professional standards authority
for Health and Social Care

Improving regulation for safer care for all

A briefing on the Government consultation on the draft Anaesthesia Associates and Physician Associates Order

April 2023

Our recommendations for making the most of these reforms

01 **Include all three stages of the fitness to practise process in the draft Order.**

02 **Give regulators clear powers to review conditions and suspensions to make sure a registrant is fit to return to practice unrestricted.**

03 **Allow final decisions by case examiners to be referred to a panel if they don't protect the public.**

04 **Give the Authority a new targeted power to obtain information so it can oversee reformed regulators effectively.**

05 **Keep the powers regulators have now to handle health concerns about a professional.**

This briefing is intended to direct people to some of the changes that we think will help to make these reforms a success, and to support people to respond.

A consultation that will affect 1.7 million healthcare professionals.

At first sight, this looks like a government consultation related to two specific roles, but look again – this is a consultation that will shape the future of professional regulation.

The Government is consulting on bringing Anaesthesia Associates (AAs) and Physician Associates (PAs) into regulation. Both these roles will be newly regulated by the General Medical Council (GMC), which already regulates doctors. But this consultation has much wider implications: it will be used as the model for all other regulated healthcare professions, and rolled out one regulator at a time – with doctors, nurses and allied health professionals next in line.*

So, this is not just a consultation about how to regulate Anaesthesia Associates and Physician Associates – the decisions that come out of it will affect around **1.7 million healthcare professionals**, and all the patients they serve.

Because of this, we want to encourage as many people and organisations as possible – and especially those representing patients and service users – to respond to it. But we are also aware that it is lengthy and technical, and not all the changes made to the policy since the previous consultation are explained in the current consultation.

These reforms are an opportunity to bring much-needed change to the sector. This briefing is intended to direct people to some of the changes that we think will help to make these reforms a success, and to support people to respond.

*Not necessarily in that order.

Help us improve regulation

This consultation could herald a new era for professional regulation.

How we got here:

October 2017

Government consults on high-level plans to reform professional regulation in ***Promoting professionalism, reforming regulation***.

April 2021

Government consults on policy for new regulatory model in ***Regulating healthcare professionals, protecting the public***.

February 2023

Government consults on legislation for regulating Anaesthesia Associates and Physician Associates, and blueprint for other professions in ***Regulating anaesthesia associates and physician associates***.

A new era for professional regulation

These reforms are an opportunity to bring much-needed change to the sector.

The effects of these reforms will be far-reaching.

More autonomy for regulators

They will give regulators the flexibility to change the way they regulate without having to go through a slow process of having these changes approved by the Privy Council. This will enable regulators to adapt more quickly to developments in healthcare and its delivery, and to improve their processes. We have called for them to have this agility, so they can deal with workforce pressures and risks emerging from new ways of treating patients and funding healthcare.

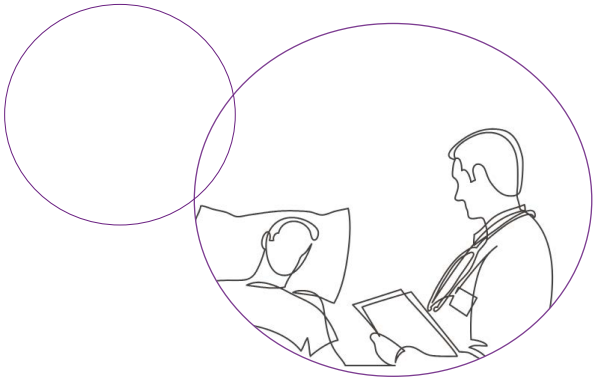
More consistency between regulators

The Government's commitment to give all the regulators the same legislation – with some tailoring where needed – is a first step to making them more consistent. Consistency is important because it will help to simplify the complicated regulatory framework, making it easier for patients and employers to navigate it, and for regulators to co-operate. The second step will be for the regulators to work together to be consistent in how they put the legislation into practice.

A less formal route for dealing with concerns about professionals

The Government's proposal to use 'accepted outcomes' as an alternative to panel hearings will provide a less adversarial way to deal with concerns about professionals. The regulator would decide the outcome and put it to the registrant for agreement. It would cut out the step of a formal panel hearing – though panels would still be used for some cases. This change should help to reduce the impacts on all involved, and the money saved could be diverted to other things regulators do to help prevent harm.

A new era for professional regulation



Finding the right balance

In short, the main effect of these changes is that the regulators will have much more freedom than they have now, both to decide how to use their powers, and to make individual decisions.

We want to help make the most of what these reforms can offer, while being there to spot and address any problems as they come up. In our response to the previous consultation, we recommended specific changes to our powers to balance out this greater freedom. We accept the Government's decision not to proceed with these changes. We support the aim of giving regulators more autonomy, but it remains important that this is appropriately balanced by effective accountability.

We're now considering how we can make use of the other tools available to us. We will need to make some changes to what we look for in our performance reviews, and possibly also what we do to assess performance against our standards. We may not know until the new model is brought in what this would look like, but we understand that we need to be prepared to adapt. We will also need to make more use of policy advice and guidance to support the regulators to make use of their new powers effectively, and to guide our performance reviews.

These reforms could be a significant improvement to the way things work now. It is important that they are rolled out to all the regulators we oversee as quickly as possible, not least to avoid having both the old and new models running at the same time for longer than necessary.

But there are still areas for improvement in the Government's proposals. The rest of this briefing sets out those we think are the most important for public protection. The complete list will appear in our final response to the consultation – look out for this on our website as we approach 16 May.

In response to the 2021 consultation *Regulating healthcare professionals, protecting the public*, we developed criteria for what success and failure of these reforms might look like. We have now amended them slightly to bring them up to date with the priorities we set out in *Safer care for all*, which themselves reflect the big patient and service user safety challenges in the health and care sectors. We are using these criteria to assess the Government's proposals.

Making the most of these reforms

Using our criteria for success and failure, we have picked out five important recommendations for getting these reforms right for safer care for all.

01 Include all three stages of the fitness to practise process in the draft Order.

The Government is proposing a three-stage process for fitness to practise – the process through which decisions are made about the conduct or competence of health and care professionals:

1. Initial assessment: 'to determine whether a concern received about a registrant meets the criteria for onward referral in the fitness to practise process'; it is likely to involve an initial sifting stage, followed by a more in-depth investigation, and may involve a second sifting stage.
2. Case examiner: to 'carry out a detailed assessment of the case from the written information and evidence available, and where possible, make a decision based on their assessment of impairment and whether action is needed to protect the public' or to refer the case to a panel where not possible; 'to conclude such a case through an accepted outcome, where the registrant accepts both the findings (including impairment) and the proposed measure'.
3. Fitness to practise panel: 'to make a determination as to whether a registrant's fitness to practise is impaired. Where the Fitness to Practise panel concludes that the registrant's fitness to practise is impaired, it will impose an appropriate measure.'*

The Government has made the decision that the initial assessment stage should not feature in the Order, and that instead the GMC – and other regulators after that – should make their own rules about it.

We think this could lead to unhelpful inconsistency, because each regulator could set out a different process, with different sifting stages for closing cases, using different criteria. This would be confusing to navigate and result in inconsistent decisions between professions. The Williams Review shone a light on apparent differences between decisions made by the regulators, and the unfairness that seemed to result from this. Why wouldn't we embrace such a straightforward step to achieve more consistency?[1]

*Quotes taken from the 2021 consultation, *Regulating healthcare professionals, protecting the public*

Making the most of these reforms

For the initial assessment stages, there is already inconsistency in the current system, and we have said that this should be fixed. The Government could take this opportunity to require a minimum level of consistency between the regulators.

Not only this, without any steps in the Order enabling the regulator to close a case, it isn't even clear whether they will have the legal authority to close cases before the case examiner stage. This could mean having to refer all cases to case examiners, which would seem to undermine the drive for more flexible, efficient regulation.

How we will respond to the consultation

What we will say	**In response to the question about the three-stage fitness to practise process, we will recommend that the Government sets out the essential steps of initial assessment in the legislation. This would describe a basic model that all regulators would have to use.**
Why it is important	**Without this change, regulation may be less effective at protecting the public, less coherent and may not be fair. With these changes, regulators could still gain in flexibility.**

02 Give regulators clear powers to review conditions and suspensions to make sure a registrant is fit to return to practice unrestricted.

Now, when panels impose conditions on a registrant, or suspend their registration, the regulator can check whether the registrant is fit to practise unrestricted before the sanction – or 'measure' under the new model – expires. These are review hearings, where panels can consider new evidence and impose further sanctions if there are still concerns about the registrant's fitness to practise. Panels decide at the point of imposing the original sanction whether a review will be needed, and can highlight new information that might be relevant to look at as part of a review. Regulators can also trigger review hearings early, say if it is apparent that conditions aren't working.

Making the most of these reforms

This process is essential to public protection – without it, a registrant who still presents a risk to the public can get to the end of their conditions or suspension and simply return to practice.

We can't see anything in the draft that would give regulators this power. The closest thing is article 11(2), which would give the regulator the ability to revise panel decisions, but there are several problems with this:

- It would apply only to panel decisions and not to case examiner decisions, despite case examiners having the same ability to impose/agree conditions and suspensions as panels.
- It would enable panel decisions to be 'revised' on the basis of a 'material change of circumstances' – so not a test relating to public protection.
- It includes a restriction that the length of the measure couldn't be extended.
- It supposes that these decisions are a revisiting of the original decision, rather than new decisions in their own right.

Linked to this, the Order would restrict the maximum period of conditions (and suspensions) to 12 months. At the moment, both the GMC and the Nursing and Midwifery Council (NMC) can set conditions for up to three years, allowing more time for registrants who need longer to address the concerns.

In practice, panels often impose conditions for longer than 12 months, and review hearings often conclude with conditions being extended. Combining the shorter maximum period with no clear ability to review fitness to practise come the end of the conditions, risks creating a serious – and as far as we can see, unnecessary – public protection gap.

To add to this, it is not at all clear whether in future these decisions would be made by panels. This would mean that the Authority was unable to challenge under section 29 of our legislation any outcomes that were insufficient to protect the public, because our powers (see our explainer) would only cover panel decisions. At the moment, we carry out checks on decisions not to renew conditions or suspensions, and have successfully challenged several in the Courts for not protecting the public.[2] Losing this ability would reduce the independent checks on fitness to practise decisions.[3]

We understand that not every review decision needs to be made by a panel – many are straightforward. However, we would want the regulators to be able to use panel hearings where needed. The work we are doing to understand the relative strengths and weaknesses of case examiners and panels could help regulators use these options most effectively.

Making the most of these reforms

How we will respond to the consultation

What we will say

In response to the question about article 11, we will recommend that the Government:

- **gives regulators clear powers to review conditions and suspensions to make sure a registrant is fit to return to unrestricted practice**
- **extends the maximum period of conditions to three years**
- **enables regulators to use panel hearings for some of these decisions, and**
- **enables the Authority to challenge decisions made at these hearings under its section 29 powers.**

Why it is important

Without these changes, regulators may be less effective at protecting the public. With these changes, regulators could still gain in flexibility.

03 Allow final decisions by case examiners to be referred to a panel if they don't protect the public.

In the 2021 consultation, the power for a registrar to review a case examiner's final decision – on request from anyone, including us – was presented as a public protection measure, and an alternative to our section 29 challenges.[4] In our response, we argued that this review could not effectively replace section 29, because it would not provide the same levels of public protection.

We have accepted the Government's decision presented in this current consultation, that section 29 should not apply to case examiner decisions. What concerns us now is that the proposal for reviewing case examiner decisions has been further amended, and would be less effective than what was described in the last consultation.

Making the most of these reforms

The draft Order says that a case examiner decision can be reviewed if there has been an error of fact or law, or a material change of circumstances since it was made. The consultation document explains that this can be on request, though the regulator will only review a decision if it seems likely that the threshold for a review will be met. This leaves open the possibility that a regulator may refuse a request from the Authority to review a case where there appears to have been a decision made that does not protect the public.

We are also concerned that the test for a review no longer makes any reference to public protection. Instead, it looks more like a power to challenge a decision on grounds based on administrative and procedural law, rather than on the key aim of protecting the public.

The Government had previously suggested that regulators should have to refer all decisions that met the test for review to a fitness to practise panel. Again, this does not feature in the current consultation documents. In fact, it is not clear what 'revising' a decision would involve.

Our final point relates to our own ability to ask for the regulator to revise a case examiner decision. Our legislation, the National Health Service Reform and Healthcare Professions Act 2002, is going to be changed to allow us to ask a regulator to review a case examiner decision.

The 2021 consultation put forward this review power as an alternative to our section 29 powers. But the draft Order would only enable us to ask the regulator to review case examiner decisions where a final measure has been agreed. Unlike others, we would not be able to challenge a finding that the registrant's fitness to practise was not impaired.

Getting these decisions wrong could mean an unsafe registrant practising without restriction or supervision. These are, in fact, the cases where there is greatest risk to the public, and we can and do challenge equivalent findings by panels under section 29.

Without changes to the way Article 11 is drafted, there will be considerable limitations to our ability to request a review as an effective public protection tool.

Read our research

In 2021, we published independent research and advice to help inform our thinking on regulatory reform. The result was a report *Does consistency between regulators matter?, Patient and public perspectives on future fitness to practise processes and Cognitive biases in fitness to practise decision-making: from understanding to mitigation*. You can read it on our website here.

Making the most of these reforms

How we will respond to the consultation

What we will say

In response to the question about article 11(1), we will recommend that the Government:

- **introduces a public protection test for revisions of case examiner decisions**
- **makes clear that case examiner decisions that do not protect the public should be referred to a panel for a new decision**
- **makes clear that any panel outcomes made following a decision to revise a decision should fall under the Authority's section 29 powers**
- **allows the Authority to request a review of case examiner decisions that a registrant's fitness to practise is not impaired.**

Why it is important

Without these changes, regulators may be less effective at protecting the public. With these changes, regulators would still gain in flexibility.

04 Give the Authority a new targeted power to obtain information so it can oversee reformed regulators effectively.

Because these reforms will devolve decisions to the regulators, there are many unknowns in the future of professional regulation. These reforms will change what the regulators do and how they do it, as well as the safety nets that sit beneath all this activity. As mentioned above, we are going to need to change how we monitor the performance of the regulators we oversee.

We don't know where regulators will perform well or where they may encounter challenges. We are very likely to have to change the way we look at their work to make sure we are focusing on the right things to spot any fluctuations in performance, or new risks.

Making the most of these reforms

To do this, we will need to obtain information from the regulators. Even now, regulators sometimes aren't able to share the information we want to help us understand how they are performing, because the law isn't clear enough – especially if it is information they haven't given us before. This happens in spite of duties to co-operate in both the regulators' and our own legislation.

Alongside this, there is the specific worry that without the ability to get case files from the regulators, our right to ask a regulator to review case examiner decisions may not work as it should. We will need to be able to get case files from regulators, so we can decide whether or not to ask a regulator to review case examiner decisions. We could not properly undertake the role without this power.

Making this change to our legislation – mirroring the powers regulators will themselves have to obtain information they need to carry out their work – would allow us to adapt to the new model of regulation.

How we will respond to the consultation

What we will say	**In response to the question about Schedule 3, we will recommend that we are given a new targeted power to obtain from the regulators the information we need to continue to do our job well.**
Why it is important	**Without these changes, regulators may be less effective at protecting the public. With these changes, regulators would still gain in flexibility.**

Making the most of these reforms

05 Keep the powers regulators have now to handle health concerns about a professional.

The draft Order suggests that 'impaired fitness to practise should be defined as
(i) inability to provide care to a sufficient standard; or
(ii) misconduct'

This is a change from the current definition which, among other things, includes health – which covers both mental and physical health – as a possible ground for taking action in fitness to practise. It will be important to make sure regulators can still take action in cases where harm has not yet occurred, but it is nonetheless necessary for a registrant's practice to be restricted, in order to manage their health conditions safely. There will also be cases where health conditions have led to wider behavioural problems, or issues which have had an impact on public confidence, and that fall outside the direct delivery of care to a patient – it is hard to see how these would be dealt with under the new test.

In addition, it would also remove the procedural safeguards which go to creating a kinder, less adversarial environment – such as that health grounds shouldn't result in removal from the register, or should be determined in private.

We don't think there is a problem that needs solving with this proposal. We don't think regulators are dealing with health cases too harshly now, and cannot see any reason why the grounds for action need to be changed – especially if this could make it harder for regulators to protect the public.

We have other concerns about the grounds for action that we will include in our full response.

How we will respond to the consultation

What we will say	**In response to the question about Part 1, we will recommend that regulators are given a ground for action linked to health so they can deal with these cases effectively and compassionately.**
Why it is important	**Without these changes, regulators may be less effective at protecting the public, and the fitness to practise processes may be less fair and more adversarial than they need to be.**

What we will do next

We will continue to review the consultation documents in detail and put together a full response.

We will publish our response before the consultation closes on 16 May. We will make our response available on our website.

If you would like to discuss any of the points we make in this briefing, or if you would be interested in receiving a copy of our final response, please contact us at engagement@professionalstandards.org.uk

About our section 29 powers

At the moment, almost all final decisions about the conduct or competence of health and care professionals, are made for the regulators by panels at hearings.

We have powers in law (under section 29 of our legislation) to challenge any that seem insufficient to protect the public. We use this power sparingly – between 15 and 20 times a year – because the legal test we have to pass sets the bar high. But when we are successful, which we are in around nine out of 10 cases, each one can help protect many hundreds of patients and service users.

These powers are a public protection safety net when mistakes have been made. In addition, they bring transparency and accountability to the processes, and encourage better decision-making.

As we understand it, under the new model of regulation, our section 29 powers will continue to be limited to Panel decisions. This means that any policy decisions that certain types of fitness to practise decision should no longer be made by panels automatically also removes these decisions from our section 29 oversight.

See our section 29 powers in practice

See how appealing final fitness to practise cases contributes to public protection. You can find case studies on our website here. Or find out more about the added value of this power to appeal.

What do we think these reforms can and should achieve?

In 2021, the Authority developed criteria for judging whether the reforms will have been a success. We have updated these slightly (changes in bold) to take account of the new priorities we set out in *Safer care for all*.

The Authority believes that the proposed reforms will be a step forwards for professional regulation if they create:

- Greater coherence of the regulatory system to support modern, multi-disciplinary health and social care
- More interprofessional working, and flexibility between professions
- **Greater agility for regulators so they can adapt to new risks**
- A safe and appropriate balance of accountability and flexibility in the work of the professional regulators
- A proportionate, and less adversarial way of dealing with concerns about professionals with the necessary public protection safeguards
- **A fair system of regulation that supports equality, diversity, and inclusion for registrants as well as patients and service users**
- Overall, a more effective public protection framework, that listens to patients and responds to their concerns, and has the confidence of the public and professionals.

These reforms will have failed the public if they lead to:

- Lower levels of public protection, public confidence, or professional standard
- Less transparency or accountability for regulator
- The same or more complexity from the perspective of the public, employers, and professionals
- Continuing difficulties for regulators in working together
- Continuing challenges to closer working between professions
- Significantly increased costs that are not justified by public protection.

Endnotes/useful links

ENDNOTES

1. https://www.professionalstandards.org.uk/docs/default-source/publications/developing-a-methodology-to-assess-the-consistency-of-fitness-to-practise-outcomes-2019.pdf?sfvrsn=97c57420_0
2. We have successfully challenged five review hearing decisions since 2016.
3. Under the new model, the Authority will not be able to challenge in the Courts final decisions made by case examiners in cases that would previously have been made by Panels.
4. See consultation question 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?'

USEFUL LINKS

1. Government consultation on *Regulating anaesthesia associates and physician associates* can be found at: https://www.gov.uk/government/consultations/regulating-anaesthesia-associates-and-physician-associates/regulating-anaesthesia-associates-and-physician-associates The deadline for responding is 14 May 2023.
2. Government consultation 2021 *Promoting professionalism, reforming regulation* https://www.gov.uk/government/consultations/promoting-professionalism-reforming-regulation
3. Professional Standards Authority response to Government consultation *Regulating healthcare professionals, protecting the public* https://www.professionalstandards.org.uk/publications/detail/professional-standards-authority-response-to-regulating-healthcare-professionals-protecting-the-public
4. Consultation outcome: *Regulating healthcare professionals, protecting the public* https://www.gov.uk/government/consultations/regulating-healthcare-professionals-protecting-the-public
5. Professional Standards Authority *Safer care for all* (September 2022) https://www.professionalstandards.org.uk/safer-care-for-all
6. Independent report: *Williams review into gross negligence manslaughter in healthcare* https://www.gov.uk/government/publications/williams-review-into-gross-negligence-manslaughter-in-healthcare
7. Professional Standards Authority *Right-touch reform* (2017) https://www.professionalstandards.org.uk/docs/default-source/publications/thought-paper/right-touch-reform-2017.pdf?sfvrsn=2e517320_7

www.professionalstandards.org.uk