Department of Health

Promoting professionalism, reforming regulation

Questionnaire

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1. Summary of the questions

Q1: Do you agree that the PSA should take on the role of advising the UK governments on which groups of healthcare professionals should be regulated?

Response:

Yes, we feel that it is logical that the PSA take on the role. There needs to be an overarching risk assessment of all healthcare professions, whether currently statutory regulated or not. We agree that the PSA is in the best position to provide an impartial recommendation but would hope that the PSA consult with the wider field before making its recommendation. We also agree that the ultimate decision should remain with Ministers.

Q2: What are your views on the criteria suggested by the PSA to assess the appropriate level of regulatory oversight required of various professional groups?

Response:

We agree that the risk criteria suggested by the PSA offer some clarity, consistency and proportionality to decision-making. In relation to the first stage of the assessment, the issue of vulnerability of the client or patient needs careful consideration as some demographic groups may also be inherently more vulnerable and more likely to seek services from certain professions. In relation to complexity, while there is no surgical or physical intervention in the counselling professions, a client could present with a number of issues including harm to self or others. We also wonder whether the scale of risk should be moved to the first stage as this significantly increases the likelihood of risk occurring.

In addition, we would suggest that it is clear that the education quality, training and appraisal of practitioners is included in the means assurance aspect.

We recommend that the risk criteria should also be supported by a rigorous analysis of the evidence of conduct cases for each of the professions. Insurance companies who provide professional indemnity insurance to health professionals will have established actuarial systems for assessing the degree of risk and may well be able to provide information.

We also stress that it is important to bear in mind that the three key areas of the first stage may vary enormously from practitioner to practitioner within a single profession. In the case of the counselling professions, some work within services but approximately half of our members have some form of private practice and are not part of either a supervised team or an organisation that can oversee assurance systems in place to protect the public. This will have a significant effect on risk.

Q3: Do you agree that the current statutorily regulated professions should be subject to a reassessment to determine the most appropriate level of statutory oversight? Which groups should be reassessed as a priority? Why?

Response:

BACP does not wish to comment on reassessment. However, there is inconsistency between those professions with similar or overlapping functions and proportionate regulatory systems need to apply equally across all healthcare professions. We also feel that the registers accredited by the PSA programme have significant legal constraints, which leave huge gaps in their ability to safeguard the public; this provides false and potentially dangerous assurance to the public. Such gaps include an inability to consider spent convictions, data processing limitations and safeguarding restrictions. In addition, as titles of professions belonging to the Accredited Registers Programme are not protected, there is evidence (https://unsafespaces.com/unsafe-spaces-download-the-report/) that being excluded from professional bodies does not prohibit continuation of employment in the same field. (Please see also our responses to Q 7.) We note that some professional non-healthcare regulators such as the Law Society and the Financial Services Authority are not fully statutory but have powers devolved to them by law. Any threats to public protection created by de-regulation need to be explored more fully and consideration should be given to delegated legal powers.

In addition, as a professional association representing counselling and psychotherapy, we are aware that the profession is disadvantaged in certain employment situations as a result of their non-regulated status, particularly within statutory settings. We would recommend that any final framework takes into account the potential for such discrimination and ensures that work is undertaken with employers and commissioners to address the problem.

Q4: What are your views on the use of prohibition orders as an alternative to statutory regulation for some groups of professionals?

Response:

It depends. There is insufficient detail given about how this might work in practice. As this is suggested as an alternative to statutory regulation, we are unsure who the relevant regulatory body might be and how legal power to restrict title and functions might work for non-statutory regulatory bodies. However, if this is possible, we do support the use of delegated legal powers in the interests of public protection and we can see a single repository for employers and the public would make it easier for everyone to understand the regulatory landscape. We would suggest that for such an initiative to work, all titles that are commonly used by the profession and readily recognised by members of the public are protected. We would also welcome further exploration of the feasibility of protection by function though it is important to guard against criminalising behaviour of those not intended to be included.

If prohibition orders are ultimately considered an alternative to statutory regulation, it is essential that the initiative is effectively communicated to all stakeholders, including the public, commissioners and employers and that the ‘barred list’ is easily understandable. We recommend that all regulators, patients/clients, the public and employers be involved in designing any prohibition orders.

Q5: Do you agree that there should be fewer regulatory bodies?

Response:

There should be public confidence in the regulatory bodies and the powers they have. Simplification is often a desirable outcome. There can be confusion when multiple regulators regulate different aspects of a broad profession.

Q6: What do you think would be the advantages and disadvantages of having fewer professional regulators?

Response:

We note the proposal to have possibly only three or four statutory healthcare regulators and agree that this would make the regulatory landscape easier to navigate for employers and the public, reducing confusion. It would also bring benefits in terms of resources and consistency.

We do have some concerns about maintaining appropriate expertise in relation to each of the very different healthcare professions that are likely to be subject to regulation. We recognise that HCPC already functions successfully on many levels as a multi-professional regulator. However, despite professional specific standards, many of the subtleties of practice have been lost and having generic requirements for aspects of professional practice such as CPD, means that crucial profession-specific requirements are not monitored. For example, supervision is a formal arrangement for both qualified and trainee practitioners who are engaged in therapeutically-based or helping services and provides an opportunity to discuss clinical work regularly with an experienced practitioner (the supervisor). As a non-statutory regulator of a single profession – counselling and psychotherapy, we are able to monitor this through audit – whereas the HCPC does not for its own psychological therapist registrants.

We also have significant concerns about the regulator's ability to provide the expertise for development of the professions. For example the HCPC publishes standards of proficiency which describe the threshold for entry to the profession and no differentiation between levels of experience is demarcated in any way. In terms of educational or training threshold for entry to any register, some professions are extremely complex. For example, in counselling, programmes are delivered in FE, HE and private sectors and some are not linked to educational qualification frameworks. It is essential that regulators seek the expertise of the professional bodies to ensure appropriate entry levels of regulation and to ensure any necessary development of the standards as professions develop. In addition, any enhancement of CPD function by the regulators should be done in conjunction with the professional bodies, otherwise there is a risk that professional expertise would be lost or diluted if professions were merged in such a way and that risk may outweigh the benefits of efficiency through size.

Q7: Do you have views on how the regulators could be configured if they are reduced in number?

Response:

The response is difficult to give without knowing which professions will be statutory regulated in the future. However, we see no reason as a start why the two pharmaceutical regulators should not merge and it would seem sensible to combine some of the smaller regulatory bodies such as the GCC and the GOsC, which could feasibly be classed as regulating similar professions. Depending on the nature of other professions that are considered high risk enough to be regulated, it may useful to concentrate on like professions such as a medical professions regulator, psychological therapies regulator etc. Also, if the risk profile identifies professions within a regulator that could be deregulated, there may be scope for a multi-professional regulator such as the HCPC to take on the remaining professions who remain within that regulator.

Configuration may also depend on consideration of the removal of statutory powers currently available to statutory regulators, such as exceptions in investigations under the Data Protection Act (specifically Section 2 and 3 of the Act), which limit the processing of information in

complainants handling for Accredited Registers. BACP for example, cannot use information provided about a third person without the consent of that person and consent is not always obtainable or may be refused. This can impede investigations. In addition, such limitations can affect information received from Safeguarding Investigations - while an accredited register can receive the information, it cannot use evidence which contains personal information (or sensitive personal information) about a person without consent. Those professions presently governed by statute are exempt from these limitations.

There is, however, scope say for example an accredited register to be a named body in legislation covering Safeguarding, currently the Safeguarding Vulnerable Groups Act. This would mean that Local Safeguarding reports, which are currently restricted to certain 'receivers' could be used by Accredited Registers and that may assist with data protection issues of holding/processing information about a party in the absence of consent.

The Rehabilitation of Offenders Act 1974 (Exceptions) Order 1975 only applies to certain professions which are listed in the Order, allowing regulators to legally consider spent convictions as part of their role in public protection. Those professions which are de-regulated may lose the ability, although it is questionable as to whether they would be removed from the list. However, accredited registers are unable to consider spent convictions of applicant members or current members, so if a serious conviction is spent an applicant/member need not disclose it and neither can it be considered even if it is disclosed by an applicant. In addition, BACP is not entitled to request a Disclosure and Barring Service check when considering applications for membership as it would contain information about spent convictions.

Therefore, there are a number of risks to public protection, associated with reducing the number of regulators, and indeed current risks with accredited registers. The potential loss of statutory powers needs to be explored fully.

Q8: Do you agree that all regulatory bodies should be given a full range of powers for resolving fitness to practise cases?

Response:

Yes, we agree. It has been recognised that fitness to practise cases can be intimidating, cumbersome, lengthy and costly. This is not in keeping with the objective of public protection. Furthermore, there is little or no scope for the possibility of conciliation between a practitioner and a complainant. A complaint becomes an adversarial process, focusing on winning or losing and any learning from issues complained about are lost. This may result in leaving the public without any resolution or assurance that an issue has been adequately addressed, or that the risk of repetition of misconduct has been minimised or eradicated.

BACP has recognised this danger and has taken the opportunity in revising its Professional Conduct Procedure by introducing new processes and tools to bring cases to an appropriate conclusion, focusing on timeliness, proportionality and transparency. For example, it has introduced a threshold test, which prevents a complainant being drawn into a process where it is obvious that the facts alleged would not amount to misconduct that could be proved. This manages a complainant's expectations at the outset. While concluded without a formal decision making process, there is a clearly written and therefore transparent process.

We have also introduced the ability for a 'Letter of Advice' to be issued at an early stage, against a published set of criteria, without the need for a formal hearing. This ensures low level

and low risk misconduct can be addressed at an early stage, thereby assuring the complainant that it has been addressed and also facilitating remediation on the part of the practitioner.

In our new process there will also be an opportunity for members facing allegations of misconduct to enter into a Consensual Disposal agreement, where conduct is admitted and the registrant accepts the imposition of a sanction. Any decision would be published. Compliance of any sanction would then be addressed by a relevant Panel.

Q9: What are your views on the role of mediation in the fitness to practise process?

Response:

In respect of the question regarding mediation, we agree that some kind of conciliatory approach could be taken by regulators. Having considered feedback from members, complainants, the PSA and from staff experience, BACP recognised that aside from being a lengthy and costly process, a fitness to practise/professional conduct hearing can be an intimidating process for a complainant. In many cases complainants are drawn into an adversarial and legal complaints process. While accepted that certain matters must be addressed by a formal hearing process, we have introduced a more resolutary process so matters which are assessed as requiring a formal hearing to address allegations of misconduct may be heard by a Practice Review Hearing (PRH) rather than a Professional Conduct Panel Allocation will be dependent on seriousness of conduct alleged and level of sanction likely. We envisaged that a PRH will take a less formal approach with a view to coming to a more conciliatory conclusion, which allows a complainant to have a voice, and allows for a member to rectify/apologise for matters of misconduct and also gives an opportunity for the member to demonstrate improvement in practice, although the ability for the Panel to impose a sanction will remain for cases that cannot be conciliated through the PRH. It is hoped that allocation to a PRH is less likely to turn into an adversarial hearing, with members less likely to 'lawyer up' and that members and complainants will approach it from a view that it is set up to come to an appropriate and satisfactory conclusion.

Q10: Do you agree that the PSA's standards should place less emphasis on the fitness to practise performance?

Response:

We note in the consultation that ‘more needs to be done to move to a more inquisitorial approach’ by the regulators and support the principle of more proportionate action against registrants. We also support the principle of flexibility with a range of powers to support quicker resolution and to move resources so that they support the professionalism of all registrants. However, we do feel that the role of the professional bodies to provide the expertise to underpin any standards developed is crucial, especially given the proposals to reduce the number of statutory regulators.

Q11: Do you agree that the PSA should retain its powers to appeal regulators' fitness to practise decisions to the relevant court, where it is considered the original decision is not adequate to protect the public?

Response:

The PSA's powers aid consistency in decision making, especially among a multitude of different regulators. The High Court's decisions in PSA cases are a useful resource for all regulators. However, it may be useful for the PSA to work with the regulatory bodies so that they have a role in identifying inappropriate decisions made by an independent tribunal service. We note that the GMC has already been granted the power to challenge decisions of the tribunals that hear cases against doctors who are alleged to have breached GMC standards.

Q12: Do you think the regulators have a role in supporting professionalism and if so how can regulators better support registrants to meet and retain professional standards?

Response:

Yes and we support the principle of front-loading resources into upstream prevention. The flow of detailed information with statistics and underlying trends from any fitness to practise tribunals is crucial. Likewise, given that the proposal that the new statutory regulators are likely to encompass several healthcare professions, it is important that the expertise of the professional bodies as competent authorities for the professions is not lost. In addition, if the single adjudicator also covers all non-statutory healthcare professions, it is even more crucial that legal mechanisms are found to aid the exchange of information with the professional bodies without unnecessary legal constraint. As a professional body, we would welcome the opportunity to share good practice in relation to counselling and psychotherapy with any relevant stakeholders in order to promote and develop the highest standards and evidence base for the profession.

Q13: Do you agree that the regulators should work more closely together? Why?

Response:

Yes, we agree. Health professional regulators working together may improve accessibility to information for the public, may generate income from economies of scale to use in regulatory prevention and assist in the objective of public protection and accountability. It is important for all those involved in healthcare regulation to share regulatory data and intelligence and to identify trends and contribute to upstream prevention. This approach should be widened to encompass all healthcare professions, whether regulated or not. BACP is working closely with the British Psychoanalytic Council (BPC) and the UK Council for Psychotherapy (UKCP) to further our joint commitment to improving the nation's mental health and wellbeing and ensure that counselling and psychotherapy are accessible to all who could benefit from them.

BACP is also part of the Accredited Registers' Collaborative and has signed up to the Information Sharing Protocol in respect of registrants removed from our register due to disciplinary procedures. However, as non-statutory regulators, sharing information must be within the confines of certain legislation such as the Data Protection Act, which hampers our public protection role.

A core set of generic standards for all healthcare professionals, (as well as profession-specific standards), would set the expectations for the work of healthcare professionals and would be easily understood by the public. Currently the statutory healthcare regulators have core principles and standards that are very similar in nature but worded differently. However, it is crucial that any profession-specific standards must be developed in conjunction with the professional bodies representing those professions.

We would also recommend that those organisations regulating premises and small businesses should be included in any collaborative working.

Q14: Do you think the areas suggested above are the right ones to encourage joint working? How would those contribute to improve patient protection? Are there any other areas where joint working would be beneficial?

Response:

Yes. We consider that working together in certain areas may improve accessibility to information for the public, and may generate efficiencies and assist in the objective of public protection and accountability.

We commented earlier (Q4) on the use of a shared online register with regard to 'Prohibition Orders'. In relation to a single online register, we are aware of inconsistencies in standards relating to registrants of accredited registers and believe such a portal needs to make the standards of the registrants' professional bodies transparent.

A core set of generic standards for all healthcare professionals, (as well sector specific standards), may be appropriate, depending on the regulatory model adopted. Advantages could be ease of reporting on the efficiencies of a particular regulator when addressing outcomes against core principles and carrying out any risk matrix, or comparison of risks between different professions.

A single adjudicator in theory sounds sensible; an alternative could be for shared tribunals of similar professions. This would increase public confidence ensuring independence from the investigating body. However, BACP consider that it may be more prudent to have several Independent Tribunals, rather than a single one. For example The Courts and Tribunal Judiciary operate a Chamber system, covering different areas such as immigration and asylum, employment, land tax and social entitlement. Each Chamber deals with very different sectors and are headed by Judges or Panels with expertise in the particular sector. There are Chambers in different parts of the country some dependent on demographics of the appellants. For example the Immigration and Asylum Cases are heard at Tribunals/Courts in Central London, Heathrow, Bradford, Manchester and Birmingham. There could be a similar adaptation of Independent Tribunals for healthcare professions, which can be categorised, for example, Counselling and Psychotherapy ARs/regulators could have an Independent Tribunal, hearing matters from BACP, UKCP, BPC or an Independent Tribunal hearing matters from GCC and the GOsC and Physiotherapists.

Q15: Do you agree that data sharing between healthcare regulators including systems regulators could help identify potential harm earlier?

Response:

Yes. We consider that data sharing is a key aspect of public protection and this was also highlighted in the Francis Inquiry report in 2013. As mentioned in our response to Q13, the accredited registers do not have the powers of the statutory regulators in relating to data-sharing. For example, on the whole, BACP is unable to receive information (intelligence) about its members without a legitimate purpose – for example, the instigation of a complaint/report of a potential misconduct.

BACP strongly believes healthcare regulators working together may lead to identifying harm at an earlier stage and we recommend that the way in which information can be shared needs to be explored in a legal context for both statutory and non-statutory regulators as a priority for effective regulation.

Q16: Do you agree that the regulatory bodies should be given greater flexibility to set their own operating procedures?

Response:

Yes, as this is compatible with the principle of agility and removes the need for lengthy legislative approval to ensure necessary changes are made in a timely manner. However, to mitigate the risk of inconsistency in procedures and powers, we welcome acknowledgment of the need for an appropriate level of parliamentary accountability and effective governance as a counter-balance to increased autonomy. The PSA may well be able to oversee the first stage of any changes, as is currently the case for the accredited registers who wish to change operating procedures.

Q17: Do you agree that the regulatory bodies should be more accountable to the Scottish Parliament, the National Assembly for Wales and the Northern Irish Assembly, in addition to the UK Parliament?

Response:

Yes. However, we do suggest that all the regulators are UK-wide – for example, we see no reason for maintaining separate regulators in Great Britain and in Northern Ireland**.** We feel that consistency with the principles of regulation is important but also recognise the need to accommodate the different perspectives of England, Scotland, Northern Ireland, and Wales. We also believe that it is important to consider any implications of the prospective withdrawal of the United Kingdom from the European Union and any implications for the requirement of free movement. We would also recommend that thought be given to both British Overseas Territories and British Crown Dependencies as many work with clients based in the UK.

Q18: Do you agree that the councils of the regulatory bodies should be changed so that they comprise of both non-executive and executive members?

Response:

Yes. We support the continuation of the move away from the old system of self-regulation. A mix of non-executive members should include both lay and those with knowledge of the profession to ensure that council members do not act in a representative way on behalf of their professions. Their appointment by Privy Council also removes the risk, or perception of risk, of bias. We also support the idea of executive members.

Q19: Do you think that the views of employers should be better reflected on the councils of the regulatory bodies, and how might this be achieved?

Response:

Yes, although this may depend on the nature of the regulated profession. A profession by definition has many stakeholders, and these include employers. In many professions

employers and commissioners are significant stakeholders but for those in private practice, this is less important.

Q20: Should each regulatory body be asked to set out proposals about how they will ensure they produce and sustain fit to practise and fit for purpose professionals?

Response:

We feel that this would be a logical approach and support the proposal.

Q21: Should potential savings generated through the reforms be passed back as fee reductions, be invested upstream to support professionalism, or both? Are there other areas where potential savings should be reinvested?

Response:

Both. Current statutory regulation fees vary for registrants from £83 (HCPC) to £801 (GCC). As the consultation indicates, this is largely owing to economies of scales and fitness to practise differences. We feel that this is unfair for smaller statutory-regulated professions. In principle, we do support regulatory reforms and feel that some of the savings resulting from any change should be reinvested in regulatory prevention. In the long-term, this may well have the benefit of reducing costs as a result of a decrease in relation to fitness to practise processes.

Q22: How will the proposed changes affect the costs or benefits for your organisation or those you represent?

- an increase
- a decrease
- stay the same

Please explain your answer and provide an estimate of impact if possible.

Response:

We cannot comment as we would need further details on how counsellors and psychotherapists might be regulated. However, we do stress that professional bodies hold expertise, which contributes to the ethics and standards of the profession, and that the continuation of professional bodies is key to the development of the professions.

Q23: How will the proposed changes contribute to improved public protection and patient safety (health benefits) and how could this be measured?

Response:

A single fitness to practise tribunal for all statutory regulated healthcare professions may give the public reassurance through more transparency and consistency. The proposals may alleviate the stress of all parties concerned through faster and more flexible resolution of concerns. We support the greater autonomy for the regulators to amend their own procedures and not have to wait for lengthy legal reform as this will offer an agility in facing existing and new challenges.

In terms of measurement, we suggest that data-gathering and analysis in relation to the numbers and types of fitness to practise concerns could be passed back to the regulators in order to feed into upstream prevention initiatives. This should include demographical information and post-qualification experience of those facing complaints about their practice. Although we support alternative routes for resolution and have introduced consensual disposal and consensual removal into BACP's new conduct procedure, we are aware that this needs careful management so that learning from the outcomes is also incorporated into the overall picture.

It is also crucial that work is undertaken to consider how future regulatory systems can be more widely promoted.

Q24: Do you think that any of the proposals would help achieve any of the following aims:

- Eliminating discrimination, harassment, victimisation and any other conduct that is prohibited by or under the Equality Act 2010 and Section 75(1) and (2) of the Northern Ireland Act 1998?

- Advancing equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it?

- Fostering good relations between persons who share a relevant protected characteristic and persons who do not share it?

If yes, could the proposals be changed so that they are more effective?

Response:

At this stage we have not identified any negative or positive impact on the aims above.

If not, please explain what effect you think the proposals will have and whether you think the proposals should be changed so that they would help achieve those aims?

Response:

If any professions do not already address Equality Act requirements, then we would recommend that these be included in its professional standards.