

## Summary of responses of the consultation on the revised process for the performance review

### 1. Introduction

- 1.1 The consultation *The review of the performance of the health and care regulators – a revised process for the performance review* closed on 27 July 2015.
- 1.2 A total of 14 responses were received; each of the health and care regulators provided a response, as well as three professional and representative bodies, one of the four UK governments, and one response received anonymously.
- 1.3 This paper sets out the nature of the responses to the areas of the consultation, as well as any more general comments provided by those who responded.
- 1.4 The paper also sets out the changes we have made to the revised process as set out in the consultation documents following our analysis of the consultation responses, and consideration by the Authority Board.

### 2. Proposal to move to a rolling programme of review

- 2.1 Respondents were asked whether they agreed with the proposal to move to a rolling programme of performance review.

#### **Question one: do you agree with the proposal to move to a rolling programme of performance review?**

- 2.2 None of the respondents disagreed with the principle of moving to a rolling programme of review.
- 2.3 The majority of respondents raised concerns about the timescales and milestones for the performance review process. In particular, a number of respondents wanted to know the timetable for 2015/16 as quickly as possible, so that they could plan the activity into their work and business plans.
- 2.4 Some of the smaller regulators raised concerns about the impact on their staff resources of the requirements of the revised process. Concerns were also raised that the revised process may favour the larger regulators, who have more resources available to meet the requirements.
- 2.5 Some respondents raised a concern that the revised performance review process means that the Authority will no longer be able to 'moderate' its assessment of how each of the regulators have met the *Standards of Good Regulation* – as each regulator's performance review will be taking place at a different time.

### 3. Management of risk: Standard versus 'risk question'

- 3.1 The consultation asked six questions about how the Authority should assess how each regulator manages risk.
- 3.2 Respondents were asked for their views on the proposed Standard relating to the management of risk. They were also asked to consider an alternative proposition – involving the Authority asking the regulator to describe how it has identified forthcoming risks.
- 3.3 Within this section of the consultation, respondents were asked for their views on who might be the appropriate person to sign off the regulator's response to the question about identification of forthcoming risks.
- 3.4 The majority of respondents agreed that it was important for the Authority to have a better understanding of the governance and risk management arrangements of the regulators. However, there was no consensus from the respondents as to which of the alternatives was preferable.

#### **Question two: do you agree with the proposal that the Standards of Good Regulation should include a new Standard relating to the management of risk?**

- 3.5 Four of the respondents stated a clear preference, in principle, for the inclusion of a new Standard relating to the management of risk, rather than the alternative proposition.
- 3.6 Those that responded in this way commented that the definition of key risks, and what might constitute adequate management of risk, would need to be discussed in detail, as each regulator faces different risks dependent on its operating environment.
- 3.7 There was also a suggestion that the Standard might be made more explicit in relation to its examination of governance as well as risk.

#### **Question three: if so, do you agree with the areas of focus relating to the management of risk?**

- 3.8 There was a view from those that provided a response to this question that the Authority would need to set out what 'good' or 'satisfactory' performance would look like in this area. One respondent stressed the need for any judgements made about the regulators' performance in this area to be transparent.
- 3.9 One respondent suggested that in the event that a risk Standard was introduced, that the methodology should be subject to a full external review by experts in the field of risk management.
- 3.10 Reasons given by those who said that a risk Standard was not their preferred option included the following:
  - It would be difficult, and take a disproportionate amount of time, to provide the evidence needed to meet the Standard, particularly in demonstrating effective oversight by a regulator's Council.
  - One respondent was of the view that a Standard relating to risk was inconsistent with the other Standards - which relate to the regulators' statutory functions.

- The same respondent raised a concern that such a Standard might change the relationship between the Authority and the regulators' Councils, as it may cause confusion if the Councils' feel directly answerable to the Authority for their management of risk.

**Question four: are there other areas that could be defined as management of risk that should be included as part of this Standard?**

- 3.11 One respondent suggested that the risk related to consistent fitness to practise decision making should be included.

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

- 3.12 Three respondents clearly expressed a preference for the risk question rather than the risk Standard.

- 3.13 Comments made in response to this question included:

- That a risk question would be a more proactive approach.
- That a balance would need to be struck between the need for regulators to be open about how they manage risk, and the confidentiality of this discussion with the Authority. Openness was also commented on by another respondent, who stated that such transparency might not work effectively in practice.
- Asking about risk in this way would help maintain the separation between operational management and governance.
- The indication that this risk question forms part of a revised process that has a focus on building an understanding of the work, practices and systemic risks faced by each regulator was welcomed by one respondent.

- 3.14 One respondent asked for assurance that the Authority has the operational capacity and skills to conduct an assessment of risk in this way.

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

- 3.15 There was a considerable variation in the comments made in response to this question, (See responses to question 6 in annex 2).

- 3.16 The fact that the question is prospective rather than reflective was deemed to be useful by one respondent.

- 3.17 A number of respondents indicated that the wording of the question might not achieve its aim of helping the Authority assess performance in this area. One respondent thought the question too open to engender a consistent response, one thought the question should be more focused on the impact of any changes to the assurance framework during the period under review, while another did not feel the question was clearly defined. Another respondent thought it would be useful to engage experts in the area of risk management to revise the structure and phrasing of the question.

- 3.18 There was uncertainty from some respondents as to whether the question was too broad (focusing both on internal risk management and the identification of impacts on public protection) and whether this would prevent consistent and useful judgements by the Authority, as well as whether it would lead to the provision of information that would be provided in any event in relation to the Standards and/or whether it would require the provision of an inordinate amount of information (e.g. by duplicating information held on risk registers).
- 3.19 One suggestion was that the question should be expanded into a series of questions, asking for more detail on mitigation strategies, and how large projects or work streams may affect the management of risk. Various respondents provided alternative wording, or alternative suggestions about how the question could be structured.
- 3.20 Two respondents suggested that the two options (use of a risk Standard and use of a risk question) could complement each other.
- 3.21 One respondent expressed uncertainty that either approach was sufficiently sound as currently described. One respondent felt that the case had not been made for the Authority seeking to assess the regulators' management of risk.

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

- 3.22 Five respondents were of the view that it was not the role of the Authority to decide who within a regulator should sign off any response to the risk question. However, three of these respondents were of the view that if the Authority did mandate the signatory within the regulator, that the Chief Executive should take that role.

**4. Providing information on processes at start**

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

- 4.1 It appears that there may have been some misunderstanding caused by the wording of this consultation question, based on some of the responses received.
- 4.2 The purpose of gathering this information is to ensure that the Authority has an adequate understanding of the operational processes used by each regulator. Such an understanding would mean that the Authority could ensure that its requests for additional data were appropriately targeted (for example, having adequate information about the processes might help to avoid any misunderstandings or requests for duplicated information) and ultimately the information provided would form part of the evidence-base for the Authority's assessment of regulatory performance.
- 4.3 As such, the Authority intended to suggest that each regulator should provide its standard operating procedures, operational policy documents and manuals

(where they exist) at the outset of the revised performance review process; so that the Authority can refer to these when considering what additional information it needs in order to evaluate how the regulator is meeting the Standards.

- 4.4 It was not the intention that each regulator, at the start of the revised process, should provide a narrative explanation of how they meet the Standards. However, it appears that a number of respondents understood this to be the proposal.
- 4.5 Five respondents expressed the view that it would be disproportionate to provide information that they believe they have previously provided, or that has not changed since the last performance review.
- 4.6 Five respondents indicated that they agreed with the proposal, on the basis that it would reduce the need to re-evidence things that have changed year on year, and would allow a focus on what has changed. It would also ensure that the Authority has up to date information on the processes of each regulator.

## **5. The dataset: general views**

- 5.1 A number of respondents provided comprehensive responses to the consultation questions relating to the proposed dataset.

### **Question nine: do you agree with the revised elements of the dataset?**

- 5.2 Ten of the respondents indicated that they did not agree, or had significant issues with, elements of the proposed dataset.
- 5.3 Those that did not agree with the proposed dataset were strongly of the view that the amount of data requested, and the collection of such data each quarter, would be disproportionate.
- 5.4 Additionally, respondents indicated that providing this dataset on a quarterly basis would impose an additional burden on the regulators, and it is their view that the Authority has not in the consultation provided a rationale for the dataset that would offset this additional burden.
- 5.5 It is also suggested in the responses to this question that the data provided might be misinterpreted by the Authority unless the regulators also provide supporting narrative. Concern was also raised about how the Authority would reach judgments based on the data

### **Question 10: are there elements that you believe should not be included? If so, please explain your specific objections.**

- 5.6 We received several detailed responses as to why particular data items required clarification from the Authority, might not be meaningful, or would be different between regulators.
- 5.7 These responses have been considered as part of the review of the dataset included at annex one.
- 5.8 Additionally, the specific responses may be helpful in any decisions to change the number and nature of data items, or to remove data items from the list, or the frequency of collection.

**Question 11: Is there additional data that you believe should be included in the dataset in order for us to gain a clearer understanding of the performance of the regulator?**

- 5.9 One respondent suggested that additional fitness to practise data that should be collected, which primarily relate to cases where cases go part-heard, allegations not admitted are proved, and interim orders are not made.
- 5.10 A number of respondents noted that the education dataset focuses on the quality assurance process and that there are no data items relating to continuing fitness to practise.

**6. The dataset: use of “indicators”**

- 6.1 As part of the consultation relating to the dataset, respondents were asked for their views on the proposal to identify certain data items as “indicators”, which would be referred to by the Authority in its annual report (and potentially in the individual reports) in terms of describing performance across the regulators.

**Question 12: do you agree with the indicators that we have set out in annex three?**

- 6.2 There was no consensus amongst the respondents as to the value of the indicators as a concept, nor about the specific indicators included in the proposals (although a number of concerns were expressed about individual indicators).
- 6.3 Some respondents appear to have formed the (incorrect) view that the Authority wishes to impose ‘key performance indicators’ on the regulators, and therefore replace the regulators’ own role in deciding on appropriate performance measures.
- 6.4 One respondent stated that they agree with the introduction of a targeted number of indicators, but that while the number of indicators is proportionate to the purpose, the individual indicators proposed may not assist in drawing helpful comparisons across the regulators.
- 6.5 A number of respondents raised a similar concern that the indicators may not helpfully demonstrate the performance across the sector. Additionally, respondents suggested that agreement will need to be reached on consistent definitions and reporting of these indicators by all of the regulators. One respondent suggested that some of the indicators proposed might motivate undesirable behaviours.
- 6.6 Specific feedback has been given on specific indicators, and this has been considered as part of the review of the dataset included in annex one.

**Question 13: are there other indicators from the dataset that we should include?**

- 6.7 Only two respondents suggested alternative indicators. These related to fitness to practise and customer service.



## 7. The dataset: frequency of collection of data

### **Question 14: Do you agree with the proposals that the dataset should be collected from the regulator on a quarterly basis?**

- 7.1 Seven respondents stated that they agreed in principle with the proposal for quarterly reporting. Four respondents disagreed with the proposal, or raised concerns about the proposal as currently presented.
- 7.2 Respondents expressed a concern that quarterly reporting of data would significantly increase the burden on regulators, which may not be proportionate to the benefit such reporting would bring.
- 7.3 Some respondents stated that they would be content to provide the data on a quarterly basis, though this was with some caveats. Clarification was required as to whether the quarterly data would be used to gain an understanding over time, or to judge performance from one quarter to the next. The latter raised concern for one respondent, not least because for small regulators the changes in a quarter would be insignificant and therefore make such judgement meaningless. Another respondent also raised the issue of small changes in performance (or 'nil returns') for small regulators.
- 7.4 Concern was also raised as to whether the Authority has sufficient resources to undertake a quarterly analysis.
- 7.5 Two respondents suggested that a focus on quarterly data may lead the Authority (and by implication the regulators) to be overly concerned about short-term performance, instead of focusing on a long term strategic outlook. One of the respondents who raised this was of the view that clear performance criteria (and thresholds of acceptable performance) would be needed.
- 7.6 One respondent asked for consistent feedback each time data is collected, so that concerns could be raised as they arise, not at the end of the process (when there is insufficient time to address them). This appears to be a reference to the timing difficulties within the previous performance review process consequent upon the regulators providing data twice a year, with only the final dataset being used as the final basis for the Authority's assessments. However, as the purpose of the performance review is report on their performance annually, it was not the intention of the quarterly data collection to provide the regulator with quarterly feedback – the purpose of the quarterly data is to help the Authority understand a regulator's performance throughout the year.
- 7.7 One respondent who agreed with the proposal to move to quarterly data reporting requested a transition period so that work can be undertaken to its IT systems to capture and report the data.
- 7.8 Another respondent suggested that only some of the data should be collected on a quarterly basis, but other data less frequently or only when an assessment indicates the need for it.

## 8. Proposed methods of assessment and review

- 8.1 Respondents were asked to consider the proposals relating to how the Authority would undertake its assessment of the information it collected, and how it would decide the level of review required.

- 8.2 Five respondents stated that they agreed with the principles set out in this section of the consultation proposals.

**Question 15: Do you agree with the proposed methods of assessment and review of each regulator? If you disagree with one or more aspects, please explain why.**

- 8.3 More than one respondent was of the view that the proposals focused attention too heavily on the regulator's registration and fitness to practise processes (one respondent describing this as 'disproportionate'), with less focus on education and standards.
- 8.4 Respondents stated that more information was required about the criteria that would be used by the Authority in deciding the type of performance review to be undertaken for each regulator. Two respondents specifically referred to the use of the term 'significant' and queried how the Authority would determine whether a targeted review was required.
- 8.5 Two respondents questioned the legal basis for the proposed audit of regulators' registration functions. One respondent explained that they have their own internal audit programme that includes an audit of the register, and suggested that the Authority's audit should be complementary to and consistent with that. This respondent also stated that they were keen to ensure that the Authority's audits are undertaken in line with recognised audit standards.
- 8.6 Two respondents were of the view that the process of assessing the type of review a regulator should undergo should include a dialogue with the regulator, as opposed to what one respondent described as a 'post hoc discussion of the PSA's conclusions'.
- 8.7 One respondent suggested that the regulator be allowed to make a submission to the decision making panel at the Authority assessing what type of review that regulator should undergo, and also suggested that the panel should meet in open session, or that the regulator should be present when the decision is made. The same respondent suggested that there should be a process for appeal against report stage findings, and that the regulator should be able to provide a statement in the report to the effect that it disagrees with the Authority's conclusions.

**9. Other impacts not considered in the proposal**

- 9.1 Respondents were asked to set out where they had identified any other impacts that were not considered in the proposals.

**Question 16: Are there any other possible impacts relating to these proposals that we have not considered?**

- 9.2 Those that responded to this question raised issues previously discussed in responses to previous questions.
- 9.3 One respondent was concerned that the proposed review process would exacerbate the already tight deadlines in the current process.
- 9.4 Concerns about the proposed indicators, as well as the dataset, were raised again in this section. The concern that there was a lack of opportunity for the



regulators to provide a narrative to support the data they would be submitting was also expressed here. Similarly, the concern that some indicators might encourage undesirable/unintended behaviours was raised.

- 9.5 One respondent suggested that an increase in data breaches could be viewed as a positive indicator rather than a negative indicator (as it may mean that the regulator's processes have become more stringent).
- 9.6 One respondent questioned whether the dataset would provide the Authority with sufficient information to compare performance across the regulators.

## 10. Other comments

- 10.1 The final question offered respondents an opportunity to make any additional comments.

**Question 17: Are there any further comments you would like to make which are relevant to the proposals, and which you have not already covered?**

- 10.2 Some of the comments made reiterated concerns/issues raised earlier in the consultation responses.
- 10.3 A majority of respondents stated that the Authority should undertake a regulatory impact assessment, to ascertain the effect of the proposed review process on the regulators' (and the Authority's) resources. A cost-benefit analysis was also suggested. This view that an impact assessment is required was also raised by several respondents in their responses to other questions.
- 10.4 The use of external expertise to help validate, refine and revise the proposals was also suggested by more than one respondent. Areas such as assessment criteria, audit standards, and a measurable risk standard were all raised as possible areas for such external advice.
- 10.5 The level of resource available at the Authority, and the experience, knowledge and skills of staff undertaking the performance review process was also raised as a concern by more than one respondent. It was suggested that the provision of training and induction for Authority (and regulators') staff on the revised process would be helpful and assist a smooth transition.
- 10.6 It was indicated by more than one respondent that there is a need for the Authority to provide more guidance about how data should be calculated, and also to set a benchmark for acceptable performance against the Standards. One respondent described this as the Authority setting out clearly 'what a strong performing regulator looks like'. This links to other responses which focused on the need for consistency and transparency in how the Authority decides the type of review each regulator should undergo. One respondent expressed their willingness to work with the Authority and other regulators to agree a core dataset comprising a small number of high level indicators. The disproportionate focus on fitness to practise was also reiterated in this section of the consultation responses
- 10.7 One respondent questioned the appropriateness of an Authority Board member being on the panel that decides on the scope of review each regulator is to

undergo. They questioned whether this blurs the responsibilities between operation and governance.

- 10.8 Two respondents described a 'missed opportunity' to review the Standards of Good Regulation. Others suggested that the performance review should be an opportunity to learn from, and promote, best practice, and expressed disappointment that this is not mentioned in the proposals. Thematic reviews of areas of the work undertaken by the regulators were also suggested by one respondent.
- 10.9 The levy was referred to by a number of respondents in their responses to various consultation questions. In essence, respondents were of the view that the Authority should ensure that the proposed revised performance review process should not increase the financial burden on regulators. This concern also formed part of their rationale for suggesting a regulatory impact assessment, as set out at 10.3 above.
- 10.10 Seven respondents provided introductory statements or covering letters with their submissions. In general, these reiterated responses to the questions in the consultation.
- 10.11 One respondent emphasised the need for the Authority to define what an effective regulator looks like, including measurements of financial viability and good governance. They suggested that this should be underpinned by a model of risk assessment (and based on external, expert advice).
- 10.12 One respondent commented that the consultation does not describe how the Authority will judge the success of the revised performance review process.
- 10.13 One respondent referred to the fact that the Authority has indicated that it will scrutinise more closely the information produced by the regulators, including Council reports, as part of the assessment process. This respondent thought that to be a more proportionate response than use of the proposed dataset.

## **11. Changes to the consultation proposals**

- 11.1 The Authority Board considered the responses to the consultation at its meeting on 17 September 2015.
- 11.2 The Board carefully considered whether a regulatory impact assessment should be undertaken. They were of the view that the consultation process was lengthy and detailed, and included a long period of face to face and direct consultation with the regulators prior to the start of the consultation process. The Authority had considered NAO guidance on regulatory impact assessments. As the Authority is not a regulator, a regulatory impact assessment is not required. However the Board is mindful of the impact on the regulators of its oversight and considered the impact of the proposals as follows:
  - That the removal of the initial stages audit cycle was a reduction in the workload of both the regulators and the Authority
  - Similarly, the change from a performance review cycle lasting from September to June each year, with the same level of review for all regulators, to one with nine separate reviews over 12 months, with different levels impact on each regulator, was also a reduction in workload.

- That the changes to the proposals following the Board's consideration of the responses to the consultation do not increase any burden on the regulators, or increase the work of the Authority. The process was intended and likely to be, less burdensome.
  - That the requested dataset would be further reviewed and reduced
- 11.3 The Board further decided to ask the Authority's internal auditors to report on the effectiveness of the consultation process conducted by the Authority
- 11.4 The Board made the following decisions in relation to the revised performance review process:
- 11.5 That the revised performance review process operates on a 12 month rolling programme.
- 11.6 That the revised review process does not at this time include either the risk Standard as proposed, or any other formal assessment of risk (such as the 'risk question' contained in the consultation). The Authority may decide to introduce a form of risk assessment in the future following further consultation.
- 11.7 That the regulators be requested to provide information on their current operational processes in relation to each of the areas covered by the Standards. The purpose is to enable Authority staff to check they properly understand how each regulator delivers its statutory functions currently, before deciding what additional information/data is required from each regulator. It is envisaged that the gathering of this data will involve liaison between Authority staff and operational staff at each regulator. As there was some misunderstanding relating to this in the responses to the consultation, we will need to ensure that we are clear with the regulators as to the information we require.
- 11.8 That once completed and approved, the Authority should publish the criteria/factors that would influence our assessment of whether a regulator has met the Standards.
- 11.9 That the revised dataset set out at annex is adopted. The number of data items that we will ask regulators to provide has been reduced from 62 items to 42. We have reviewed which data we require on a quarterly basis and have also indicated where data can be collected annually. Of the 42 data items, 21 will be required on a quarterly basis, and 10 annually. We accept that not all regulators will be able to provide all of the data, either because they do not operate the relevant process (such as consensual disposal), or because they do not currently capture that data. We have also identified some 11 items of data which we may not need to request from individual regulators depending upon the adequacy of their documented processes and procedures. We will work with each regulator to understand their individual issues in relation to the provision of the revised dataset
- 11.10 That the number and content of the indicators be revised, based on the changes to the dataset. We have also changed the term 'indicator' to 'comparator', as a result of the responses to the consultation. Comments from a number of respondents indicated their view that the indicator and data item related to information security breaches was unhelpful. The Authority considers that this data item remains a useful method of understanding how a regulator

manages its risks in relation to information governance. Providing this data on a quarterly basis will allow the Authority to better understand the trends in relation to this data item. It is not the Authority's intention to discourage reporting of information security breaches.

- 11.11 Respondents raised an issue that the dataset does not include any data relating to continuing fitness to practise, and queried the usefulness of the education data proposed. In response we are revising this dataset, and developing appropriate data items relating to continuing fitness to practise. At the start of the revised process we will not request any data items relating to education or continuing fitness to practise.
- 11.12 A number of respondents were of the view that consistent definitions relevant to some of the data items are required (for example, a consistent definition of 'start dates' for the calculation of timeframes) and offered to engage in the development of these definitions. However, not all regulators who responded made this offer, and past attempts to engage with such group activities around such data definitions have been unsuccessful. The Authority will therefore determine and communicate its own definitions to the regulators, based on our analysis of their processes/procedures.
- 11.13 The panel who make the decision as to the level of review to be undertaken will be separate from those who prepare the initial recommendation. This panel will be comprised of the Authority's chief Executive and two other senior staff members. Before any final decision is taken by the panel, the regulator will be provided an opportunity to make representations on the initial recommendation.
- 11.14 In the event that a regulator disagrees with the findings of any report, then the process for dealing with such disagreement will remain as in the current process.
- 11.15 Two of the respondents queried the process for registration audits, as well as the basis under which the Authority will conduct them. Section 26 of the National Health Service Reform and Health Care Professions Act 2002 (as amended) enables the Authority to investigate, and report on, the performance by each regulatory body of its functions. This enables us to review the effectiveness of a regulator's registration processes in a similar way to our current audit process for the initial stages of fitness to practise.
- 11.16 Work is already underway to develop an evaluation strategy for the revised performance review process. It is anticipated that a full evaluation would be conducted after two cycles of the revised performance review process have been completed.
- 11.17 Some respondents were of the view that the Standards of Good Regulation should have been reviewed as part of the consultation. The Board did not consider that the Standards should be reviewed at this time.