General Osteopathic Council

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Council
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PSA consultation on revised Performance Review process and Levy arrangements

Classification	Public
Purpose	For discussion
Issue	This paper provides draft responses to the consultations on the PSA's revised Performance Review process and Levy arrangements.
Recommendation	To consider the draft responses to the PSA Performance Review and Levy consultations.
Financial and resourcing implications	The 2015-16 revenue budget included £17,000 to cover the estimated cost of the levy in 2015-16.
Equality and diversity implications	None
Communications implications	None
Annex	A. The review of the performance of the health and care regulators – A revised process for the performance review B. Draft GOsC response to Performance Review consultation C. Consultation on the Authority's requirements for 2015/16 in respect of its regulatory and standards functions D. Draft GOsC response to the Levy consultation
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Background

1. The Professional Standards Authority (PSA) has published its proposals for a revised approach to the annual Performance Review. The document *The review of the performance of the health and care regulators – A revised process for the performance review* is attached at Annex A.

2. A draft response from the GOsC is attached at Annex B. This was considered by the Audit Committee at its meeting on 2 July. The Committee supported the position put forward by the Executive and no comments from the Committee were incorporated into the draft.

3. The PSA has also published it *Consultation on the Authority's requirements for 2015/16 in respect of its regulatory and standards* functions (the Levy). This document is attached at Annex C.

4. A draft response from the GOsC is attached at Annex D.

Discussion

Performance Review

5. Overall the Executive's judgement is that the process is an improvement on the existing process. However, we say in response to the consultation that:

   'We welcome the refinement of the Performance Review model and consider it has the potential in some areas to be less burdensome. We are less convinced that the process is fully fit for purpose and provides sufficient added value to the work of the regulators. We think that this proposed revised process is a lost opportunity to consider wider issues relating to the Performance Review and to review the Standards themselves.'

6. We have some concerns about elements of the process, specifically the analysis of the data we will be expected to provide. Our view is that the data obtained from a small regulator in some areas is likely to vary considerably from quarter to quarter and raise unjustified concerns.

7. We also have some concerns about specific elements of the dataset which are set out in some detail in our draft response.

8. The PSA intends to either introduce a new standard around the management of risk or to ask a specific question about risk as part of the assessment process. The Committee's views on this aspect would be particularly helpful.

9. The Committee is asked to consider the GOsC's draft response at Annex B and provide feedback to the Executive.

The Levy

10. This consultation is not about the mechanism for collecting the levy, but about the financial needs of the PSA.

11. Our concern in relation to the proposals (and the consultation questions) is the lack of detail about the PSA's requirements and, in particular, any steps they are taking to control the costs of their work.

12. It is accepted that the volume of fitness to practise cases reviewed by the PSA continues to increase but the PSA's costs, as set out in the document, appear to have increased at a disproportionate rate.

13. The consultation itself consists of six 'closed' questions, i.e. suggesting a yes/no answer. Our draft response is in the form of a brief commentary on the proposals.

14. The Committee is asked to consider the GOsC's draft response at Annex B and provide feedback to the Executive

Recommendation: to consider the draft response to the PSA Performance Review consultation and the draft response to the Levy consultation.

Draft GOsC response to the Performance Review consultation

Q1: Do you agree with the proposal to move to a rolling programme of performance review?

Yes, provided that there is clarity about when an individual Performance Review is due to take place. For a small regulator the Performance Review requires a significant investment in staff resources which needs to be planned well in advance, and if there are to be variable timings these will need to be agreed with us.

Q2: Do you agree with the proposal that the Standards of Good Regulation should include a new Standard relating to the management of risk?

We think that the consideration of governance and risk management would be a helpful addition to the Performance Review. However, in the context of the introduction of the new Levy, we would expect the PSA to maintain the overall cost of undertaking the Performance Review within current parameters.

Q3: If so, do you agree with the areas of focus relating to the management of risk?

Yes, these seem appropriate.

Q4: Are there other areas that could be defined as management of risk that should be included as part of this standard?

It is probably helpful in the first instance for this to be kept simple and developed further in the light of experience.

Q5: 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 scope of their review?

We are unclear as to why these are alternatives rather than complementary approaches. It might be helpful in the first instance for the PSA to gain a greater understanding of the way in which regulators manage risk and then use the 'question' approach to identify any changes in approach as well as any identified emerging risks.

Q6: Do you have any views on the effectiveness of the question as currently drafted, and whether it will assist us in determining how risk is managed?

We think that the current formulation may not be effective. There are many ways and to varying degrees in which the performance of a regulator could be at risk but without necessarily having a direct impact on the protection of the public, but the responses to the first part of this question 'what is the likelihood that you will fail in the coming year to protect the public' are likely to be very limited. The second part

of the question 'and have you identified any specific risks' appears likely to generate very broad responses which may not be useful and prove difficult to analyse.

Q7: 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?

The response should be signed off by the Chief Executive. Our view is that the Performance Review process is one that should be conducted entirely between the regulator's staff and the PSA, and that the Council should engage with the final Performance Review report. This is analogous to the relationships with financial auditors, the audit process and presentation of the Audit Findings Report.

Q8: 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?

No. We have met all the Standards in each of the five years. Therefore, it would not be 'right touch' to require us to demonstrate that we meet the standards once again before the new system is introduced.

Q9: Do you agree with the revised elements of the dataset?

No. We do not consider the rationale behind the entire dataset has been made out. We make further comments on individual measures in response to Question 10 below.

We are also concerned that by identifying certain data as 'key indicators' the PSA is taking on too much of a role in relation to the performance management of regulators. It should be for the individual regulators to agree their own key performance indicators not for the PSA to produce a de facto set of their own.

In paragraph 6.3 it is stated that 'it is difficult for any member of the public to draw genuine comparisons between the regulators across key areas of their performance.' It is not obvious to us that the proposed 'key indicators' will solve this problem because of the considerable degree of interpretation that will still need to be applied to them.

In addition the quarterly provision of such a large volume of data is likely to be a burden on small regulators. This is not just because of the need for regulators to collate the data but also to supply the PSA with the accompanying commentary that will be necessary for the PSA to interpret the data in any meaningful way.

Q10: Are there elements that you believe should not be included? If so, please explain your specific objections.

Proposed key indicator 3 – 'the percentage of educational quality assurance visits where concerns are raised resulting in the regulator taking regulatory action.' It is unclear what this means and what it would tell the PSA. Would 'taking regulatory

action' include placing a condition on the recognition of a course? Is imposing such a condition a good thing or a bad thing, as presumably to take such action is indication of a vigilant and well-performing regulator? Given that for us in most quarters the number of quality assurance visits will average less than one, this figure may fluctuate between 0% and 100%. What will this tell the PSA?

Proposed key indicator 9 – 'number of data breaches reported to the Information Commissioner.' While we share the PSA's view that data breaches are serious issues, is this indicator likely to improve reporting to the ICO or lead to fewer reports? Surely the 'key indicator' here, if one is necessary at all, should be adverse findings from the ICO?

Data item 6 – clarification is required as to whether the time taken for the processing initial registration applications (particularly from international applicants) is that from the start of the application process to registration or from the completion of the recognition/assessment process to registration. We are aware of this being an inconsistency in the current dataset between regulators.

Data item 9 – the issue of registration lapsing while a registrant is under investigation is closely related to voluntary erasure while under investigation (data item 45) and it may be helpful to bring these together in the fitness to practise data section.

Data item 12 – it is not clear to us what the value is in this data item, particularly for a small regulator where such concerns arise with very low frequency.

Data item 13 – this data item appears to be meaningless without knowing how many concerns or complaints have been opened.

Data item 14 – we do not quality assure education institutions we quality assure courses, the number of which varies between institutions.

Data item 15 – see comments on key indicator 3. We are also unsure why one of these is a percentage and the other a number.

Data item 16 – clarification is required as to whether this is (a) as part of the quality assurance process or otherwise, and (b) whether this relates to educational or fitness to practise concerns.

Data item 19 – it is not clear to what the value is in this data item, particularly for a small regulator undertaking a small number of visits.

Data item 21 – clarification is required as to whether cases concluded means cases closed (i.e. not referred to a hearing) or cases completed (the sum of those closed or referred, i.e. not 'open'). We are aware of this being an inconsistency in the current dataset between regulators.

Data item 25 – this data appears to be included in data item 49.

Data item 47 – we assume that this data item relates to consensual disposals but this is not clear.

Data item 49 – see comment on data item 25. It is not clear why the PSA is introducing a mean measurement in addition to the median.

Data item 54 – we are not clear as to the purpose of measuring the number of hearing days. It might be more useful to consider mean or median case lengths which may be an indicator of effectiveness rather than of volume of cases.

Data item 55 – we are not clear as to the purpose of measuring number of days lost in this way. It might be more useful to consider the proportion of hearings that go part heard which may be a better indicator of effectiveness.

Data item 56 – a change to data item 55 might make this item redundant.

Data item 58 – see comments on 'key indicator' 9.

Data item 59 – the rationale for choosing the categories of organisational complaints is not clear

Data item 62 – while we agree that staff turnover may be an important indicator of organisational health, in a small regulator the percentage figure may be extremely misleading.

Q11: 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?

The education dataset relates entirely to quality assurance of courses while the Standard itself also encompasses continuing fitness to practise.

Q21: Do you agree with the indicators that we have set out in annex three?

See responses to questions 9 and 10. Our concern is less about the data but the implication that the PSA is introducing 'key indicators' which should be a matter for individual regulators.

Q13: Are there other indicators from the dataset that we should include?

No.

Q14: Do you agree with the proposals that the dataset should be collected from the regulator on a quarterly basis?

In principle we have no objection to providing data on a quarterly basis. However, we have identified a significant number of data items where the response is likely to be 'nil' in most quarters and possibly 'one' in other quarters, or where for good reason the figures will fluctuate considerably. What will be critical is how the PSA

chooses to interpret this data and how it engages with the regulators around this interpretation.

Q14: 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.

A critical part of the assessment process appears to be analysis of trends from the dataset which as we have tried to identify above is likely to be difficult without dialogue with the regulator.

The proposed process at 7.3 and 7.4 does not envisage a dialogue with the regulator about the data but a post hoc discussion of the PSA's conclusions. It might be more helpful for the process to include the submission, with the final quarter dataset, of the regulator's interpretation of the data and any trends that may be evident to seek to avoid the problems that often arise in the current Performance Review process.

Q15: Are there any other possible impacts relating to these proposals that we have not considered?

We think it is important with the introduction of the Levy and the PSA's growing costs to ensure that the new Performance Review process is contained within the current budget, and that the overall cost of the process does not increase.

Q16: Are there any further comments you would like to make which are relevant to the proposals, and which you have not already covered?

We welcome the refinement of the Performance Review model and consider it has the potential in some areas to be less burdensome. We are less convinced that the process is fully fit for purpose and provides sufficient added value to the work of the regulators. We think that this proposed revised process is a lost opportunity to consider wider issues relating to the Performance Review and to review the Standards themselves.

It is noteworthy that the key proposed new element of the process – analysis of the new dataset – is focused largely on fitness to practise with 37 out of 56 data items in this area. While fitness to practise performance is critical in any regulator, the activity itself is an expression of the failure of regulation and not its success. We detect that across the majority of the regulators there is a growing awareness of the relative importance of 'upstream' activity that is aimed at promoting and maintaining standards, and that there needs to be more of a balance struck with fitness to practice activity. This is not evident in the Standards or in the revised Performance Review process.

We are also disappointed that in this process the PSA appears to be stepping further away from promoting best practice. It is not clear within the process presented in Annex One how best practise within and across regulators will be identified and disseminated. As a regulator that regularly meets all the Standards, we find

reflection on the strengths and best practice of other regulators to be the most useful part of the current process.

We would also have like to see the PSA take this opportunity to include thematic reviews within the Performance Review process which could take a more qualitative cross-regulator approach to the areas contained within the Standards.

We have commented in the past that the Performance Review process gives a perverse incentive to regulators not to report innovative changes to policies or processes. We remain concerned that this new Performance Review process as described in Section 3 may continue to reinforce this.

Finally, in Section 8.6 the PSA suggests that the initial stages audit process provides assurance 'about the ongoing quality of the regulators' day to day handling of fitness to practise complaints'. We think this is misleading as the audit activity relates only to a small proportion of complaints, all of which are by definition the least serious, and can not be used to draw wider conclusions about overall fitness to practise process quality.

Draft GOsC response to the Levy consultation

1. This response provides general comments on the PSA's document rather than responses to the six consultation questions.

2. While it is acknowledged that the workload of the PSA has increased in recent years, there is insufficient analysis within the paper of why the numbers of fitness to practise cases are predicted to increase in the way that is suggested. For example, we note that in its 2013-14 Annual Report the PSA said: 'The number of our own appeals has also increased; however, these remain a very small percentage of the total and we do not think general conclusions can be drawn from such small numbers or from one year's data.'

3. In addition to the lack of analysis of workload there is also insufficient financial detail in the document. The document suggests that the recent trend rates of caseload growth appear to be slowing slightly. In the past two years the PSA has increased its budget by 10% and 16%. It is insufficiently clear why a further increase in expenditure of 25% is required in 2015.

4. Since the publication of Enabling Excellence in 2011 all regulators have been seeking to make savings in their costs to registrants. It is not apparent from this document how the PSA has sought, or is seeking to, identify savings in its own costs to minimise those passed on to registrants by the regulators. We consider that future levy consultations should clearly identify where cost savings have not only been identified, but also realised.

5. Given the growth in number of fitness to practise cases and the continuing small number of cases referred to court, we would be interested in whether the PSA is taking an appropriate risk-based approach to screening cases to improve the efficiency of the process. If this has not been done, it might be a helpful piece of work to consider for 2015-16.

6. The proportion of cases considered at s29 meetings has increased from one in 273 in 2012/13 to a projected one in 60 next year. Similarly the proportion of referrals has increased from one in 684 (2012/13) to one in 148 (2015/16). We would be interested to know whether the PSA has undertaken an audit of whether it is applying its procedures consistently or whether any other factors are at play. It would also be helpful to have a better understanding of the final outcomes at the end of the appeal process and whether, given the costs involved, the overall process is proportionate to the outcomes achieved.

7. We are concerned to note that the there is an assumption that the Performance Review process, which was anticipated to be less onerous for the regulators, is assumed to cost more that at present (paragraph 6.9).

8. We note that it is the PSA's intention that any unused funds would offset the following year's requirement (3.2) although any surplus funds might be subject to Corporation Tax. While we understand tax advice has been sought (5.53) and

discussion with HMRC continues, we are concerned that any unused funds would reduce by 20% Corporation Tax. Until this tax issue is resolved, we would be concerned that the PSA does not overestimate its budget requirement leading to unused funds being lost to Corporation Tax.

9. We note that the levy would include provision for capital expenditure (5.59). We would seek assurance that the expenditure budget does not include a depreciation charge meaning the regulators were essentially paying twice for capital expenditure.

10. PSA acknowledges that it will, over time, need to build reserves to cover working capital requirements and longer-term expenditure (6.10). It would be helpful for the proposed reserves policy to form part of a future consultation on Levy requirements.