investigation, particularly those with a health concern.

We believe that those with a health concerns being categorised as having a ‘lack of competence’ would likely exacerbate their health and also it could discourage registrants from seeking help at an earlier stage; which would endanger both patients and the registrant.

More broadly, we are concerned that the term ‘lack of competence’ is unnecessarily pejorative even for those who do not have health concerns. It should be emphasised that situation and systemic organisational factors are taken into account before arriving to the finding of “lack of competence”. There are interactive variables which can affect performance in situations where competence may not be the primary concern. We suggest a more neutral phrase such as ‘professional practice gap’. The gap may be related to competence but it may be the result of factors outside the direct control of the professional.

45. Do you agree or disagree that:

- **all measures (warnings, conditions, suspension orders and removal orders) should be made available to both Case Examiners and Fitness to Practise panels; and**
- **automatic removal orders should be made available to a regulator following conviction for a listed offence?**

MPS broadly agrees with proposals that all measures should be made available to both case Examiners and Fitness to Practice Panels. However, safeguards should be in place to protect registrants' rights.

While we understand the proposals that all measures should be made available to Case Examiners and FtP panels, we have concerns with the prospect of unrepresented registrants accepting impairment and an outcome that may not be appropriate and simply to avoid incurring the significant costs associated with a hearing.

We believe that not all instances of falling below the required standard should warrant a warning. A warning should only be considered for cases involving a significant departure from the required standard and falling just short of the threshold required for onward referral; or where the threshold for onward referral has been met but the registrant's insight and/or remediation means that their fitness to practise is unlikely to be found to be impaired.

We agree with the proposals to limit the maximum period for which an order of conditions could be imposed to 12 months, with the option to include a review. This should help to ensure that a registrant is not kept on conditions for longer than was necessary, and would also bring earlier consideration of those cases in which a registrant may not have been complying with the conditions.

With regards to the automatic removal orders, MPS broadly agrees with the proposals of an automatic removal order being available to the regulator. However, there will need to be adequate safeguards if and when the list will be reviewed. For example, Gross negligence manslaughter will not be part of the list.

46. Do you agree or disagree with the proposed powers for reviewing measures?

MPS has concerns with the proposed powers for reviewing measures. We believe there must be a way for the Case Examiner decisions to be reviewed, however there must be appropriate checks and balances to ensure probity on the regulator.

47. Do you agree or disagree with our proposal on notification provisions, including the duty to keep the person(s) who raised the concern informed at key points during the fitness to practise process?

MPS agrees with this proposal. This ensures transparency in the process and allows for challenge of any decision. A registrant should be informed at this stage also unless the regulator has reason to believe that it would prejudice their ability to investigate the matter properly or it would result in harm being caused to the registrant or some other person. The reason why a registrant should be informed is that he/she may be able to provide clarification of certain matters which could help the investigation. Also, the registrant will have an opportunity to begin any reflective or remediation

process much sooner if they are aware of a possible concern. Also, it will enable the registrant to seek early advice from their MDO.

The proposals are not adequately clear in regards to a regulator providing updates. The regulator should be under a duty to provide an update when requested as well as in the instances described in paragraph 289. The exception to this would be where the registrant has asked the regulator not to do so or where the regulator has reason to believe that providing an update would prejudice the investigation, or cause harm to the registrant or some other person. Reasons for not providing an update should be provided, where practical, and recorded in all cases.

48. Do you agree or disagree with our proposal that regulators should have discretion to decide whether to investigate, and if so, how best to investigate a fitness to practise concern?

MPS strongly agrees with the proposals of a new power for regulators to decide whether to investigate. We see this as a particularly important proposal which we would like to see implemented as a priority.

Under the current legal framework, regulators are too often required to investigate allegations even when it's apparent that there will not be any regulatory action. The vast majority of the GMC and GDC's investigations are closed without action, the end result being that over a thousand registrants go through an investigation each year without a sanction, while many complainants go into the process with false expectations and end up disappointed with the outcome.

While improvements have been made in recent years to complaints triage processes, this proposal now needs to be implemented so that regulators have more discretion to not take forward investigations in cases where the allegations clearly do not require action.

However, we do have concerns about the principle in the consultation that gives the regulator the power to require information from a registrant as this could result in regulators going on fishing expeditions and placing an undue burden on registrants to provide documents/information. It would run the risk of reversing the burden of proof, which is an important safeguard to ensure the registrant receives a fair hearing.

49. Do you agree or disagree that the current restrictions on regulators being able to consider concerns more than five years after they came to light should be removed?

MPS strongly disagrees with this proposal. There must be a limitation that applies for civil proceedings and disciplinary matters. We believe a 5 year rule should remain with the power for a regulator to investigate where there are exceptional reasons for doing so, such as, the concerns raised are of a type that if proved could result in the registrant being removed from the register. There is a public interest in concerns being raised quickly so that they can be properly investigated and result in a fair outcome, whatever that may be. The removal of the 5 year rule could also disincentivise complainants from raising their concerns sooner which, in turn, could increase the risk to patients by allowing an otherwise unfit healthcare professional to continue to practise.

50. Do you think that regulators should be provided with a separate power to address noncompliance, or should non-compliance be managed using existing powers such as "adverse inferences"?

MPS agrees with the issue of non-compliance being managed using existing powers, such as “adverse inferences”. However, we are concerned with the regulators currently interpreting that if a registrant chooses not to comply with a request to prove a requirement, their non-compliance could be taken as evidence that they do not meet such requirement. In our view, non-compliance with a request should be charged as an allegation of misconduct. This ensures that there is no reversal of the burden of proof and that it is for the regulator to demonstrate that the request itself was reasonable

51. Do you agree or disagree with our proposed approach for onward referral of a case at the end of the initial assessment stage?

MPS agrees with this proposal, as long as there is always the opportunity to provide written submissions to influence or inform an initial assessment.

52. Do you agree or disagree with our proposal that regulators should be given a new power to automatically remove a registrant from the Register, if they have been convicted of a listed offence, in line with the powers set out in the Social Workers Regulations?

MPS agrees with the proposals of regulators being given a new power to remove a registrant from the register if convicted of specific extremely serious crimes– such as murder, rape and child abuse. These crimes are so serious that they raise very serious questions about a healthcare professional’s fitness to practise. This is a small group of very serious cases.

53. Do you agree or disagree with our proposals that case examiners should:

- **have the full suite of measures available to them, including removal from the register**
- **make final decisions on impairment if they have sufficient written evidence and the registrant has had the opportunity to make representations?**
- **be able to conclude such a case through an accepted outcome, where the registrant must accept both the finding of impairment and the proposed measure?**
- **be able to impose a decision if a registrant does not respond to an accepted outcomes proposal within 28 days?**

With regards to accepted outcomes, MPS can see the benefits in the proposal and we support the intention of reducing the need for a hearing in cases where the doctor agrees with the sanction proposed by the professional regulator.

Our support is however cautious due to the following factors:

- *Case Examiners would have significantly increased powers and a lack of independence from the regulator;*
- *In our experience, certain regulators have a tendency to overpitch sanction submissions;*
- *Unrepresented registrants or those unable to meet the cost of a full hearing in front of an FtP panel would be susceptible to accept an unduly harsh outcome;*
- *The lack of finality, given the prospect of review.*

Moreover, we have concerns with the proposed time available to registrants to respond and the proposals of imposing a decision if registrants do not respond within 28 days. We believe that this deadline should not be an absolute and rather capable of being extended where appropriate and proportionate, since the purpose is to encourage to arrive to agreed outcomes. We believe that if a registrant does not respond within 28 days, then the case Examiner decisions should not be imposed. Instead that should go to a fitness to practise panel, since it has not been agreed/accepted.

MPS disagree with the proposals of all case examiner decisions being made publicly available. We believe that only decisions which are agreed by both parties and which result in at least a warning should be published. It would be unfair if a decision to refer was published as it is still open to a panel to find none of the grounds proved. Moreover, if the case examiners decision to conclude a case with no further action were to be published, this would cause unnecessary reputational harm to the registrant; thereby, undermining his/her confidence and encouraging unmerited complaints.

54. Do you agree or disagree with our proposed powers for Interim Measures, set out above?

MPS can see the benefit of the proposed powers for interim measures, as it could provide for a less adversarial process for vulnerable registrants. However, it should be made absolutely clear that interim measures are only for the most serious concerns and where immediate action is likely to be necessary.

If these proposals were to go ahead, we would ask for measures to be put in place, such as, strict time limits, to ensure that the regulator does not delay in either its consideration of a registrant's request for an early review of an interim measure or in determining the outcome of that review. We would also ask that this review requested by the registrant can be carried out by an interim measure panel.

We would ask that discretion to hold an early review should be weighed strongly in favour of a registrant in cases where the registrant had agreed to the interim measure or, in all cases where the registrant has not previously requested an early review. This would not compromise public safety and would also provide additional protection for the registrant, who's ability to practise may be unfairly restricted.

MPS agrees with proposals that where the outcome of a case examiner review of an interim measure is not accepted by a registrant, the case examiner must refer the matter to an interim measures panel. With regards to the proposed times, we believe that 12 months would be more appropriate than the proposed 18 months and demonstrates a commitment towards a more rapid outcome by the regulator.

55. Do you agree or disagree that regulators should be able to determine in rules the details of how the Fitness to Practise panel stage operates?

MPS broadly agrees with this principle as long as the Fitness to Practice panel is an independent adjudicator in order to maintain the confidence of both the public and the registrant.

Furthermore, we have concerns with the ability of a panel to issue a warning in circumstances where they have concluded that the registrant's fitness to practise is not impaired.

MPS disagrees with proposals giving FtP panels the power to make a request for information from anyone whom the panel deems appropriate. This would confuse the separate adjudicatory function of the panel with the investigation function of the regulator. It could lead to wasted and longer

hearings whilst these requests were considered and information obtained, which itself could result in ancillary lines of investigation.

MPS agrees with FtP panel decisions made publicly available except for Health and personal information which should be excluded.

56. Do you agree or disagree that a registrant should have a right of appeal against a decision by a case examiner, Fitness to Practise panel or Interim Measures panel?

MPS agrees with this proposal.

57. Should this be a right of appeal to the High Court in England and Wales, the Court of Session in Scotland, or the High Court in Northern Ireland?

MPS agrees with this proposal.

58. Do you agree or disagree that regulators should be able to set out in Rules their own restoration to the register processes in relation to fitness to practise cases?

MPS agrees with this proposal.

59. Do you agree or disagree that a registrant should have a further onward right of appeal against a decision not to permit restoration to the register?

MPS agrees with this proposal.

60. Should this be a right of appeal to the High Court in England and Wales, the Court of Session in Scotland, or the High Court in Northern Ireland?

MPS agrees with this proposal.

61. Do you agree or disagree that the proposed Registrar Review power provides sufficient oversight of decisions made by case examiners (including accepted outcome decisions) to protect the public?

MPS agrees with this proposal.

62. Under our proposals, the PSA will not have a right to refer decisions made by case examiners (including accepted outcome decisions) to court, but they will have the right to request a registrar review as detailed above. Do you agree or disagree with this proposed mechanism?

MPS agrees with the proposal that the PSA should not be given a right of appeal.

The proposed changes make it clear that anyone -including the PSA- can request a review of the 'accepted outcome'. Should the review be rejected or does not go as far as a person/party would like then there would remain the option of Judicial Review. The PSA should be able to review all 'accepted outcomes' as they would be published, and could then decide whether or not to seek a review on behalf of the public. This is similar to the current situation whereby the PSA reviews all decisions by fitness to practise panels to determine if they can/should appeal under S.29.

63. Do you have any further comments on our proposed model for fitness to practise?

MPS has a further comment with respect to closed decisions. We believe that such decisions should not be published because there was no sanction attached, since the Case Examiner is determined that the evidence did not demonstrate current impairment, these should only be amenable to review through a request to the Registrar where there is new information. However, that should not automatically remain that the case is referred to a fitness to practise panel (para 362) but should either be reinvestigated (where there is new information) all reviewed with new comments sought from the registrant before a case Examiner decision is rendered.

Regulation of Physician Associates and Anaesthesia Associates

64. Do you agree or disagree with the proposed approach to the regulation of PAs and AAs?

MPS agrees with the proposals that Physician Associates and Anaesthesia Associates should be regulated. These professionals play an increasingly important role in the wider healthcare team and it is important that they have the appropriate level of regulation.

We support the statement that if professions are to be regulated by the GMC, the cost of doing so should not be borne by doctors on the medical register. We do however note that the cost of regulating doctors by the GMC is higher than for other professionals regulated by HCPC and we have concerns about the potential cost that could be incurred by PA and AAs. We would therefore support the initial costs of introducing regulation being met by the state and efforts made by the GMC to ensure the ongoing cost of regulating these professionals is proportionate.

65. In relation to PAs and AAs, do you agree or disagree that the GMC should be given a power to approve high level curricula and set and administer exams?

MPS understands the case for the GMC having similar powers with regard to the education and training of PAs and AAs as they do with medical professionals, and that they should work with the relevant colleges and faculties in a similar way.

66. Do you agree or disagree with the transitional arrangements for PAs and AAs set out above?

While there needs to be an effective transition period, MPS does not have a position on the process suggested in the consultation and would defer to other organisations with more a role in this process.

67. Do you agree or disagree that PAs and AAs should be required to demonstrate that they remain fit to practise to maintain their registration?

MPS believes that any practitioner should be required to demonstrate ongoing fitness to practise.

Next steps for the reform of professional regulation

68. Do you agree or disagree with the benefits identified in the table above? Please set out why you've selected your answer and any alternative benefits you consider to be relevant and any evidence to support your views.

MPS has no comment on this question.

69. Do you agree or disagree with the costs identified in the table above? Please set out why you've chosen your answer and any alternative impacts you consider to be relevant and any evidence to support your views.

MPS has no comment on this question.

70. Do you think any of the proposals in this consultation could impact (positively or negatively) on any persons with protected characteristics covered by the general equality duty that is set out in the Equality Act 2010, or by Section 75 of the Northern Ireland Act 1998?

- **Yes – positively**
- **Yes - negatively**
- **No**
- **Don't know**

It is difficult to give a simple answer to this question given the complex range of factors that shape how and why complaints are made to the regulator about healthcare professionals, how these are handled, and how this might differ for healthcare professionals with different protected characteristics. The ability to give a simple answer is also complicated by the very wide and varied range of proposals included within this consultation.

There is significant evidence in the public domain regarding the extent to which ethnic minority healthcare professionals are more likely to be referred to their regulator and to receive a sanction compared to white healthcare professionals. In the case of doctors, ethnic minority doctors are twice as likely to be referred by their employers to the GMC compared to white doctors.

This situation should concern all respondents to this consultation and it is important that due consideration is given to how each of the proposals could both positively and negatively impact positively and negatively on people with protected characteristics.

We welcome the intention behind the comments made by the Chief Executive of the GMC on 11 May 2021, where he stated that the shameful disadvantage ethnic minority doctors still experience could be tackled by giving greater autonomy to the GMC so they can focus on supporting and nurturing doctors rather than simply stepping in when things go wrong.

Clearly some of the proposals in this consultation could provide an opportunity to regulators to positively address current inequalities in how complaints against healthcare professionals are made and handled. It does however have to be noted that giving professional regulators more freedom to determine how cases are handled could also have an adverse impact also, and this will make it all the more important that regulators continue to report on the respective experience of registrants with different protected characteristics, what they are doing to address any inequalities and to keep this under review.

Furthermore, with the three-stage process proposed in this consultation, we understand that more registrants may go through the process of accepted outcomes with only a case examiner reviewing the case rather than a panel. Consolidating decision making power into the Case Examiner, as opposed to it being distributed across a Fitness to Practise panel could lead to a greater risk of bias which could prejudice against ethnic minority registrants.

With regard to agreed outcomes, we also have concerns that some registrants from overseas may be more vulnerable to simply accepting a proposed outcome, even if that is not a fair outcome, as they could have been raised in a society where it is culturally unacceptable to challenge a person or organisation in authority. Additional safeguards and measures for monitoring should therefore be put in place to ensure that one group is not disproportionately affected compared to another.

About MPS

MPS is the world's leading protection organisation for doctors, dentists and healthcare professionals with more than 300,000 members around the world.

Our in-house experts assist with the wide range of legal and ethical problems that arise from professional practice. This can include clinical negligence claims, complaints, medical and dental council inquiries, legal and ethical dilemmas, disciplinary procedures, inquests and fatal accident inquiries.

MPS is not an insurance company. We are a mutual non-for-profit organisation and the benefits of membership of MPS are discretionary as set out in the Memorandum of Articles of Association.

Contact

Should you require further information about any aspects of our response to this consultation, please do not hesitate to contact us.

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