

Consultation on our approach to Performance Review

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1. Introduction

Our role and the performance review process

1.1 The Professional Standards Authority for Health and Social Care (the Authority) was established on 1 December 2012, taking over the functions of the Council for Healthcare Regulatory Excellence. We are an independent UK body. Our role and duties are set out in the Health and Social Care Act 2002. We oversee the work of the ten statutory regulators of health and social care professionals:

- **The General Chiropractic Council (GCC)** which regulates chiropractors in the UK
- **The General Dental Council (GDC)** which regulates dentists, dental nurses, dental technicians, dental hygienists, dental therapists, clinical dental technicians and orthodontic therapists in the UK
- **The General Medical Council (GMC)** which regulates doctors in the UK
- **The General Optical Council (GOC)** which regulates optometrists, dispensing opticians and student opticians in the UK
- **The General Osteopathic Council (GOsC)** which regulates osteopaths in the UK
- **The General Pharmaceutical Council (GPhC)** which regulates pharmacists and pharmacy technicians in Great Britain
- **The Health and Care Professions Council (HCPC)** which regulates arts therapists, biomedical scientists, chiropodists/podiatrists, clinical scientists, dieticians, hearing aid dispensers, occupational therapists, operating department practitioners, paramedics, physiotherapists, practitioner psychologists, prosthetists and orthoptists, radiographers and speech and language therapists in the UK.
- **The Nursing and Midwifery Council (NMC)** which regulates nurses and midwives in the UK
- **The Pharmaceutical Society of Northern Ireland (PSNI)** which regulates pharmacists in Northern Ireland.
- **Social Work England (SWE)** which regulates social workers in England

The performance review process

1.2 The Authority has a duty to report to Parliament each year on 'how far, in the opinion of the Authority, each regulatory body has complied with any duty imposed on it to promote the health, safety and well-being of [users of health care, users of social care in England, users of social work services in England and other members of the public]'.¹

1.3 We fulfil this duty by undertaking annual performance reviews of each regulator. These reviews assess the performance of the regulators against our Standards of Good Regulation (the Standards) which set out the outcomes that we expect

¹ Paragraph 16 (1A) of the NHS Reform and Health Care Professions Act 2002, as amended.

regulators to achieve. The current Standards came into effect in January 2020 and are set out at Annex A.

This consultation

- 1.4 We last reviewed the performance review process in 2014/15, and implemented our current process in 2016. In the almost five years that we have been operating our performance review process, and with feedback from stakeholders, we have identified a number of areas which we think could be improved. We consider that it is timely to revisit our approach to performance review to ensure that our process remains appropriate in the light of the new Standards and continues to be proportionate and effective.

Pre-consultation work

In July 2020, we wrote to key stakeholders to inform them of this project and to invite initial feedback on the performance review process, with specific reference to our reporting and areas which may benefit from greater or different scrutiny by the Authority. We are very grateful to all the individuals and organisations that met with us and provided us with written comments and assisted.

- 1.5 We analysed our findings from this pre-consultation work and took these into account in developing this paper.
- 1.6 The health and social care system and regulators of the practitioners in it are facing substantial challenges. The Covid-19 pandemic has added to this significantly. In addition, regulators will have to deal with the impact of the Brexit on EU registration applications and practitioners and the workforce pressures that have long been identified.
- 1.7 In addition, the government is considering changes to the way the regulators work in order to make professional regulation 'faster, simpler and more responsive to the needs of patients, professionals, the public and employers'.² Throughout this review, we will keep in mind that our performance review process will need to be flexible and agile enough to assess any changes to the way the regulators operate. The changes to how the regulators operate may mean that new or different risks emerge, and our overall oversight function should remain robust. While we consider that our process is likely to be sufficiently flexible to enable us to monitor the effect of changes introduced by the regulators, we would welcome comments on how we can ensure that the process remains agile enough to address any matters arising from the proposed Government reforms.
- 1.8 We plan to settle any changes to the process in mid-2021 and to adopt them in the performance review cycle beginning in 2022. We believe that this should provide sufficient time for us and the regulators to adapt to any changes. However, we will keep this timescale under review.
- 1.9 We welcome responses to the questions posed in this consultation paper from all stakeholders. Please send them to: PRconsultation@professionalstandards.org.uk no later than **4 March 2021**. In

² The government consulted on reforming professional regulation in late 2017/early 2018. See <https://www.gov.uk/government/consultations/promoting-professionalism-reforming-regulation> for more information.

light of the pandemic, we would strongly urge respondents to submit their responses by email or to contact us if this is not possible.

2. The current performance review process

- 2.1 We introduced the current performance review process in January 2016. The system replaced a previous process whereby we published a single report on the performance of the regulators as an adjunct to our annual report. That process was labour-intensive and required substantial information to be provided by the regulators, and we received feedback that it was burdensome. The revised process aimed to provide a more proportionate, risk-based approach. The feedback we received from the regulators at the time suggested that they welcomed the changes, and we have no concerns that this more targeted process has failed to identify major concerns about their performance.
- 2.2 Under the present process, we review each of the regulators in sequence over the course of each year. We examine the evidence available and reach a judgement on how far the regulator has met each of the Standards and prepare a report setting out our findings.³

Assessment

- 2.3 Each performance review starts with an initial assessment of the information we have about the performance of the regulator. We do this without seeking information from the regulator. The information we look at includes:
- the outcome of the previous year's performance review, particularly where we have identified issues that need to be kept under review
 - the statistical information all the regulators send to us each quarter (the dataset)
 - a check of information on the regulator's published register
 - information from our reviews of the regulator's final fitness to practise decisions under our Section 29 process
 - information published by the regulator, including reports, research, and Council and committee papers
 - press releases by the regulator and public statements made by its stakeholders
 - feedback received from third parties including concerns raised with the Authority – in the run-up to each assessment, our website features a call for feedback about the relevant regulator
 - current policy and process documents provided by the regulator.
- 2.4 We use this information to make a recommendation to an internal decision-making panel. The panel decides whether we need to carry out a further review

³ Copies of our most recent performance review reports are available on our website: <http://www.professionalstandards.org.uk/what-we-do/our-work-with-regulators/read-performance-reviews>

to determine whether each Standard is met. If no further review is required, we move straight to the reporting stage.

Further review

- 2.5 If the panel decides we should carry out a further review, we will gather the further information we need. This might include:
- asking a regulator for further information to address any queries that may have arisen
 - meeting relevant staff from the regulator to discuss an aspect of its performance
 - carrying out file reviews of a sample of the regulator's work (audits).
- 2.6 If, during our review, we come across new evidence which changes our view about a Standard that was met following our assessment, we will reconsider it. Following the review, the team makes a final recommendation to our panel about the regulator's performance. The panel makes the final decision about whether each Standard is met.

Reporting

- 2.7 Once we have made our final decision about the regulator's performance against the Standards, we write our performance review report. The report is narrative and explains what we looked at and what we found. It does not set out full details of everything that we considered, but provides enough information so that people can understand how we reached our decision about each Standard. We share a copy of the draft report with the regulator before publication, so that it has a chance to clarify any factual misunderstandings. The report is then published on our website and submitted to the Health and Social Care Select Committee, the Secretary of State for Health and Social Care, the Secretary of State for Education (for Social Work England only) and the devolved administrations.

Discussion of the current process

- 2.8 We received the following comments in response to our initial request for feedback:
- A number of stakeholders questioned the need for annual reviews, although there was no consensus on how frequent reviews should be
 - Some regulators were concerned about an overreliance on the dataset as it does not measure quality or make allowances for the different contexts each regulator operates in. We note that there might be a lack of awareness of the range of evidence we utilise. One regulator noted that the views of patients/complainants seem to be under-represented in the evidence we gather and consider
 - Some regulators expressed a desire for more regular and frequent engagement during the year as well as throughout the assessment process, particularly to clarify issues or areas of concern before decisions are made
 - Some regulators argued that regulatory development could be driven by a greater focus on outcomes and how regulators meet their over-arching

purpose of protecting the public rather than on the lower level inputs and processes and the key statutory functions

- Several regulators thought we should adopt a more nuanced approach to describing performance against the Standards opposed to the current 'met/not met' approach
- Some regulators felt that by the time of publication, the report is no longer current, or issues raised are no longer relevant
- There is wide-spread support amongst the regulators for the sharing of the Authority's views on good practice
- The feedback received on the format of reports was limited, but positive, including that the narrative is helpful and provides valuable context and that the level of detail demonstrates our scrutiny of regulators and provides assurance that performance reviews are carried out in a rigorous and proportionate way.

2.9 We also undertook a desk-based review of schemes that perform similar functions to our performance review. We identified relevant areas to examine and used publicly available information to develop an understanding of how nine schemes work, looking at their powers and purpose, methodology and reporting. Our findings included:

- Several of the schemes reviewed did not operate on an annual cycle. Some had less frequent review cycles as a default, and others used performance or risk to determine frequency of review
- Some of the schemes engage with stakeholders and use feedback more than we currently do, particularly the inspections schemes
- Some schemes use a wider range of evidence than we do, such as information from staff at a service under review, stakeholder feedback, and more detailed inspection or audit data
- Of the schemes reviewed, there was a range of decisions available, from met/not met, to wider, more descriptive ratings systems
- Some schemes noted good practice, either through reporting (such as through formally noting this in the report) or through decision making (such as those which can award 'outstanding' ratings)
- Most of the schemes produced narrative reports comparable to ours, but others had shorter and more accessible reports. We also reviewed one that produced different reports for different audiences, with a brief summary report for the public and a longer report for the subject of the review.

2.10 We agree with many of the points raised. In particular:

- We agree that it takes longer than we would like to report, including where we undertake targeted reviews and audits and our reports are published several months after the period under review has ended. To some extent this is inevitable in a retrospective process. However, we will be considering whether we can adjust our processes to reduce the time taken
- We consider that there may be scope to develop our risk-based, performance-related approach further, which might reduce the burdens on

well-performing regulators as well as targeting areas of risk more accurately. However, there may also be scope to look more rigorously at regulators in some circumstances

- There are a number of options for the Authority to support improvement through our performance review work
- We considered our binary 'met/not met' approach when we consulted on the new Standards, but we consider that reviewing our approach again is appropriate at this time, when we are reviewing our broader approach and processes
- We agree that it is important to ensure that our evidence base provides a full picture of the performance of the regulators and we will be reviewing this. In particular, we will seek to improve engagement with stakeholders, such as patient, employer, registrant and academic representatives
- When reviewing our evidence base, we will also consider what we can do to assess how the regulators and the processes they operate are protecting vulnerable people
- We agree that we could improve how we engage with the regulators and we will discuss with regulators the most productive way of engaging with them both within and outside the review process
- We noted comments by some regulators told us that regulatory development could be driven by a greater focus on outcomes and how regulators meet their over-arching purpose of protecting the public rather than on inputs and processes and the key statutory functions. We considered this question when we consulted on the Standards of Good Regulation. We noted that it is difficult to identify wider outcomes which are not clearly attributable to a regulator's performance in a single year. Moreover, regulators' processes need to be sufficient to ensure that the public has access to appropriate qualified practitioners who are subject to appropriately enforced standards. However, in our discussion below, we seek views on how we can identify the key risks to the wider system and ensure that regulators are addressing them
- We will consider whether we need to make any changes to our reports to make them more accessible.

2.11 Some of the areas identified raise fundamental questions about our approach and we wish to explore these in the paper. We therefore seek views on the following five areas:

- Scope of reviews: should all of the Standards of Good Regulation be assessed annually for all the regulators?
- Assessing risk: how can we best identify risks to public protection and public confidence through the performance review process?
- Decision making: should we retain the current binary system or adopt a different approach?
- Supporting improvement: how can we ensure that our performance reviews add the greatest value and enhance the work of the regulators in protecting the public?

- Thematic reviews: do you think thematic reviews would assist us in our scrutiny of the regulators and enhance our public protection role?

2.12 Although these key areas are the focus of this review, we will examine all of the points noted in paragraphs 2.8-2.10 through this review. Any changes to our operational processes will be the subject of further engagement.

Question 1: Are there other concerns about the current performance review process that we have not identified here?

3. Options for improving our approach

Introduction

- 3.1 As mentioned above in paragraph 1.2, we have a statutory duty to report on the performance of the regulators annually.
- 3.2 We think that in considering the performance of the regulators we should look at:
- Whether the regulator is aware of and addressing the risks to the public posed by its registrants
 - How its standards, training, processes and other requirements (e.g. continuing fitness to practise) address those risks
 - How the regulator is working and engaging with others (e.g. patient groups and employers) to address those risks
 - The effectiveness of the regulator's internal processes (registration, illegal practice, fitness to practise) in addressing those risks.
- 3.3 In carrying out our role, we bear in mind that regulators are best placed to establish the systems that work for them. We also consider that what we may identify as good practice in one regulator may not necessarily be good practice for another regulator.
- 3.4 We also bear in mind that the process places a burden on regulators in responding to our targeted reviews and accommodating our audits. We want to ensure that our requests are justified and targeted properly.
- 3.5 Finally, we consider that the basic tools that we use – initial evidence gathering followed by questions of the regulator with the option of an audit if we have concerns about processes – are the right ones to carry out the task and should enable us to adopt a proportionate, risk-based approach.

Question 2: Do you have any comments on our role or the broad approach that we take to performance review as we have set out here?

Scope of reviews: should all of the Standards of Good Regulation be assessed annually for all the regulators?

- 3.6 The Act does not specify how the Authority should carry out its statutory duty to report to Parliament on the regulators' performance. We consider that we have considerable discretion as to how we reach our view. Our current process

already takes a risk-based approach; although we assess each Standard every year, we undertake further reviews only where we identify that more information is required than is available at the assessment stage. However, it may be possible to develop this further. A more targeted approach would allow us to focus our resources where most needed, including on those areas where regulators' performance does not meet our Standards or where particular risk factors exist. We also consider that a more targeted approach could allow us, and the regulators, to focus on other work, including thematic reviews (discussed in more detail in paragraphs 3.32-3.39) where we can add more value to the system as a whole. There are benefits to using our resources, and those of our stakeholders, in a more focused way, targeted towards areas of risk.

- 3.7 Against this, if we were to reduce the scope of our reviews, there is a risk that we might not spot emerging concerns about performance or might miss good practice. It might also cause us to become less familiar with the work of the regulators where risk appears to be lower.
- 3.8 A change in our approach might mean that we could rely on a reduced review of some or all of the Standards where we have not identified concerns, effectively limiting our scope to concentrate our resources on regulators, or areas of regulators' work, where we have identified risk factors.
- 3.9 We are mindful that across the regulators' four statutory functions,⁴ the risks posed to public protection if performance is poor will vary. For example, we consider that poor process or policies in a regulator's registration or fitness to practise function may result in immediate risks around specific registrants (individual registrants could be allowed to practise or continue to practise when they are not safe to), whereas in guidance and standards, or education and training, the risks may be less immediate but broader (a wider group of registrants may be practising whilst not meeting appropriate standards). We are also mindful that our general Standards (Standards 1-5) relate to all of the regulators' functions and are therefore broader in scope, so a failure in one of the general Standards may have a more significant impact. In considering a more targeted approach to performance review, we should also consider whether some or all of the Standards require higher or greater scrutiny.

Question 3: Do you think we should continue to look at the regulators' performance against all of the Standards every year or could the scope of our reviews be more targeted?

- 3.10 If we were to take a more targeted approach, the following factors might suggest that we can have confidence in the performance of a regulator in respect of some or all of the Standards and indicate a lower level of review:
- Evidence that the regulator is aware of and addressing emerging risks in respect of the profession
 - Evidence that the regulator is reviewing its own performance regularly and taking action against concerns
 - The regulator is meeting appropriate key performance indicators and adhering to its business plan

⁴ Guidance and standards, education and training, registration and fitness to practise.

- The regulator has not made any significant changes to processes or policies
 - The dataset supplied by the regulator does not suggest serious adverse variations in performance
 - Information from stakeholders does not suggest serious concerns
 - The previous performance review did not identify concerns in respect of the relevant Standards.
- 3.11 These factors could be evidenced by material available to the Authority and, in principle, the regulator might not need to provide further information. However, we think that it would be appropriate to seek the regulator's views on whether there is anything it would wish to draw to the Authority's attention.
- 3.12 By contrast, a closer review might be indicated by:
- New or significant risks arising from registrants' practice or the health care environment, particularly where these do not appear to be being addressed
 - Evidence that the regulator was not meeting appropriate key performance indicators or other targets (such as work set out in its business plan)
 - Evidence of decline in performance against the Standards, such as evidence of specific concerns, or where a regulator is failing to meet its own targets (such as those set out in its business plan)
 - New processes and procedures in areas relevant to our Standards
 - Serious concerns raised by stakeholders
 - Concerns identified in previous performance reviews.

Question 4: If we were to change our approach, are these the right factors for us to consider in determining the scope of reviews? Is there anything else we should be considering?

- 3.13 As we have suggested, there is a danger that, if we do not look at performance against all of the Standards regularly, emerging risks or poor performance may not be identified. To address this, we could adopt a presumption that we should examine a regulator's performance against each Standard at regular minimum intervals to satisfy ourselves that performance remains strong. This would enable us to satisfy ourselves about a regulator's performance, or identify concerns. However, this might mean that we impose a greater burden on regulators than is needed.
- 3.14 If we were to adopt this approach, we would need to consider the maximum length of time that should elapse between reviews of individual Standards. While it is possible for performance to decline rapidly, we believe that our criteria ought to enable us to identify where we needed to review performance against a Standard that had previously not caused us concern. We therefore consider that five years could be an appropriate maximum time to elapse between reviews. However, we seek views from stakeholders about the right timescale.
- 3.15 It may be helpful to summarise the steps the Authority would take in deciding whether or not to review a Standard if we were to adopt this approach. In considering whether we needed to hold a review, we would:

- We would not review a Standard if:
 - the factors at paragraph 3.10 applied in respect of that Standard
 - the factors at paragraph 3.12 did not apply and
 - we had reviewed the Standard within the last five years.
- We would review the Standard if
 - Some of the factors at paragraph 3.10 did not apply in respect of that Standard, or
 - Some of the factors at paragraph 3.12 applied, or
 - We had not reviewed the Standard within the last five years.

Question 5: If we implemented a system as described above, do you agree that there should be a presumption that the Authority should actively review all of the Standards at regular intervals? What do you think an appropriate timeframe would be?

Agility to respond to serious risk

- 3.16 We consider that risks associated with a reduction in the scope of our reviews could be mitigated by a formal monitoring process, based on regular assessment of the points set out above in paragraphs 3.10 and 3.12. This would help us to have a clear and current understanding of risks and performance against all of the Standards for each regulator.
- 3.17 We also think there could be benefits to introducing a formal monitoring process where we are aware of significant and specific risks, where we need to look closely at a regulator's performance over the course of a performance review period. We think that such an approach might be appropriate where we identify major risks to public protection (for example as a result of poor performance in previous reviews). We consider that it is essential for public protection to monitor the work of a regulator to address those risks. Such an approach would be likely to be exceptional. This could include the option to issue interim reports on performance.

Question 6: Do you agree that we should introduce monitoring processes as described above? Do you have any comments on these suggestions?

Assessing risk: how can we best identify risks to public protection and public confidence through the performance review process?

- 3.18 Inquiries including the Paterson Independent Inquiry,⁵ the Report of the Morecambe Bay Investigation,⁶ the Cumberlege Report⁷ and the Report of the Mid Staffordshire NHS Foundation Trust Public Inquiry (the Francis Report)⁸ have identified regulatory failings. These include that the regulators' processes

⁵ <https://www.gov.uk/government/publications/paterson-inquiry-report>

⁶

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/408480/47487_MBI_Accessible_v0.1.pdf

⁷ <https://www.immdsreview.org.uk/Report.html>

⁸

https://webarchive.nationalarchives.gov.uk/20150407084231tf_/http://www.midstaffspublicinquiry.com/report

were not effective in addressing the public protection concerns identified to them, either to prevent the harms or take early action when they were discovered. In addition, concerns about regulators' internal processes and their communication with others have been identified. It has also been noted that the Authority may not have all the tools it needs to address such matters.

- 3.19 While the question of tools is one that can be taken up in the context of regulatory reform, performance review has an important role to play in identifying and mitigating the risk of similar failures occurring in the future. While we are only one of many organisations that have a role in public protection and are several steps removed from the day-to-day delivery of health and social care services, we have an overview of the regulators as a group, as well as knowledge of the wider risks within the health and care system. We need to ensure that the regulators are carrying out their roles in a way that helps mitigate those risks. We want to ensure that our performance review process is designed to identify risks, including failures in the regulatory system.
- 3.20 Two of our new Standards are particularly relevant to our assessment of risk: Standard 4, 'The regulator reports on its performance and addresses concerns identified about it and considers the implications for it of findings of public inquiries and other relevant reports about healthcare regulatory issues' and Standard 5, 'The regulator consults and works with all relevant stakeholders across all its functions to identify and manage risks to the public in respect of its registrants'.
- 3.21 There are several areas that we think are important for us to review in our approach to identifying risks and regulatory failings:
- Engagement with stakeholders: Although we currently use evidence from a wide range of sources, our initial work and early stage feedback received as part of this review (as discussed in paragraphs 2.8-2.9 above) suggests to us that we could engage more effectively with and use feedback from a wider range of stakeholders, including the regulators themselves, their registrants and members of the public, as well as employers and service providers
 - Evidence base: We will review the evidence we use to inform our performance reviews, including whether we should be obtaining different evidence (such as through revisions to our dataset or our approach to audit) with specific consideration of how we assess whether the regulators are doing enough to protect vulnerable people and ensure their services are accessible to all
 - Developing our understanding of profession-specific risks: While regulators are likely to have a very strong understanding of the clinical risks associated with practitioners, risks change and it is important that we should be satisfied that regulators are keeping up to date with these. We plan to use our networks of stakeholders to further inform our assessment of risk so that the Authority can properly assess regulators' performance in managing risk
 - Thematic reviews: We discuss thematic reviews further in paragraphs 3.32-3.39. We anticipate that introducing thematic reviews would provide us with an additional tool to the performance reviews which would help us to understand where risks exist in the regulatory system, understand potential

regulatory failings, as well as to support learning and development across the sector

- Focus on outcomes: We are also mindful of feedback from the regulators, as set out in paragraph 3.8 above, that we should consider being more outcomes focused. This would mean focusing more on how regulators meet their overarching purpose of protecting the public rather than on inputs and processes and ensuring that when assessing performance against the Standards we have the impact of public protection at the forefront of our minds.

Question 7: Have we identified the right areas of our approach that we need to develop in this area? Is there anything else we should be considering?

Question 8: How could we best engage with stakeholders, to ensure that we are aware of key risks to public protection? Is there any other evidence that we should be seeking to inform our performance reviews?

Decision-making/measurement of performance: should we retain the current binary system or adopt a different approach?

- 3.22 Under our current process, we decide whether each Standard is met or not met. We think that this is a clear way of setting out our assessment of the regulators' performance. However, we recognise that describing a Standard as met or not met can be a blunt tool and:
- May not reflect more nuanced performance, such as where performance is either improving or deteriorating, or where the Standard describes a number of aspects of a regulator's performance. Currently, those nuances are captured in the narrative of our reports, but we wish to explore whether there are benefits to introducing an alternative measurement system
 - It can give a misleading impression of performance in that a full set of Standards described as 'met' might suggest that there was no room for improvement for that regulator
 - It can be used as a way of comparing regulators that might not be helpful.
- 3.23 We consulted on this approach when we sought views on the new Standards in 2017. There was no consensus from respondents about the most appropriate way of describing performance against the Standards. Some respondents supported the present approach, and other preferred more nuanced systems. These included a four-step approach (for example 'met', 'met with concerns', 'not met but improving' and 'not met'), or more complex systems involving different levels of performance. Some noted that the current approach did not allow for identification of performance that exceeded expectations.
- 3.24 We decided not to change its approach because:
- We wanted to describe outcomes that were clear to readers
 - We did not think it was likely to be helpful to have a complex system involving different levels which might be difficult to assess consistently and which might lead to confusion and debate with regulators

- We felt that qualifying a ‘met’ assessment could be confusing to readers and inappropriate
 - We considered that we could discuss the nuances of performance in the narrative of the report
- 3.25 Since that decision was taken, we have introduced and assessed performance against the new Standards. Generally, we have not had difficulty in making assessments on the evidence available to us and we have been able to express our decision reasoning in the narrative of the report. However, as some of the Standards cover several aspects of the regulators’ work, we have had to take a view on whether poor performance in one aspect overrides good performance in others. The resulting outcomes may therefore not convey the complexity of the matters which led to the decision.
- 3.26 We continue to believe that simple judgements in respect of each of the Standards are desirable and that they will concentrate regulators’ attention on the areas that need to be improved most. However, we seek views again on whether there is an alternative approach which is both clear but also communicates some of the nuance of performance.
- 3.27 Alternative measurement systems that we could adopt include a:
- Ratings scheme with a range of options describing poor to excellent performance
 - Scheme including ‘red’, ‘amber’ and ‘green’ ratings where red indicates significant concerns about performance, amber indicates some concerns, and green indicates no concerns
 - Scheme where we retain the met and not met descriptors, but add in some further detail such as ‘not met but improving’.

Question 9: Should we retain the binary system or adopt a more nuanced approach?

Question 10: If we were to adopt a different approach, what alternative approach would you prefer and why?

Supporting improvement: how can we ensure that our performance reviews add the greatest value and enhance the work of regulators in protecting the public

- 3.28 Our performance review reports are largely descriptive. While we have identified positive new initiatives or improvements, our focus has been to assess whether the regulators are meeting the Standards, rather than to identify good practice. We are mindful that according to the principles of right-touch regulation,⁹ responses should be proportionate to the risks involved. Therefore, our resources (and the regulators’ resources) should be focused primarily on identifying where the Standards are not met or where we have identified concerns with performance, rather than where the Standards are met and exceeded.

⁹ Right-touch regulation describes the approach we adopt in the work we do. It is the approach that we encourage regulators to work towards. Our paper, Right-touch Regulation can be accessed here: https://www.professionalstandards.org.uk/docs/default-source/publications/thought-paper/right-touch-regulation-2015.pdf?sfvrsn=eaf77f20_20

- 3.29 We have also had reservations about issuing instructions for regulators to follow where performance concerns exist, as we are mindful that regulators are best placed to identify how to improve their own performance.
- 3.30 We are mindful that what works for one regulator may not work for another regulator, and if we were to issue recommendations or note good practice, it would need to be understood that this was not necessarily a suggestion for every other regulator to follow.
- 3.31 However, we recognise the force of comments by some regulators (including points raised during our pre-consultation engagement) that we should be more pro-active in identifying good practice in our reports as well as specific areas where improvements could be made. Indeed, section 26(2)(c) of our legislation permits us to 'recommend to a regulatory body changes to the way in which it performs any of its functions'. We have identified four possible ways in which we could address the points made by regulators:
- We could be more explicit about identifying strong performance of individual regulators. This would be a way of identifying good practice for the rest of the sector
 - We could make formal recommendations to individual regulators about ways in which they should improve processes
 - We could provide recommendations to the sector. These would be likely to be high level recommendations, probably around risks that cover the whole sector or problems that are common to a number of regulators. It is not clear to us that a performance review of a single regulator would be the most appropriate basis on which to make such recommendations, but we think that thematic reviews may provide us with an opportunity to explore sector wide risks and these could result in recommendations. Thematic reviews are discussed in more detail in paragraphs 3.32-3.40 below
 - We also consider that our role in identifying, sharing and supporting good practice could include a broad range of activities beyond noting good practice in our performance review reports. This could include, for example, supporting cross-regulatory working, engaging with the regulators through seminars and similar.

Question 11: Would these changes support the regulators to learn from our work and that of other regulators, in order to better protect the public?

Thematic reviews: do you think thematic reviews would assist us in our scrutiny of the regulators and enhance our public protection role?

- 3.32 We explored the possibility of introducing thematic reviews with the regulators in 2019. The responses from the regulators were mixed. Some considered that a detailed look at a single subject area with resulting benchmarking for future performance reviews and guidance could be beneficial. Other regulators were concerned about the resource requirements for such reviews.
- 3.33 We did not progress the reviews at that time, as shortly before we planned to introduce them, the Covid-19 pandemic placed significant burdens on the regulators which it would have been wrong to add to. We decided to revisit the issue as part of this work because we think that our approach to thematic

reviews links to other questions we are asking, such as those in paragraphs 3.18-3.21 above on risk, as well as in paragraphs 3.28-3.31 above on how we can support improvement.

- 3.34 Performance reviews are intended to look at the performance of individual regulators. They do not provide information about or an analysis of the regulators' approach as a group. A thematic review would look at a single subject area and could examine different approaches, ask questions or make recommendations for the regulators to consider. It would take advantage of our unique position in overseeing the work of all the regulators and could help disseminate good practice. Thematic reviews could assist us in providing benchmarks for performance reviews. They could support wider learning and improvement. This links to our thinking around these areas of our work, as discussed in paragraphs 3.28-3.31 above.
- 3.35 We envisage that thematic reviews would involve a period of desk-based research as well as evidence gathering from the regulators and others, following which a report would be drafted. The report could identify areas of good practice and might make recommendations. but would not be seen as a detailed performance review and we would not expect to audit individual regulators' work.
- 3.36 In determining areas for thematic review, we would keep in mind changes in the health and social care environment. These would include, for example, policy developments, emerging risks, and the outcomes of inquiries. We can assess how the regulators are responding to such changes through individual performance reviews. We consider however, that in relation to some such changes it may be beneficial to undertake thematic reviews to look at the regulators' response as a group.
- 3.37 Undertaking thematic reviews would create additional work both for us and the regulators. Our aim would be to address this by efficiencies created in the performance review process following this review. We would identify the work as part of our business planning each year and would consult the regulators about the timing of reviews and priorities for subject matter.
- 3.38 Our present view is that undertaking such reviews would provide an important vehicle to enable us to provide deeper insights into risk and good practice. We invite feedback on the possibility of introducing a scheme of thematic reviews.

Question 12: Do you think thematic reviews would assist us in our scrutiny of the regulators and enhance our public protection role?

4. Impact assessment of the proposals

- 4.1 We are keen to ensure that we understand any impact or burden that our proposals are likely to create so that we can consider any changes that may be appropriate.
- 4.2 We consider that the impact of any changes can be more accurately assessed once any revised operational processes have been developed, but remain mindful of the potential impact of any changes we explore throughout this review process. We seek initial views from those affected, and particularly the

regulators and others who respond to our performance reviews of the likely impact of the changes to the process that we have outlined here.

Question 13: Please set out any impacts that the proposals set out in this paper would be likely to have on your organisation or considerations that we should take into account when assessing the impact of the proposals.

- 4.3 In all stages of our review, we will consider whether there are significant equality implications, either positive or negative, for our stakeholders. We have not identified any significant negative equality or diversity implications from our proposals and expect there to be a positive benefit for patients, service-users and the public by the improved scrutiny of regulators that an updated process would provide.
- 4.4 We would, however, welcome any feedback to ensure we consider all relevant issues. We would welcome any comments about the impact that these proposals will have.

Question 14: Are there any aspects of these proposals that you feel could result in differential treatment of, or impact on, groups or individuals based on the following characteristics as defined under the Equality Act 2010:

- *Age*
- *Disability*
- *Gender reassignment*
- *Marriage and civil partnership*
- *Pregnancy and maternity*
- *Race*
- *Religion or belief*
- *Sex*
- *Sexual orientation*
- *Other (please specify)*

If yes to any of the above, please explain why and what could be done to change this.

5. Summary of questions and how to respond

Summary of questions

Question 1: Are there other concerns about the current performance review process that we have not identified here?

Question 2: Do you have any comments on our role or the broad approach that we take to performance review as we have set out here?

Question 3: Do you think we should continue to look at the regulators' performance against all of the Standards every year or could the scope of our reviews be more targeted?

Question 4: If we were to change our approach, are these the right factors for us to consider in determining the scope of reviews? Is there anything else we should be considering?

Question 5: If we implemented a system as described above, do you agree that there should be a presumption that the Authority should actively review all of the Standards at regular intervals? What do you think an appropriate timeframe would be?

Question 6: Do you agree that we should introduce monitoring processes as described above? Do you have any comments on these suggestions?

Question 7: Have we identified the right areas of our approach that we need to develop in this area? Is there anything else we should be considering?

Question 8: How could we best engage with stakeholders, to ensure that we are aware of key risks to public protection? Is there any other evidence that we should be seeking to inform our performance reviews?

Question 9: Should we retain the binary system or adopt a more nuanced approach?

Question 10: If we were to adopt a different approach, what alternative approach would you prefer and why?

Question 11: Would these changes support the regulators to learn from our work and that of other regulators, in order to better protect the public?

Question 12: Do you think thematic reviews would assist us in our scrutiny of the regulators and enhance our public protection role?

Question 13: Please set out any impacts that the proposals set out in this paper would be likely to have on your organisation or considerations that we should take into account when assessing the impact of the proposals.

Question 14: Are there any aspects of these proposals that you feel could result in differential treatment of, or impact on, groups or individuals based on the following characteristics as defined under the Equality Act 2010:

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- *Sex*
- *Sexual orientation*
- *Other (please specify)*

If yes to any of the above, please explain why and what could be done to change this.

How to respond

- 5.1 You can respond to this consultation paper by email:
PRconsultation@professionalstandards.org.uk
- 5.2 Due to the pandemic, we strongly urge responses by email if this is not possible, our postal address is:

Professional Standards Authority
157-197 Buckingham Palace Road
London
SW1W 9SP
- 5.3 If you have any queries, or require an accessible version of this document, please contact us on 020 7389 8030 or by email at
- 5.4 Please return your response to us by **4 March 2021**.

6. Confidentiality of information

- 6.1 We will manage the information you provide in response to this discussion paper in accordance with our information security policies which can be found on our website (www.professionalstandards.org.uk).
- 6.2 Any information we receive, including personal information, may be published or disclosed in accordance with the access to information regimes (primarily the Freedom of Information Act 2000 (FOIA) the Data Protection Act 1998 (DPA) and the Environmental Information Regulations 2004).
- 6.3 If you want the information that you provide to be treated as confidential, please be aware that, under the FOIA, there is a statutory Code of Practice with which public authorities must comply and which deals, amongst other things, with obligations of confidence. In view of this, it would be helpful if you could explain to us why you regard the information you have provided as confidential.
- 6.4 If we receive a request for disclosure of the information we will take full account of your explanation, but we cannot give an assurance that confidentiality will be maintained in all circumstances. An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded as binding on the Authority.
- 6.5 We will process your personal data in accordance with the DPA and in most circumstances this will mean that your personal data will not be disclosed to third parties.

7. Our consultation process and feedback

- 7.1 Our consultation process is based on the current Cabinet Office principles on public consultation, 'Consultation principles: guidance'.¹⁰ When conducting public consultations on aspects of the Authority's work we aim to:
- Be clear about both the consultation process and what is being proposed. This gives respondents the opportunity to influence our thinking and consider the advantages and disadvantages of our proposals
 - Consult formally at a stage where there is scope to influence the policy in order that consultations have a purpose
 - Give enough information to ensure that those being consulted understand the issues and can provide informed responses. We include assessments of costs and benefits of the options considered
 - Seek collective agreement before publishing a written consultation particularly when consulting on the new proposals
 - Consult for a proportionate amount of time, taking a judgement based on the nature and impact of the proposals. Consulting for too long will unnecessarily delay policy development and consulting too quickly will not give enough time for consideration and will reduce the quality of responses
 - Ensure our consultation is targeted to consider the full range of stakeholders, bodies and individuals affected by the policy and include relevant representative groups. Consider targeting specific groups if necessary.
 - Consider consultation as an ongoing process, not just about formal documents and responses.
 - Analyse responses carefully and explain the responses received and how they have informed the policy. Give clear feedback to participants following the consultation. Publish responses to the consultation within 12 weeks or explain why that it is not possible
 - Allow appropriate time between closing the consultation and implementing the policy.

- 7.2 If you have concerns or comments which you would like to make relating specifically to the consultation process itself, please contact us:

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Professional Standards Authority
157-197 Buckingham Palace Road
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Tel: 020 7389 8030
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christine.braithwaite@professionalstandards.org.uk

¹⁰ Cabinet Office. 2016. *Consultation principles: guidance*. Available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/492132/20160111_Consultation_principles_final.pdf