Recommendations to improve the draft Regulation of Health and Social Care Professions etc Bill

May 2014

1. Introduction

1.1 This paper outlines the Professional Standards Authority's recommendations to the Department of Health to change the draft bill published by the Law Commissions (April 2014). We make these recommendations in the interests of best practice in regulation, as described by the Better Regulation Executive's principles of good regulation, right-touch regulation, and the Authority's standards of good regulation.

1.2 Our concerns are prompted by our assessment that the provisions as drafted would not enable consistency in meeting our standards of good regulation and that some of them run counter to good practice. They are informed by the policy context within which the review was commissioned by the Department of Health, which we describe in more detail below.

The policy context

1.3 The Law Commissions' simplification review was commissioned in the context of *Enabling Excellence* (2011), which described the Coalition Government's policy on the regulation of health and social care professionals. *Enabling Excellence* stated that regulators should be given '*greater autonomy… to decide how best to meet their statutory duties*.' Such flexibility would '*need to be balanced by a commensurate strengthening of their public and parliamentary accountability for their performance*' (paras 3.6 and 3.8).

1.4 The Law Commissions' simplification review and *Enabling Excellence* are the most recent steps on a long journey of reform of professional regulation. In *Trust, Assurance and Safety*, published in 2007 as part of the response to the Shipman Inquiry, the Department of Health wrote:

'The Government believes it is no longer acceptable for doubt to be cast on the regulators because of a suspicion that they are 'looking after their own…'

'To ensure professional and public confidence, all the stakeholders need stronger assurance of their independence:

- *they must be separate from the Government, constitutionally insulated from day-to-day political pressures;*
- *they must be independent of those who employ health professionals, whether in the NHS, the independent sector, or the voluntary sector, to ensure that employer interests are not perceived to weaken safeguards for the public or undermine the fair conduct of regulation; and*

- *they must be independent of health professionals themselves, so that they are not thought to be beholden to a perceived natural esprit de corps with professional colleagues.'*

While all these stakeholders themselves share a commitment to the fair regulation of health professionals in the best interest of patients and the public, they do so from different viewpoints and perspectives. The ability of the regulators to sit outside those differences and day-to-day disagreements, and to be guided solely by the role that Parliament has agreed for them on behalf of society, is critical to their effectiveness. To be effective, regulators must be seen to be independent, transparent, accountable, ethical, dispassionate and just.' (paras 1.4-1.6)

1.5 These important themes of transparency and accountability recur through more recent reports into health and care service failings, most notably the Francis Report published in 2013. This report also stressed the need for a common culture across the health and care system that put patients first, ensuring openness, transparency and candour throughout the system about matters of concern, and a proper degree of accountability. Since the Francis Report was published the need to regain and sustain the public's confidence in regulation has become more urgent and steps are being taken by the government and regulators to do this.

1.6 The Law Commissions' simplification review was anticipated in this context, as the long-awaited next step in a programme of modernisation and reform for health professional regulation in the UK and social work professional regulation in England. The terms of reference encompassed the need for greater autonomy and prevailing government policy as outlined in *Trust, Assurance and Safety* and *Enabling Excellence*, and the much-needed common legislative framework for the momentum established by those earlier policy statements.

The Authority's perspective

1.7 The Authority (as the Council for the Regulation of Health Care Professionals, later the Council for Healthcare Regulatory Excellence) was set up in 2003 to promote the interests of patients and the public in professional regulation through our work to establish standards of good regulation, review regulators' performance, promote and share good practice, and scrutinise fitness to practise decisions. These have remained our objectives through two subsequent rounds of legislative developments (in 2008 and 2012).

1.8 Building on the conclusions of *Trust, Assurance and Safety*, our substantial and varied research with patients, service users and other members of the public has allowed us to describe how public confidence in professional regulation may be maintained and enhanced, in both strategic and operational terms.

1.9 At a high level, our aspirations for the Law Commissions' simplification review were a legislative framework that:

- Is more transparent and open
- Offers greater accountability by regulators and professionals to the public

- Puts the interests of patients, service users and the public at the centre of a consistent system of regulation.

1.10 In the following recommendations a number deal with fitness to practise and reflect our general concern that the draft bill allows a number of exit points (disposal options) throughout the process, without the oversight and transparency that is necessary to secure public confidence in the outcomes. In particular we are concerned that someone can apply for voluntary removal at various points, including during the hearing before it is concluded. In this case the registrant will be given effectively a lesser type of sanction. It will be essential for panels to be guided on the appropriate circumstances in which voluntary removal is acceptable to avoid the system being 'gamed'.

1.11 We welcome the prospect of a single legislative framework offered by the Law Commissions' simplification review, and the potential advantages this offers in terms of consistency and efficiency in the delivery of professional regulation (particularly as it would provide more flexibility in the process for amending the ways in which the regulators operate their statutory procedures in future) and for the Authority's oversight of the sector.

1.12 However, based on our analysis we have concerns that in practice, if passed into law as it stands the draft bill may not secure a statutory basis for the momentum that has been established as good practice over the last few years. Without amendments (detailed below), which on an initial reading we consider to be achievable and practicable, we may miss the opportunity to achieve consistency across eight different regulatory bodies and by doing so, to increase public trust in regulation.

1.13 The rest of this paper highlights where we have identified concerns; further issues may emerge from other stakeholders. We look forward to exploring these matters and questions further with all interested parties.

2. General provisions

1. Make the draft bill less England-centric [s15, s237]

2.1 The definition of NHS bodies in the 'relevant authorities' clauses is England-centric. In the interests of successful UK-wide regulation this should be modified to reflect provider organisations across the rest of the UK.

2. Reduce number of opportunities to introduce variation through regulator-specific rulemaking

2.2 One principle of good regulation, echoed in the recommendations of the Francis Inquiry, is greater consistency for the public, including patients, employers and education providers, across regulation. However, with potential for regulators to make their own rules across almost 80 different issues, the bill has missed opportunities to deliver consistency in various key areas. It will also introduce a large burden of consultation on those listed in s249(5) if they choose to engage fully with regulators' multiple rule consultations.

3. Authority's roles and responsibilities

3. Remove the Authority's role to sanction dispensation of consultation [s249]

3.1 At present the Authority does not approve regulators' operational processes or decisions. At best this provision would be an unusual development for us, but at worst it would compromise our oversight of the regulators' performance and undermine our independence in reporting to Parliament.

4. Remove cost effectiveness and efficiency role for the Authority in voluntary registers [s221]

3.2 This provision is unhelpful and unwelcome. The Authority already considers the financial sustainability of applicant organisations and has to carry out an impact assessment on each application and re-application. To go further than this means the Authority would have an inappropriate role in the internal operations of private organisations (and organisations that the Government has decided to not require statutory regulation) beyond what is necessary to promote the health, safety and well-being of the public.

5. Provide clarity on the revised test for an Authority's appeal to the Courts [s167]

3.3 The new test 'sufficient protection of the public' should

- Include the wider public interest (declaring and upholding standards and maintaining confidence in the profession), as well as direct protection from harm
- Give the Authority the right to appeal on the basis of the panel's factual findings or on the basis that the relevant ground of impairment has not been established (as well as a finding that the relevant ground has been established but nevertheless the registrant's fitness to practise is not currently impaired, for example because of their insight/remediation/lack of risk of repetition, as well as on the basis of the sanction imposed)
- Give the Authority the right to appeal the decision to close a case following a successful submission of 'no case to answer'.

6. Allow the Authority to join appeal referrals if they are made by the regulatory body, and vice versa [s167, s168]

3.4 Given this the evident difficulties of a regulator appealing on the basis of its own 'under-prosecution' of the case at the original hearing, it is the interests of effective and efficient regulation that the draft bill is amended to give a power to join appeals.

7. Close the loophole that emerges between failure to pay the retention fee and the Authority's right to scrutinise and refer a case to court [s26]

3.5 We note that the provisions around preventing lapsing from the register [s45] only apply when the regulator has opted to make rules around renewal [s44].

Therefore there remains a possibility that the Authority might appeal a case relating to a registrant who has failed to pay a retention fee, who under s26 should be removed from the register by the registrar. This may make it difficult for a court to take the usual action upon a successful appeal, ie, either to remit (send back) the case to the panel for reconsideration, or to substitute its own sanction, because by that time the individual concerned is no longer a registrant. In our view there should be consistency in the provisions made by the draft bill to prevent this lacuna continuing.

8. Mandate a lay board for the Authority [schedule 8]

3.6 The Authority was reconstituted (as CHRE) in 2009 as part of the reforms to governance outlined in *Trust, Assurance and Safety*. These reforms barred any current or former registrant of one of the nine regulatory bodies from being a member of the Authority's board. The draft bill makes no similar provision, leaving the detail of the Authority's constitutional arrangements to the Secretary of State with no mention of need for a completely lay board. There has been no change in policy so the draft bill should confirm the continuation of the existing arrangements.

4. Indemnity insurance

9. Allow regulator to investigate other fitness to practise matters when it is clear that a registrant does not have adequate indemnity insurance [s62]

4.1 Forcing the regulator to remove the registrant on the basis of their lack of indemnity insurance would prevent any associated investigations from taking place. Failure to have adequate indemnity insurance arranged can be an indicator of other fitness to practise issues that should be investigated, especially given that the registrar has a duty to restore an individual once insurance has been obtained.

10. Give registrar power to restore a registrant after failure to have adequate insurance, rather than a duty [s69]

4.2 Any restoration to the register should consider whether an individual registrant is fit to practise. The draft bill is silent on timeframes around this duty but a registrant's fitness to practise is not necessarily guaranteed after a significant period of time off the register. This can be managed by giving the registrar the power to restore an individual registrant to the register, rather than the obligation to do so.

5. Fitness to practise

11. Give greater clarity around the meaning of key terms used to describe disposal options [s60, part 6]

5.1 Our work in 2009 on sanctions terminology clearly confirmed that patients, the public and employers need and want greater consistency in sanctions terms in

order to understand the regulatory process and have confidence in its outcomes. It should be clear how and why a particular sanction or disposal has been used but this is not necessarily the case when the draft bill uses undertakings, warnings and voluntary removal.

- 'Undertakings' [s129, s144, s146] can be given through different routes (whether or not the registrant's fitness to practise is found to be impaired, whether the registrant admitted the allegations or they were found proved at a hearing) with different review options (as regulators have the power to make rules around reviews in s132, but not mandatory).
- Undertakings should only be used if impairment is admitted so using the wording 'if the panel determines that the professional's fitness to practise is impaired' in s159(4) is wrong. This also applies to s160(4), s161(4), s162(7).
- Warnings can be given through different routes (whether or not a registrant's fitness to practise is found to be impaired)
- Voluntary removal is used in a wide variety of circumstances, some of which relate to concerns about an individual's fitness to practise, making it unclear for the public and employers. The bill should be amended so this term would only apply in a restricted set of circumstances. It should not be confused with applications for administrative removal outside of the fitness to practise process. Allowing regulators to make rules under s60 risks considerable variation in the use of voluntary removal.

12. Prevent a member of staff at the regulatory body being the person appointed under s28 to appoint panels under s139, s142

5.2 Without a change to the current draft, the person appointed under s28 could be a member of staff which would not provide the necessary independence from the regulatory body that panels should have.

13. Set criteria that guide how and when referrals are cancelled, and give the power to cancel hearings to the panel, not to the regulatory body [s135]

5.3 It is troubling that there is no requirement that there needs to be new evidence or information for cancellation to happen. It would be helpful to all involved if there was clarity around the circumstances in which this is supposed to apply, for example, only when the registrant is terminally ill. Without this, the power could be widely interpreted and become carte blanche for cancellation of hearings. (We note that no provision has been made for oversight of these decisions to cancel.) We would expect to see the opportunity for interested parties to make representations about the proposal to cancel a referral.

5.4 It is also a concern that the regulatory body retains this power even when the case has been referred to a fitness to practise panel. There is nothing to prevent someone just overturning a previous decision-maker's decision (as s135(2) does not define who is the 'regulatory body' making the decision to cancel).

14. Revert to ‘misconduct’ as grounds for impairment [s120]

5.5 In separating ‘deficient professional performance’ from misconduct the draft bill appears to change the threshold for impairment by reason of misconduct by changing the term to ‘disgraceful misconduct’. This change of threshold suggests that fewer cases will be referred to a panel. We are concerned that this will also mean existing case law on misconduct will not apply.

15. Prohibit a registrant majority on panels [s137]

5.6 In the interests of maintaining confidence in the fitness to practise decision making process, it is essential that the draft bill is altered to prevent registrants from forming the majority membership of panels.

16. Use ‘striking off’ not ‘removal’ [s146, 159, 160, 161]

5.7 Our research with patients and the public in 2009 found that the preferred term for erasure was ‘striking off’ (we also note that this was the term the Commission use in their press release, but the report and bill have settled on ‘removal’). It is an unhelpful term as it can mean different things in different circumstances (voluntary or not, FTP-related or not) [s60, s129, s146].

17. Allow regulators to refer for a review hearing when a suspension has been breached [s136(4)]

5.8 It is not reasonable to exclude this from the criteria that may prompt a referral for a review hearing.

18. Remove the ‘five year rule’ as a reason for not referring a matter for investigation [s123]

5.9 The five year rule is contentious and unattractive to the public, and in the light of the Francis report, we should not be legislating for closing down investigations in this manner without any oversight or opportunity for review.

19. Allow decisions taken under s122 based on eligibility criteria outlined in s123, to be open for review under s134

20. Include a requirement to seek the views of a complainant, and an expectation that the registrant’s response will be shared with the maker of the allegation during the investigation [s128]

21. Remove the definition of ‘fairly and justly’ for panel proceedings [s80, 170, 181]

5.10 The definition is surprising. In our view it is inappropriate to define that ‘dealing with a case fairly and justly’ includes ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and the resources of the parties. The weight apparently given to these factors combined with the absence of reference to factors that might suggest that a hearing is required in the interests of fairness, justice and the wider public interest prompts a related concern about maintaining public trust in a system

which permits panels (appointed by the regulator – which is itself funded by the professionals – including those whose fitness to practise is being scrutinised) dispensing on the basis of cost with public hearings at which the evidence could be fully tested. We would have anticipated that provisions around panel proceedings would include reference to seeking to ensure that the panel are presented with the best evidence so they can reach a sound decision in the public interest – we note there is no reference in the draft bill to panels' duty of inquiry (as per *Ruscillo*) - it seems that this has been overlooked.

5.11 'Using the expertise of the panel' may indirectly prioritise registrants' views in panel discussions, especially where there is a majority of registrants on the panel (although see recommendation 15).

22. Ensure that the decision maker at the end of the investigation is independent of those staff investigating the allegations [s129]

5.12 There is no provision for this in the draft bill but it is essential for fair decision making.

23. Provide for rules to be made on the circumstances when it is appropriate to give a warning [part 6]

24. Provide clarity around how sanctions take effect following a successful appeal by the Authority [s149]

5.13 If the Authority successfully appeals a case the court may remit it to the regulator for a re-hearing. Subsection 149(5)(b) of the draft bill should be amended to allow the regulator to make an interim order pending the outcome of the re-hearing.

25. Give clear and consistent criteria to determine how a decision to determine a matter outside a public hearing will be reached [s171]

5.14 It is essential that the public and others are aware of the circumstances in which a case may be disposed of without a hearing and the level of openness and transparency that can be expected when this happens. The draft bill does not mandate rules in this area, and this is disappointing given the importance of transparent and accountable decision making to public confidence and trust in regulation.

5.15 In addition, this may undermine the effectiveness of the Authority's right to appeal a case if there is insufficient information available about how the decision was made.

26. Mandate an admission of impairment alongside statement of facts when proceeding in the absence of a public hearing [s171]

5.16 The agreed statement of facts provision at subsection 171(1)(c) will not include an admission of impairment as currently drafted.

27. Mandate publication of guidance about fitness to practise [s194]

5.17 The option whether or not to publish should not be left to the regulators to decide, especially given that any independent adjudicator appointed under s29 should publish their equivalent guidance.

28. Specify what happens if a review hearing is not held in time [s158]

5.18 The draft bill is silent on the consequences of any failure to adhere to the timescales for review hearings, and clarity is needed on the continuing effect of undertakings, conditions, and suspensions in these circumstances.

6. Voluntary removal in fitness to practise

29. Require regulator to inform the maker of the allegation if an application for voluntary removal is made during the fitness to practise process [s129, s144, s159, s160, s161]

6.1 This is current good practice.

30. Restrict the circumstances where voluntary removal may be granted during fitness to practise processes to those where registrant agrees that they will never apply for restoration [s60, s129, s144, s159, s160, s161]

6.2 This is in line with current practice by NMC and HCPC.

31. Prevent 'voluntary removal' from taking immediate effect if the Authority's appeal right is to have any impact [s129, s149, s163]

6.3 If an order is made for voluntary removal, even though the decision is one that can be considered by the Authority under s167, the registrant would immediately leave the register. If the Authority considered there were grounds for appeal, any referral to the Courts would be undermined by the fact the registrant was no longer on the register, which in effect repeats the current problem the Authority experiences with trying to appeal a case if a registrant has lapsed: a problem that the Courts have said the Secretary of State should address as a matter of urgency.

32. Provide clarity for panels around the merits of an application for voluntary removal during panel hearings and review hearings [s144, s159, s160, s161]

6.4 We are concerned that the latitude given to regulatory bodies to make rules around voluntary removal [s60] will lead to unwelcome inconsistencies and continued poor practice in the use of voluntary removal.

33. Provide clarity on how applications for voluntary removal should be handled once a case has been referred to a panel but before the hearing [s60, s144]

6.5 The draft bill is silent on this part of proceedings. An application for voluntary removal should not be a reason to cancel a referral to a panel made under s135.

34. Require admission of impairment when voluntary removal is considered in fitness to practise proceedings [s60, s129, s144, s159, s160, s161]

6.6 This is currently the case with the NMC and HCPC voluntary removal processes, which go beyond the draft bill's requirements only to agree a statement of facts (not in s129), which would hamper any future consideration of a restoration application.

7. Regulator's right to appeal

35. Remit a successful appeal by the regulator back to the independent adjudicator, not the regulator [s168]

36. Specify the same timescale for a regulator's appeal right as for the Authority [s168]

7.1 We can foresee some practical difficulties with the proposals to allow appeals by the Authority alongside a regulator, as the draft bill allow one to appeal only if the other is not. In part this could be addressed by allowing a joinder (see rec 5) but the arrangements as they are currently drafted may prove difficult to manage in practice as each organisation will be reviewing a case at the same time, but perhaps for different periods of time. There is no reason to permit variation in regulator appeal timescales when the Authority has timeframe on the face of the draft bill.

8. Restoration applications

37. Give power to restore following any removal during the fitness to practise process to the restoration panel, not split with the registrar [s70, and s144, 159, 160, 161]

8.1 Restoration to the register following a removal ordered by the panel, voluntary or otherwise, should follow the same route and the same timeframes. The implication in the draft bill is that a registrant who is removed (struck off) would have to wait five years and have their application considered by a panel, but if they had agreed voluntary removal with the panel (at the initial hearing or in review hearings) they would, in contrast, not be subject a similar five year time limit and would apply to the registrar to be restored. Allowing regulators to make their own rules around voluntary removal will only exacerbate the inconsistencies in this area.

9. Transparency and openness in registration and fitness to practise information

38. Provide for publication of s93 lists alongside register information

39. S93 lists should include those removed voluntarily under s129 at the end of an investigation

9.1 In the absence of this the list is incomplete, and the process lacks transparency.

40. Allow regulators to share information with employers if health is involved [s144, s157]

9.2 There may be circumstances where it would be appropriate to share information about health with an employer if the undertakings require assistance to be sought from the employer's occupational health team. A complete ban on sharing information may be counterproductive.

41. Provide for publication of full fitness to practise decisions [s193]

9.3 The draft bill allows many more opportunities for decisions about fitness to practise to be taken outside of public hearings. It is essential that this measure, introduced for efficiency, does not compromise the need for transparency about important decisions taken in the interests of the public, and therefore needs to be accompanied by sufficient provision for publications of full determinations linked to registration records. The draft bill should be amended so it is clear that the publication of decisions that s193 provides for means the current document that sets out the allegations, the background and the reasons for the panel's decisions on facts, grounds of impairment, current impairment and sanction. There should also be provision for this information to be included with register information and linked to the relevant registrant's entry (or equivalent entry on a list compiled under s93 of removed persons). (At present, ss193(11) leaves the manner of publication entirely open, which could lead to inconsistency and a lack of transparency). Regulators should also be required to publish a decision to take no further action.

9.4 The publication of a decision that someone's fitness to practise is impaired is an important factor in declaring and upholding standards, even if there are reasons that mean that no sanction is ultimately imposed.

10. Standards and continuing fitness to practise

42. Remove role of regulator in setting standards for entry to pre-registration training courses [s106]

10.1 The regulator does not have a role in setting admissions standards for pre-registration training at present so this is an unnecessary extension of statutory responsibilities and contrary to right-touch regulation.

43. Remove the artificial separation of continuing professional development (CPD) and revalidation [parts 4 and 5]

10.2 The separation of revalidation and CPD is unhelpful. The approach taken in the draft bill does not support or reflect the fact that there is potential for a continuum of approaches to validating continuing fitness to practise. Instead it mandates a single approach (revalidation) that demands a licence to practise. This limits the options for regulators to adopt a risk-based and proportionate approach. The general public and employers understanding of the term 'revalidation' differs from the specific definition that the draft bill gives. The narrowness of the bill's definition means that a regulator would be able to introduce a scheme identical to the GMC's in every manner except for the licence to practise and would not be able to call it 'revalidation'. Restricting schemes based on evaluation to regulators who have a licence to practise system seems to fail future proofing, limiting the models that could be adopted. We set out in our paper *An approach to assuring continuing fitness to practise based on right-touch regulation principles* that good practice in this area is risk and context-based. The bill should support and enable solutions that fit this framework. CPD and revalidation are by no means the only ways of achieving continuing fitness to practise and to legislate for them in this way is unhelpful and contrary to proportionate regulation.

11. Useful references

CHRE. 2009. *Harmonising sanctions: terminology paper.* Available at: http://www.professionalstandards.org.uk/docs/psa-library/sanctions-terminology-paper---november-2009.pdf?sfvrsn=0

CHRE. 2010. *Right-touch regulation.* Available at: http://www.professionalstandards.org.uk/library/document-detail?id=a3ea5638-fadf-400e-8635-47bf4b028a1f

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