

## Response to European Commission Consultation on the regulation of professions: Member States' National Action Plans and proportionality in regulation

August 2016

### 1. Introduction

- 1.1 The Professional Standards Authority for Health and Social Care (the Authority) promotes the health, safety and wellbeing of patients, service users and the public by raising standards of regulation and voluntary registration of people working in health and care. We are an independent body, accountable to the UK Parliament. More information about our work and the approach we take is available at [www.professionalstandards.org.uk](http://www.professionalstandards.org.uk)
- 1.2 As part of our work we:
  - Oversee nine health and care professional regulators and report annually to the UK Parliament on their performance
  - Conduct research and advise the four UK governments on improvements in regulation
  - Promote right-touch regulation and publish papers on regulatory policy and practice.

### 2. General comments

- 2.1 We welcome the opportunity to respond to this European Commission consultation on the regulation of professions. Alongside our statutory duties in overseeing the performance of the statutory health and care professional regulators in the UK, we also work with colleagues around the world to share ideas and develop our thinking on how regulation can be improved.
- 2.2 We are supportive of the need for a proportionate approach to regulation. From our experience of the regulation of healthcare professionals we have developed our principles of right-touch regulation. These principles focus on understanding the problem that needs to be solved before deciding on the solution. The approach seeks to make sure that the level of regulation is proportionate to the level of risk of harm to the public. For example, this would seek to avoid regulating based on other objectives where it may not be necessary.
- 2.3 In developing a framework to encourage proportionate regulation of professionals, it is important that the European Commission and national governments recognise the diversity of regulated professions that exist and the varied levels of risk of harm that different professions pose to the public.
- 2.4 It is also important to be clear on the purpose of regulation: to provide adequate public protection and ensure that decisions on regulation are clearly based on an

assessment of risk of harm to the public. This is clearly distinct from other objectives such as protecting professional status or controlling entry to a profession which should not in themselves be reasons to regulate professions.

### **3. United Kingdom National Action Plan 2016**

- 3.1 Our comments relate solely to the United Kingdom National Action Plan (NAP). Within the NAP the UK Government has expressed its commitment to reform health and care professional regulation in line with our ideas published in our paper *Rethinking Regulation*<sup>1</sup> in August 2015, which we welcome.
- 3.2 We have called for reform of health and care regulation for some time and expressed the view in *Rethinking Regulation* that, 'Health and care regulation is incoherent and expensive and there is little evidence for its effectiveness'. We argue that radical change is needed 'to understand better what regulation can and can't do to control the risk of harms, to deregulate in some areas and focus regulation more effectively in others.'
- 3.3 Action taken by the UK Government to give the Authority the powers to develop the Accredited Registers programme<sup>2</sup> is a good example of an alternative to statutory regulation for lower risk health and care professionals.
- 3.4 Under the Accredited Registers programme, the Authority independently assesses organisations who voluntarily register practitioners, who are not regulated by law. For example, the British Acupuncture Council holds a register of acupuncturists practising in the UK and the organisation is accredited by the Authority. This ensures that the organisation meets a range of standards including requirements to have robust processes in place to ensure that practitioners on the register are properly trained and that complaints from the public are dealt with swiftly and properly. This allows members of the public or employers to choose health and care practitioners who are on an accredited register which meets the standards.
- 3.5 Any action taken by the EU in developing a framework to encourage proportionality in regulation should complement any such activities being taken at a national level to reform and improve regulation in different areas.

### **4. Proposed proportionality test for regulating professions**

- 4.1 We are supportive of a commitment at a European level to proportionality in professional regulation and guidance for national governments to help assess whether regulation is necessary to manage the risk to the public. As highlighted, this should complement activity being undertaken at a national level.
- 4.2 As outlined, the primary purpose of regulation in the health and care sector is to protect the public. There is a range of different regulated professions, however, a

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<sup>1</sup> Rethinking Regulation, Professional Standards Authority, August 2015  
<http://www.professionalstandards.org.uk/docs/default-source/psa-library/rethinking-regulation.pdf?sfvrsn=2>

<sup>2</sup> Accredited Registers, Professional Standards Authority website  
<http://www.professionalstandards.org.uk/what-we-do/accredited-registers>

focus on public protection and a risk-based approach should be at the core of any test of proportionality.

- 4.3 Our publication *Right-touch regulation*<sup>3</sup> outlines the principles we have developed for assessing the role of regulation in controlling the risk of harm to the public. The principles state that regulation should aim to be:
- Proportionate: regulators should only intervene when necessary. Remedies should be appropriate to the risk posed, and costs identified and minimised
  - Consistent: rules and standards must be joined up and implemented fairly
  - Targeted: regulation should be focused on the problem, and minimise side effects
  - Transparent: regulators should be open, and keep regulations simple and user-friendly
  - Accountable: regulators must be able to justify decisions, and be subject to public scrutiny
  - Agile: regulation must look forward and be able to adapt to anticipate change.
- 4.4 The right-touch regulation principles are relevant to regulation in all sectors and all countries and can be applied in a range of different circumstances.
- 4.5 In considering the best way to manage risk for health and care professionals, we describe a 'continuum of assurance'<sup>4</sup>. This outlines the range of possible ways to manage different levels of risk arising from professional practice. Those needing the greatest regulatory force (e.g. the highest risk professions) are at one end of the continuum, and decreasing amounts of regulatory force is required as the risk decreases. Within health and care, different approaches can range from employer controls (e.g. supervision or oversight by a senior colleague) and voluntary codes of practice through to statutory professional regulation and registration for the highest risk groups.
- 4.6 As well as the benefits of reduced cost and burden that arise from preventing unnecessary statutory regulation, we have found in the UK that other forms of assurance for lower risk health and care professionals, such as the Accredited Registers programme, can provide a flexible, lower cost alternative to statutory regulation. Rather than presenting decisions on regulation as a binary choice, to regulate or not, we would agree that promoting alternatives to statutory regulation where appropriate should be a part of any framework.

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<sup>3</sup> Right-touch regulation, Revised October 2015, Professional Standards Authority, p.9  
[http://www.professionalstandards.org.uk/docs/default-source/psa-library/151020\\_rtr-ii\\_final\\_website.pdf?sfvrsn=0](http://www.professionalstandards.org.uk/docs/default-source/psa-library/151020_rtr-ii_final_website.pdf?sfvrsn=0)

<sup>4</sup> Rethinking Regulation, Professional Standards Authority, August 2015, p.11  
<http://www.professionalstandards.org.uk/docs/default-source/psa-library/rethinking-regulation.pdf?sfvrsn=2>

## 5. Taking a risk-based approach

- 5.1 We are developing a two stage risk based assessment process to help decide which health and care occupations should be regulated or if not, what the most suitable form of assurance is.
- 5.2 The first stage involves profiling the risk of harm that arise from:
- The complexity of the activities carried out by the occupation (for health and care this could include prescribing medication, invasive diagnostic or therapeutic techniques or physical or psychological interventions)
  - The context of the setting they are working in (high or low level of oversight e.g. for health and care a large hospital environment compared to a small care home)
  - How vulnerable the patients or service users they are dealing with are (for health and care this could include the amount of contact that those within the occupation have with patients or service users who may be more vulnerable e.g. children, elderly people).
- 5.3 This risk profile is then assessed against additional external factors including the size of the occupation and the market impact of regulating, including the potential effect on labour supply. This allows a comprehensive assessment of where the risks occur and what the most proportionate method is to manage the risk, statutory regulation or a non-statutory alternative.
- 5.4 Whilst this model is being developed to assess the risk of harm posed by health and care occupations, the core principles could equally apply to assessing risk in other professions and establishing the most proportionate action to take.
- 5.5 Our approach makes establishing a risk of harm and its likelihood and severity a key aspect of decisions on what type and level of regulation is required. We would suggest that this should also be a key part of any framework developed at a European level to guide decisions on proportionality of regulation.
- 5.6 However, we would agree with the consultation that other criteria including economic impact of regulation and the size of the occupation are an integral part of reaching a decision on whether regulation is proportionate or whether there is a suitable alternative that will adequately manage the risk to the public.

## 6. Further information

- 6.1 Please get in touch if you would like to discuss any aspect of this response in further detail. You can contact us at:

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