

Response to New Zealand Ministry of Health consultation on Core Performance Standards for Responsible Authorities

June 2020

1. Introduction

- 1.1 The Professional Standards Authority for Health and Social Care promotes the health, safety and wellbeing of patients, service users and the public by raising standards of regulation and 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
- 1.2 As part of our work we:
- Oversee the 10 health and care professional regulators and report annually to Parliament on their performance
 - Accredit registers of healthcare practitioners working in occupations not regulated by law through the Accredited Registers programme
 - 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 comment on the New Zealand Ministry of Health's consultation on Core Performance Standards for Responsible Authorities.
- 2.2 Our comments in response to this consultation derive from our experience of reviewing the performance of regulators of healthcare professionals in the UK and from carrying out commissioned reviews of regulators internationally, including in New Zealand^{1,2}. We do, however, acknowledge that we do not have a detailed knowledge of the regulatory context in New Zealand. Some of our comments therefore may be impractical or less relevant due to contextual factors we are not aware of. We also recognise that the detail of the process is yet to be developed. We have, where possible, provided responses that we hope will be helpful when developing this detail.

¹ [https://www.professionalstandards.org.uk/publications/detail/the-medical-council-of-new-zealand-performance-review-report-\(may-2010\)](https://www.professionalstandards.org.uk/publications/detail/the-medical-council-of-new-zealand-performance-review-report-(may-2010))

² [https://www.professionalstandards.org.uk/publications/detail/the-review-conducted-of-the-nursing-council-of-new-zealand-\(october-2012\)](https://www.professionalstandards.org.uk/publications/detail/the-review-conducted-of-the-nursing-council-of-new-zealand-(october-2012))

- 2.3 We note that this review focuses on Government, rather than an independent body, reviewing the performance of responsible authorities. The consultation document notes the role of the Professional Standards Authority in the UK but states that 'In New Zealand, an oversight body like the Professional Standards Authority may not be the best solution because such an independent body would significantly add to the costs of regulating health practitioners.'
- 2.4 Whilst we recognise that the context is different in New Zealand and the UK model may not be appropriate, the cost of the Authority providing independent oversight for ten regulators in the UK equates to around £2.84 per statutory registrant.³ The Authority is funded by a levy on the regulators that we oversee.
- 2.5 We have structured our detailed response below under the headings provided in the online response form. We have only included these headings where we have specific comments.

3. Detailed comments

Terms of reference

Guiding principles

- 3.1 We believe the guiding principles could more explicitly reference public protection, which we understand to be the principal purpose of the Act. We welcome their reference to the principles of Right-touch regulation (proportionate, consistent, targeted, transparent, accountable, and agile) developed by the Authority and our comments are framed with that approach in mind.

Scope of review and methodology

- 3.2 We welcome the flexibility to allow tailored reviews outside of the five-year cycle. We recommend a risk-based approach to determining the scope, and order, of these reviews.
- 3.3 We did not find enough information on methodology to be able to comment fully. We recognise this will be developed in due course and would be happy to provide further comment at that point.
- 3.4 In our previous approach to performance review (from 2010 to 2015), we required regulators to submit self-assessments against the standards. We subsequently (2015 onwards) moved away from this model to one that placed the evidence-gathering burden on us rather than the regulators. In addition to the self-assessment, we have previously and continue to use other tools to gather data, including for example, audits of fitness to practise cases. We would encourage the use of a range of sources to triangulate evidence used to assess each standard.
- 3.5 One of the key points in the summary of the impact statement notes that the terms of reference for each review will be set at least three years before the

³ Figures from 2018/19 - https://www.professionalstandards.org.uk/docs/default-source/publications/an-overview-of-our-work.pdf?sfvrsn=699e7720_5

review takes place. We would caution that, unless the terms of reference are very broad, these may significantly hinder the Ministry's ability to undertake a review that focuses on the main areas of current or emerging risk.

- 3.6 An additional point within the impact statement summary outlines that the terms of reference will be developed in consultation with the responsible authority (among others). As the responsible authority will bear the financial burden of the review and may have other interests, has consideration been given to what extent this might impact on any negotiations as to the extent of the review?

Roles and responsibilities

Reviewers

- 3.7 We recognise the need for cost-effectiveness, but caution that this should not be a driving factor in appointing reviewers. We strongly encourage the focus to be on knowledge, expertise and experience, which we note are included.
- 3.8 We did not find it clear from the consultation who the reviewers will be, whether they are likely to be from the responsible authorities (i.e. peer reviewing the other responsible authorities), independent contractors, or other individuals. To promote public confidence, reviewers will need to be demonstrably independent from and objective about the authority under review.

Responsible Authorities

- 3.9 We agree that it is important to have a named contact at each responsible authority.
- 3.10 Further detail on the self-assessment will be important, for example whether this covers all areas or focuses on risk. We consider it likely that a full self-assessment would be required for the first round of reviews to provide a baseline against which to measure future performance.

Ministry

- 3.11 We would expect to see the roles and responsibility of the Ministry covered here. For example, recruiting and selecting reviewers, any administrative support, negotiating scope of review.
- 3.12 Clarification on the role of the Ministry is important for a number of reasons, including the risk that through taking on responsibility for the performance review directly, the Ministry takes (or is perceived to take) ultimate responsibility for the performance of the responsible authorities.

Schedule for first round of reviews

- 3.13 The consultation states that this will be determined in consultation with the responsible authorities but does not mention whether this will include considering risk to the public when deciding prioritisation. We recognise

however that at this early stage the evidence needed to make a risk-based schedule may not exist.

- 3.14 The principle of providing at least 12 months' notice to a responsible authority of a review appears generous and one weighted towards the convenience of responsible authorities rather than public protection. We appreciate that the completion of a self-assessment will take time, but consider that a responsible authority should be in a position to be reviewed at all times. A 12 month or longer lead-in time may risk the perception that it is allowing a responsible authority to get its house in order before being subjected to assessment. We are also not sure whether this principle will hamper the ability to undertake tailored reviews outside of the five-year cycle. It might also make it harder to create an agile, flexible, risk-based or responsive schedule.
- 3.15 We recognise that issues may arise that make it impractical to undertake reviews at certain times. However, we would strongly encourage that changes to the schedule were based on risk rather than logistical or administrative issues as per the examples provided.
- 3.16 We do not take a view on the overall frequency of performance reviews (for context, we undertake these annually in line with our legislation but have discretion over their scope). However, one risk to be aware of (which exists regardless of the frequency of review) is where a responsible authority meets all the standards, and major issues then arise in the period before the next review. We encourage interim monitoring to reduce the likelihood of this risk eventuating.

Reporting

- 3.17 In our experience, the publishing of reports is crucial for transparency, and so we are pleased to see the requirement for responsible authorities to publish the report on their website and to formally respond with their action plans in their annual reports.
- 3.18 We did not find the documentation to be clear about how consistency of decision-making and reporting will be maintained, and whether the Ministry has a role here. It will be crucial, especially with the scope to make recommendations to other organisations and highlight areas of learning that might benefit other responsible authorities, that there is a coordinated approach to decision-making and report development.
- 3.19 We would also welcome further clarity on how decisions will be made about whether a standard is met, partially met or not met, and whether the different aspects of each standard will be specifically outlined as met or not, contributing to an overall decision for the standard.

What negative impacts (if any) do you foresee arising from the proposed approach to performance reviews?

- 3.20 We see the proposal to review the performance of the responsible authorities is a positive development and note that this can drive improvements in performance.

- 3.21 There is always a risk of unintended consequences from regulatory action, and we would encourage this to be considered in detail, in line with the eight elements we outline in Right-touch regulation. By focusing, through performance review, on particular areas of a responsible authority's performance, there is a risk that the responsible authority puts resources into that area at the expense of others. There is also a risk that the focus of reviews drives the work of the responsible authorities, which may not necessarily be the intention.
- 3.22 An overly-burdensome approach to performance review can also take resources from the responsible authorities' work to protect the public, the impact of which may be especially keenly felt in smaller organisations.

Will review against the proposed standards provide confidence that a responsible authority is carrying out its functions in the interest of public safety?

- 3.23 We feel that public protection and public confidence need to be more explicit within the standards.
- 3.24 It can be difficult to measure performance against some standards, and for these standards it can be helpful to use criteria to help to guide decisions and ensure consistency. This is especially important for standards that include statements such as 'timely', 'appropriate' and 'improve'. The Ministry may wish to decide whether to define the thresholds for determining whether standards are met, partially met or not met.

Do the proposed standards adequately and appropriately reflect good regulatory practice (including the principles of Right Touch regulation)?

- 3.25 Some of the standards appear to be process, rather than outcomes, focused. For example, a number of the standards require the responsible authorities to have mechanisms in place for particular areas. With this wording, it might be possible for a responsible authority to meet a standard if they had such a mechanism in place even if the outcome of the mechanism is suboptimal.
- 3.26 One of the key points mentioned within the documentation is enhancing the transparency of the responsible authorities. We agree that a process such as performance review, with appropriate standards and processes, should improve the transparency of these organisations. However, this may not increase the public and professionals' understanding of the role of the responsible authorities and the Act. Attention would need to be paid to explaining this clearly to the public and professionals, as well as explaining the process and publishing the report. A requirement for the responsible authority to publish a report on its website does not necessarily mean this will be widely read and understood or be publicised by the responsible authority.
- 3.27 Without detail of the underlying processes, it is difficult to determine whether the overall programme of performance review will be consistent with Right-touch regulation. While the standards are an important part of working to Right-touch principles, whether the performance review programme conforms to these principles will be depend on the approach taken and implementation.

- 3.28 We think that more outcomes-focused standards would help the Ministry to judge whether the responsible authorities are working to good regulatory practice and Right-touch regulation, and make it easier for the performance review programme to do so.

What gaps (if any) are there in the proposed standards?

- 3.29 We do not know how effective governance and leadership are in the responsible authorities, but numerous inquiries and reports have shown us that weaknesses in these areas can result in poorly functioning organisations that lead to deficient public protection. This has often been the focus of reviews that the Authority has carried out for regulators outside of the UK. If governance and leadership are well established, then the standards as they are should be appropriate in this area, assuming that performance is maintained. If there are concerns about these aspects, or a risk that their effectiveness may diminish, then specific standards relating to governance and leadership might be beneficial.
- 3.30 One question to consider is whether the standards will allow the Ministry to identify, monitor and resolve the sort of longstanding concerns that have led to the introduction of the performance review process. It is not clear from the documentation whether the problems today are the same as they were in 2009 and 2014. We would encourage this to be considered to ensure that the approach is tailored to the problem it is trying to fix.

Most of the proposed standards are closely tied to a responsible authority's functions (as prescribed under s 118 of the HPCA Act). Others, for example those relating to the principles of the Treaty of Waitangi and of Right Touch regulation, take a broader view. Is it appropriate for the standards to include this broader focus?

- 3.31 We would agree that it is appropriate, and indeed important, to include this broader focus. A broader focus can allow routes in to identify and act on issues that might not otherwise be identified

Comments on Standard relating to 118(d,e,k)

- 3.32 This may be a misunderstanding of the role of responsible authorities on our part, but we are not clear how their mechanisms will be able to 'improve and remediate the competence of practitioners found to be below the required standard.' While we agree that the responsible authorities' mechanisms should facilitate, or even require this, we would argue it is for the individual practitioner (with assistance as appropriate) to improve and remediate their competence and demonstrate that they have done so. Putting the emphasis on the responsible authority to improve and remediate competence may create a conflict of interest. For example, if the registrant does not improve their performance, is it the registrant or the responsible authority who is accountable? And would this then present a barrier to removing the registrant from the register if the responsible authority is at fault for not improving performance?

Comments on Standard relating to 118(f,g)

- 3.33 It may be intentional on the part of the Ministry, but we believe there could be greater specificity provided in this standard to outline what is expected of a fitness to practise process. There is no inclusion, for example, of taking action to restrict a registrant's practice.

Comments on Standard relating to 118(h)

- 3.34 We are not sure why this has been separated from 118(f,g). To us, these appear to be about similar considerations: where there may be a need for regulatory intervention to address risks associated with a registrant's practice.

Comments on Standard relating to 118(i)

- 3.35 While this outlines the requirements for developing the standards and an element to be included, we do not feel it focuses on the outcome, which to us is ensuring that registrants practise safely and ethically and thereby ensure public protection.

Other comments

- 3.36 We welcome the Ministry's decision to implement a performance review process to improve the performance of the responsible authorities and enhance public protection. We would be happy to have further discussions about the practicalities of developing and delivering such a programme.

4. Further information

- 4.1 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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