Consultation Response

The Review of the performance of the health and care regulators

July 2015

Overview

MPS welcomes the opportunity to respond to this review. As a membership organisation that represents and supports the medical and dental professions with regulatory and disciplinary issues, we are well placed to provide feedback on the regulatory environment from the registrants' perspective.

Our in-house medicolegal and dentolegal experts assist with the wide range of regulatory, legal and ethical problems that arise from professional practice. Through offering this advice and our contact with the profession, we have a clear idea how regulation is impacting on the professions

We have grown concerned that the increased scrutiny and regulation of the professions has had a negative impact on professionals. Doctors and Dentists are finding themselves under considerable pressure when under investigation by their regulators. An MPS survey of 180 doctors investigated by the GMC in the last five years found that 72% believed that the investigation had a detrimental impact on their mental and/or physical health. We also conducted a separate survey of 140 dental members who had been investigated by the General Dental Council (GDC). The survey revealed that 94% felt it had an impact on their stress and anxiety, and 33% said they had considered leaving the profession because of the experience.

Recently, we have been particularly concerned about the impact and performance of the GDC's fitness to practise function up to and including the period that was subject to the most recent audit. Our members have become extremely anxious about the threat of a GDC investigation, and they have lacked confidence that their cases will be treated fairly and consistently. Having said that we have recently met the new Director of fitness to practise at the GDC and we welcome the steps being taken to clarify guidance on dishonesty and drafting of allegations, to ensure consistency of the Case Workers and the Investigation Committee and engage with stakeholders.

MPS understands and fully supports the primary purpose of the Professional Standards Authority (PSA) to 'promote the health, safety and wellbeing of patients and other members of the public and to be a strong, independent voice for patients in the regulation of health professionals throughout the UK'. However, MPS argues that a crucial element of ensuring good quality healthcare for patients is

maintaining and protecting the long-term sustainability of the professions. Furthermore an effective system of regulation must have both public confidence and confidence of the profession that it seeks to regulate.

As the guardians of 'right-touch' regulation, we also believe that the PSA should take a more concerted interest in how targeted, fair and proportionate the actions and sanctions of regulators are, and their impact on the profession. We would like to see this better reflected in the approach that the PSA takes.

With this in mind, MPS suggests that there are further areas of data/research that should be required by the PSA as part of their review of regulators. The purpose of this data would be to ensure greater scrutiny of, and transparency around, the impact regulators have on professionals. We are also concerned that the current data sets are focused too much on speed and not enough on quality outcomes. Further tests are required to ensure that decisions are not only made quickly and efficiently, but also robustly and effectively with a focus on the quality and accuracy of the processes/decision making. Such data could include:

- The proportion of cases where all allegations not admitted by the registrant are proved by the regulator at hearing
- The number of investigations that are closed with no further action
- The number of hearings that are closed at half time, with a finding of no misconduct and a finding of no current impairment (and the average length of these hearings)
- The number of hearings where the Practice Committee has determined that a lesser sanction or less adverse outcome should be given, compared to that sought by the regulator
- The number of cases where interim orders are not made by a convened interim orders panel, as a percentage of referrals
- The average length of
    - all fitness to practise investigations
    - all hearings, including a note of the number that were part-heard
- Results of an annual survey of registrants regarding their experiences of, and satisfaction with, the processes and procedures of the regulator

In order to further ensure that the PSA has a good understanding of medical and dental professionals, we would like to see greater representation of them in the PSA. For example, we believe that when the PSA investigates regulators' decisions or carriers out an audit, there should always be a current registrant on the review panel. For example it would be acceptable to the profession if that registrant had previously served on one of the regulator's independent panels.

Aside from this, MPS agrees with the principles behind the proposal, but is keen to ensure that this new review system is regularly reviewed to ensure that it is providing the public and Parliament with the reassurance that it requires.

Response to specific questions

Q1: Do you agree with the proposal to move to a rolling programme of performance review?

MPS agrees with the principles behind this proposal but suggests that a full performance review should take place earlier than five-six years even where no concerns are identified based on the information provided by the regulators. This regular, independent assurance would provide the profession, the public and Parliament with the confidence that the regulator is performing to the expected standard. MPS would like to see a full audit/review at least once every 2-3 years.

We have concerns about the PSA relying on the regulator to disclose data before a decision is reached on whether the PSA will 'audit' as part of a 'targeted review'. We think audits ought to be routinely undertaken, randomly, at specified periods.

Q2: Do you agree with the proposal that the Standards of Good Regulation should include a new Standard relating to the management of risk?

MPS agrees, but argues that this should be based on standards that can be measured using objective evidence rather than the subjective view of those tasked with the reporting role within the various regulators. It would be helpful if further guidance could be provided by the PSA to elaborate on what is meant by 'risk' in each of the categories identified, with reference to examples. It is crucial that the view of "risk" is properly informed by discussion with the various professions. It appears to MPS that the PSA view of risk when considering the need for Interim Orders Committee referrals in relation to the GDC can be disproportionate. MPS would welcome the opportunity to discuss this with PSA.

Q3: If so, do you agree with the areas of focus relating to the management of risk?

MPS agrees but as explored above, it would be helpful if further guidance could be provided by the PSA to elaborate on what is meant by risk in each of the categories identified, with reference to examples.

Q4: Are there other areas that could be defined as management of risk that should be included as part of this standard?

Poor and inconsistent decision making at each stage of the fitness to practise process (which includes unduly harsh as well as unduly lenient decisions) risks undermining public and professional confidence in the regulator. The regulator should be asked to demonstrate how this particular risk is addressed and how far this has been achieved based on objective evidence.

Q5: Would you prefer the alternative proposal that, instead of including a new Standard about the management of risk, we should ask the regulator about forthcoming risks as part of the information we use to decide the scope of their review?

MPS suggests a hybrid of both. In addition to requiring the regulator to demonstrate how it manages the various categories of risk identified in 'standard five', each regulator should also be asked what further risks it anticipates during the forthcoming year and how it plans to address these risks. This will ensure that the regulator is looking forward as well as back over its performance and, in doing so, should be better prepared to meet any potential risks.

It is also crucial that there is robust challenge on this point. For example some concerns may not be reported since the question would be subjective 'likelihood that you will fail in the coming year'. It is foreseeable that the person/s charged with forming that opinion within the regulator might conclude there was no risk of a situation occurring, or that it is not 'likely'. However, any objective perspective, such as that of the PSA or other third parties, could highlight risks that the regulator had not declared.

Q6: Do you have any views on the effectiveness of the question as currently drafted, and whether it will assist us in determining how risk is managed?

As previously stated, it would be helpful if further guidance could be provided by the PSA to elaborate on what is meant by risk in each of the categories identified, with reference to examples. Additionally, it is also crucial that there is robust challenge on the question of forthcoming risks and the views of third parties should be considered.

Q7: Should the response to the question be signed off by the Chief Executive, the Chair of Council, the Chair of the Audit and Risk Committee, or a combination of these individuals?

Sign-off from all of the above would provide greater reassurance, as fewer PSA audit/reviews will be taking place. It will also ensure that any response to PSA is subject to the governance of an executive

review. This should, for example, make it impossible for an employee to provide misinformation or an underestimate of the potential risk to PSA.

Q8: Do you agree with the proposal that each regulator should provide information on how it meets the Standards at the outset of the revised performance review process, and in subsequent years only provide information relating to any changes to how the Standards are met?

MPS disagrees on this point, we think in addition regulators should have to disclose where they have failed and, in subsequent years, whether any changes made have also failed to meet the Standards.

Q9: Do you agree with the revised elements of the dataset?

MPS has no comment on this question.

Q10: Are there elements that you believe should not be included? If so, please explain your specific objections.

MPS has no comment on this question.

Q11: Is there additional data that you believe should be included in the dataset in order for us to gain a clearer understanding of the performance of the regulator?

MPS would like to see some further additions to the data set to ensure they have scrutiny over the impact of the regulator on the professions. We are concerned that the current data sets are focused too much on speed and not enough on the quality and consistency of outcomes. Further tests are required regarding the quality and accuracy of the processes/decision making. This could include data such as:

- The proportion of cases where all allegations not admitted by the registrant are proved by the regulator at hearing
- The number of investigations that are closed with no further action
- The number of hearings that are closed at half time, with a finding of no misconduct and a finding of no current impairment (and the average length of these hearings)
- The number of hearings where the Practice Committee has determined that a lesser sanction or less adverse outcome should be given, compared to that sought by the regulator
- The number of cases where interim orders are not made by a convened interim orders panel, as a percentage of referrals

- The average length of
    - all fitness to practise investigations
    - all hearings, including a note of the number that were part-heard
- Results of an annual survey of registrants regarding their experiences of, and satisfaction with, the processes and procedures of the regulator

An effective system of regulation is based on both public confidence and confidence of the profession that it seeks to regulate. Data should be captured to show the number of cases where the outcome of a hearing results in a sanction that is less than that sought by the regulator. This data should also be published as part of the PSA's review together with the PSA's recommendations on any areas for improvement. It will be apparent whether or not the Regulator is correctly assessing each case as the end of the case approaches, the facts having been determined.

We would also like to see a more formal inclusion of third party feedback. Perhaps the regulator could disclose how many complaints it has itself received about all aspects of its performance on an annual basis and evidence about how (and how quickly) they were resolved. It is important to capture what third parties have reported to the regulator, as well as what the third parties report directly to the PSA.

Q12: Do you agree with the indicators that we have set out in annex three?

MPS questions whether all of the data requested can achieve the stated aims of the PSA. Much of the data requests relate to numbers of cases, which absent any objective analysis, would not provide sufficient information to assess the quality of the process/decision making.

Q13: Are there other indicators from the dataset that we should include?

MPS would like to see some further additions to the data set to ensure they have scrutiny over the impact of the regulator on the professions. We are also concerned that the current data sets are focused too much on speed and not enough on quality outcomes. Further tests are required regarding the quality and accuracy of the processes/decision making. This could include data such as:

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Q14 A: Do you agree with the proposals that the dataset should be collected from the regulator on a quarterly basis?

MPS agrees that it is advantageous for the dataset to be collected on a quarterly basis but we are concerned about the PSA relying on the regulator to disclose data before a decision is reached on whether the PSA will 'audit' as part of a 'targeted review'. We think audits ought to be routinely undertaken, randomly by PSA, at specified periods. Regular objective scrutiny of the evidence is crucial to build confidence in the outputs.

Q14 B: Do you agree with the proposed methods of assessment and review of each regulator? If you disagree with one or more aspects, please explain why.

As discussed in answer to previous questions, MPS agrees with the principle behind the proposed changes, but has some suggestions to make them more robust. This includes the need to request more information regarding registrant experience and quality of outcome in the data set, greater use of third party information and the introduction of randomly selected audits.

Q15: Are there any other possible impacts relating to these proposals that we have not considered?

MPS has no comment on this question.

Q16: Are there any further comments you would like to make which are relevant to the proposals, and which you have not already covered?

MPS would like the approach of the PSA to move away from a reliance on data supplied by the regulator, and towards its own assessments on quality as opposed to quantity.

About MPS

MPS is the world's leading protection organisation for doctors**,** dentists and healthcare professionals. We protect and support the professional interests of more than 300,000 members around the world. Our benefits include access to indemnity, expert advice and peace of mind. Highly qualified advisers are on hand to talk through a question or concern at any time.

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

Our philosophy is to support safe practice in medicine and dentistry by helping to avert problems in the first place. We do this by promoting risk management through our workshops, E-learning, clinical risk assessments, publications, conferences, lectures and presentations.

MPS is not an insurance company. All the benefits of membership of MPS are discretionary as set out in the Memorandum and Articles of Association.

CONTACT

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

Sara Higham
Head of External Relations

Email: sara.higham@medicalprotection.org

The Medical Protection Society Limited
33 Cavendish Square
London W1G 0PS
United Kingdom

Tel: +44 (0)20 7399 1300
Fax: +44 (0)20 7399 1301

info@mps.org.uk

www.mps.org.uk
www.medicalprotection.org