

**Agenda Item 16**

**Enclosure 14**

**Health and Care Professions Council  
25 September 2019**

**Summary of the PSA's report: 'How is public  
confidence maintained when fitness to  
practise decisions are made?'**

**To note**

**From Mohammed Shafiq, Policy Officer**

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## Summary of the PSA’s report: ‘How is public confidence maintained when fitness to practise decisions are made?’

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### Executive Summary

The Williams Review, ‘Gross negligence manslaughter in healthcare: The report of a rapid policy review’ (June 2018), recommended that the Professional Standards Authority (PSA) work with regulators and review how the impact of public confidence is assessed in fitness to practice decisions about healthcare professionals. Following this the Department of Health and Social Care (DHSC) commissioned the PSA to take this work forward.

The PSA carried out its review January – April 2019 and has recently published its report; ‘How is public confidence maintained when fitness to practise decisions are made’. The report summarises the PSA’s findings from research of public confidence considerations in the fitness to practise process across the regulators and makes recommendations to improve consistency in this area.

Appendix B summarises the contents of the PSA’s report and its recommendations.

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Previous consideration	This paper was approved by SMT at its 3 September meeting, with minor amends.
Decision	The Council is asked to note the report.
Next steps	Next steps are outlined in the actions set out in the paper.
Strategic priority	Strategic priority 4: Make better use of data, intelligence and research evidence to drive engagement and inform our work in preventing problems arising in professionals’ practise
Risk	Strategic risk 4 - Failure to be a trusted regulator and meet stakeholder expectations.
Financial and resource implications	There are no financial or resource implications associated with this work at this stage.
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# How is public confidence maintained when fitness to practise decisions are made?

Advice to the Secretary of State

April 2019

## About the Professional Standards Authority

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 voluntary registration of people working in health and care. We are an independent body, accountable to the UK Parliament.

We oversee the work of nine statutory bodies that regulate health professionals in the UK and social workers in England. We review the regulators' performance and audit and scrutinise their decisions about whether people on their registers are fit to practise.

We also set standards for organisations holding voluntary registers for people in unregulated health and care occupations and accredit those organisations that meet our standards.

To encourage improvement we share good practice and knowledge, conduct research and introduce new ideas including our concept of right-touch regulation.<sup>1</sup> We monitor policy developments in the UK and internationally and provide advice to governments and others on matters relating to people working in health and care. We also undertake some international commissions to extend our understanding of regulation and to promote safety in the mobility of the health and care workforce.

We are committed to being independent, impartial, fair, accessible and consistent. More information about our work and the approach we take is available at [www.professionalstandards.org.uk](http://www.professionalstandards.org.uk).

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<sup>1</sup> The Professional Standards Authority (2015). [Right-touch regulation – revised](#).

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# 1. Executive summary

- 1.1 Public protection in healthcare professional regulation comprises three limbs: protecting the public (safety); upholding professional standards; and maintaining public confidence in the professions.
- 1.2 This report arises from the recommendation of the Williams Review for the Authority to review how impact on public confidence is assessed in reaching fitness to practise (FtP) decisions about individual healthcare professionals. It represents a contribution to the ongoing discussion about how regulators can ensure public confidence in their decisions and the wider regulatory process.
- 1.3 In carrying out this review we have considered the regulators' various legislation, guidance and standards, and relevant case law. We have examined a sample of FtP decisions and policy and research across the regulators. We interviewed experienced Panel Chairs and issued a questionnaire to gather views and further information from the nine health professional regulators.
- 1.4 Public confidence is relevant to three main elements of final fitness to practise decisions – deciding whether a registrant is impaired, deciding on the appropriate sanction and the robustness of the regulatory process, for example holding hearings in public and publishing clear reasoned decisions.
- 1.5 Although eight of the nine regulators are now subject to a shared overarching objective they continue to operate under separate legislation. This is reflected in their guidance, where there are significant differences. In addition, there is no agreed definition of what public confidence is, or what behaviours or regulatory action may impact upon it in the context of health professional regulation.
- 1.6 There is variable use of language referring to public confidence with phrases such as 'reputation of the profession' and 'bringing the profession into disrepute' still used in guidance and standards. This is out of step with modern regulation, which places patients and the public at its heart and aims to maintain their confidence in the professionals who treat them, rather than to maintain the reputation of the profession for its own benefit and may lead to perceptions of an inconsistent or outdated approach.
- 1.7 There is a limited consensus on the types and seriousness of behaviours which are likely to damage public confidence and the public have different views in relation to different professions. This is supported by our own and regulators' research with the public and our interviews with Panel Chairs which suggests the public may be more tolerant of certain behaviours amongst some professions than others.
- 1.8 Case law provides some important and helpful principles which Panels can use when considering how to approach public confidence. A detailed analysis across different professions inside and outside healthcare might yield further insights.

- 1.9 There are variable levels of detail in Panel reasoning even in FtP decisions considering similar types of behaviours. Whilst we recognise the feedback from Panel Chairs that there are some practical reasons for this and that they did not always reflect the detailed and nuanced discussions held, this variability makes it difficult to compare decisions and may give rise to perceptions of inconsistency where such inconsistency does not exist.
- 1.10 We conclude that there are differences in approach across the regulators which are shaped by a range of factors. However, it is unclear what impact this has on the decisions made and whether this impacts markedly on FtP outcomes. A larger scale case analysis would be needed to assess this.
- 1.11 Some variation in approach to public confidence is likely to be justified as views shift over time and the public are not a homogenous mass. As highlighted by the case law, the concept of ‘the man on the Clapham Omnibus’ is flawed. However, the approach of both Panellists and the Courts will inevitably be shaped by background and their perception of the public view. It may therefore be more helpful to think of a group of people with a range of reasonable perspectives. FtP decisions taking into account the impact on public confidence may therefore fall within a reasonable range. However, there is scope for greater ‘coherence’, if not absolute consistency, which would strengthen public confidence in FtP decision-making and satisfy the need for fairness.
- 1.12 There is a significant amount of recent and ongoing work in this area amongst the regulatory bodies which may have a direct or indirect impact on our understanding of public confidence and we suggest that it would be premature to seek to provide definitive guidance in this area at this stage.
- 1.13 We make some recommendations to support a move towards a more coherent approach:
- There should be further definition by regulators of the focus and purpose of public confidence as a concept, e.g. for the public to be able to trust and have confidence in those that care for them rather than for the profession to maintain a good reputation for its own benefit
  - The variance in terminology in relation to public confidence in guidance and standards is unhelpful, and it would be beneficial for regulators to consider standardising language, using the shared wording from the legislation as the basis
  - There should be a cross-sector analysis of the case law to help deepen understanding of what public confidence is and how it should be applied
  - There is a need for more extensive research with the public to understand their views on different kinds of behaviour and to further explore any potential differences in views of different professions and in the views of the public across the UK, building on other published research
  - A cross regulator case analysis exercise would be helpful in establishing whether public confidence is considered more prominently, regularly or in-depth across various case types and registrant categories and whether there is a difference in approach between impairment and sanction

- Regulators should ensure that Panels have access to a wide range of public views and seek to ensure that Panel members are drawn from a sufficiently diverse pool
- Given the trend towards greater use of consensual disposal, we suggest that there should be a more detailed comparison of the approach to public confidence by Panels and case examiners respectively.



## 2. Introduction

### Overview

- 2.1 Public protection in healthcare professional regulation comprises three limbs: protecting the public (safety); upholding professional standards; and maintaining public confidence in the professions.
- 2.2 The Williams Review, *Gross negligence manslaughter in healthcare: The report of a rapid policy review* (June 2018) made the following recommendation for the Professional Standards Authority: 'The PSA, working with professional regulators, should review how the impact on public confidence is assessed in reaching fitness to practise decisions about individual healthcare professionals, and develop guidance to support consistent decision making in this area'.<sup>2</sup> The Review, led by Professor Sir Norman Williams was set up in the wake of the case of Dr Bawa-Garba,<sup>3</sup> to look at the application of gross negligence manslaughter in healthcare. Williams made this recommendation because witnesses to the Review highlighted that there was limited understanding about the type of behaviours and failings that might affect public confidence in the profession and therefore the potential for inconsistency of approach.
- 2.3 The Department of Health and Social Care subsequently commissioned the Authority review how the impact on public confidence is assessed in reaching fitness to practise (FtP) decisions about individual healthcare professionals, across the regulators by undertaking a review of guidance for FtP Panels and having discussions/focus groups with the regulators and FtP Panel Chairs. The review was carried out between January and April 2019.
- 2.4 In carrying out our review, we have primarily focused our attention on how public confidence is assessed when Panels are making final FtP decisions. We have included some consideration of the role of case examiners in agreeing undertakings with registrants and how public confidence is considered in this context. We have not examined in detail how public confidence is taken into account at earlier stages of the FtP process, although recognise that this is a consideration.
- 2.5 The Williams Review also recommended developing guidance to support consistent decision-making. Our initial review of approaches to public confidence in FtP decision-making across the regulators includes some recommendations based on our observations from our research to support future work. We also note that that there is a significant amount of work going on across the regulators which may be of use.
- 2.6 We draw attention to three areas of relevance. First, understanding of what is meant by 'public confidence in the profession' has shifted over time. Secondly, in 2015-2016 both the majority of the regulators' and our own legislation was amended to provide an overarching objective to 'protect,

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<sup>2</sup> Sir Norman Williams 2018, *Gross negligence manslaughter in healthcare - The report of a rapid policy review*. Available at: <https://www.gov.uk/government/groups/professor-sir-norman-williams-review>

<sup>3</sup> *The Bawa-Garba case: a timeline*: <https://www.gponline.com/bawa-garba-case-timeline/article/1488874>

promote and maintain the health, safety and well-being of the public'. Finally, the regulators' varied legislation is acknowledged to be outdated and the current government intends it to be reformed – a published Government response to the consultation *Promoting professionalism – reforming regulation*<sup>4</sup> is anticipated.

## Method

- 2.7 Our evidence has primarily been drawn from desk research, questionnaire responses and Panel Chair interviews. We have reviewed:
- guidance produced by the regulators for decision makers including for case examiners and FtP Panels when making final fitness to practise decisions
  - a sample of relevant FtP Panel decisions provided by the regulators and some of the relevant case law
  - relevant research and policy papers published by the regulators touching on the issue of public confidence.
- 2.8 We issued a questionnaire to staff at the regulators asking for their views on how public confidence is currently considered when final fitness to practise decisions are made, including how public confidence is balanced along with the other two limbs of public protection and whether there is any difference in how public confidence is assessed for different professions. A version of this questionnaire is reproduced at Annex 1.
- 2.9 We met with experienced Panel Chairs nominated by some of the regulatory bodies to gain a better sense of how public confidence is considered in practice in hearings. This was an invaluable exercise to gain better insights into the nuances of how public confidence is considered in FtP decision-making.
- 2.10 We also presented on emerging findings from our research at the Professional Standards Authority's conference for Panel Chairs on 25 March 2019 and gained further feedback from attendees on the issues arising.
- 2.11 This report, whilst dealing with issues associated with the legal framework and case law is not a legal opinion. It is intended as an overview of the issues arising from our research and will also highlight areas where further work is needed.

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<sup>4</sup> Department of Health and Social Care, *Promoting professionalism, reforming regulation*. Available at: <https://consultations.dh.gov.uk/professional-regulation/regulatory-reform/>

## 3. The regulatory context

- 3.1 The role of the professional health and care regulators in the UK is to:
- Set standards of competence, conduct and ethics which health and care professionals must meet to register and practise
  - Check the quality of education and training courses, including practice placements, to ensure trainees develop the knowledge, skills and qualities to practise competently and safely
  - Maintain a public register of professionals that anyone can search
  - Investigate complaints about registered professionals and make decisions about whether they should be allowed to continue to practise.
- 3.2 Since September 2016 eight of the nine UK health and care professional regulators along with the Professional Standards Authority have been subject to a single overarching objective to ‘protect, promote and maintain the health, safety and wellbeing of the public’.<sup>5</sup> In addition, the regulators must also adhere to the three underpinning elements to the overarching objective, known as the three limbs of public protection which are:
- The protection of patients
  - The maintenance of public confidence in the profession
  - Upholding proper standards of conduct and behaviour.
- 3.3 These objectives are relevant to the way that the regulators carry out all of their functions but particularly relevant to the FtP process where decision makers must ensure that they consider all three of these elements when investigating a concern raised about a professional and deciding whether it is necessary to impose a sanction.
- 3.4 The purpose of the fitness to practise process is to decide whether the registrant’s fitness to practise is ‘impaired’ at the time of the hearing. It is not intended to be a system to punish practitioners for past wrongdoing. This means that, if they decide that the facts alleged are proved and that they amount to misconduct or a lack of competence, a Panel must consider whether they are fit to practise. A Panel can find that a registrant is impaired if they pose an ongoing risk to patients, or their behaviour was such that failing to find impairment would mean that public confidence in the profession would not be maintained and/or professional standards would not be upheld. If impairment is found, then the Panel must decide on an appropriate sanction ranging from no action through from warnings (for some regulators), conditions of practice to suspension or erasure from the register. If impairment is not found, then some regulators still have the power to issue a warning or advice to the registrant.<sup>6</sup>

<sup>5</sup> Health and Social Care (Safety and Quality) Act 2015. Available at: [http://www.legislation.gov.uk/ukpga/2015/28/pdfs/ukpga\\_20150028\\_en.pdf](http://www.legislation.gov.uk/ukpga/2015/28/pdfs/ukpga_20150028_en.pdf)

<sup>6</sup> For the purpose of this report, descriptions of regulator processes have been generalised however we acknowledge a number of key differences. The General Osteopathic Council and the General Chiropractic Council operate FtP models based on unacceptable professional conduct (UPC) rather than

## A changing landscape

- 3.5 Whilst the above objectives have been engrained in one form or another across health professional regulation for some time, the purpose and focus of fitness to practise has developed over time in line with the shift from a system of self-regulation by professions to a more overt focus on public protection. This is in part in response to a variety of reports and inquiries into incidents within healthcare including the Bristol Royal Infirmary Inquiry<sup>7</sup> and the Shipman Inquiry<sup>8</sup> which stressed the wider importance of the public having confidence in regulators. It is also due to changes in interpretation of the relevant statutory objectives in case law, produced through rulings by the Courts across the UK and the Court of Appeal.
- 3.6 The concept of public confidence has long been established in case law as being an integral part of the overarching objective of public protection rather than being part of a hierarchy of importance. The case law also outlines the principle that a restrictive or punitive sanction should not be discounted due to the impact on the registrant if it is necessary to uphold the wider public interest.
- 3.7 Along with the role of the regulators more broadly and the focus on fitness to practise, the understanding and definition of public confidence and the kinds of misconduct that are likely to impact on public confidence have shifted over time. Whilst some regulators still have references in their legislation to the 'reputation of the profession' or to 'bringing the profession into disrepute' in their guidance, this language appears out of step with modern regulation, which places patients and the public at its heart and aims to maintain their confidence in the professionals who treat them, rather than to maintain the reputation of the profession for its own benefit.
- 3.8 However, as recent cases, including that of Dr Bawa-Garba which was the catalyst for the Williams Review, have demonstrated there may be different understandings and approaches to public confidence amongst professionals, the bodies that regulate them and the public. The question continues to arise about to what extent consideration of public confidence requires a regulator to be seen to be taking action, even when the professional in question poses no current risk to the public and has fully remediated any clinical failings.

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impairment. Grounds of impairment vary by regulator – most can also take action on the basis of a relevant criminal conviction or a health condition that may affect a registrant's fitness to practise as do sanctions available and different terminology is across the regulatory bodies, for example some regulators refer to caution orders or admonishments.

<sup>7</sup> *The Report of the Public Inquiry into children's heart surgery at the Bristol Royal Infirmary 1984-1995*. Available at: [https://webarchive.nationalarchives.gov.uk/20090811143822/http://www.bristol-inquiry.org.uk/final\\_report/the\\_report.pdf](https://webarchive.nationalarchives.gov.uk/20090811143822/http://www.bristol-inquiry.org.uk/final_report/the_report.pdf)

<sup>8</sup> *The Shipman Inquiry*. Available at: <https://webarchive.nationalarchives.gov.uk/20090808155110/http://www.the-shipman-inquiry.org.uk/reports.asp>

## 4. Definitions and terminology

- 4.1 Final fitness to practise decisions for healthcare professionals are generally broken down into several distinct stages, several of which may include consideration of public confidence:
- Whether the Panel finds the facts of the case proven and if so whether they amount to misconduct because conduct inside or outside practice is very serious or lack of competence, for example for serious failings in clinical care (or one of the other grounds of impairment, for example health or criminal offences)
  - On the basis of the finding of fact, whether the registrant's fitness to practise is currently impaired at the time of the hearing, based on whether they pose an ongoing risk to the public or whether there is a need to take action to uphold professional standards, or to maintain public confidence in the profession
  - What sanction is appropriate to address the failings identified and to address the three limbs of public protection, including maintaining public confidence in the profession.
- 4.2 There is also a consideration about whether the regulator is demonstrating that it is acting in a way which maintains public confidence in the regulatory process, for example, holding public hearings, publishing clear, reasoned decisions.
- 4.3 In the context of health professional regulation, there is no clear, consistent definition of what public confidence is or how it should be interpreted when making fitness to practise decisions. Case law has established some important principles and we highlight these below.
- 4.4 It should be noted that not all of those we heard from as part of this project felt that it was possible or desirable to fully define what was meant by public confidence as this could constrain or limit the discretion of decision makers. However, others felt that the lack of a shared definition could limit the ability to assess how effectively regulators are maintaining public confidence with their decisions.

### Legislation

- 4.5 Since September 2016, the statutory professional regulators, except the Pharmaceutical Society of Northern Ireland (PSNI) have had similar wording within their governing legislation broadly stating the requirement for them to: 'maintain public confidence in the profession'.<sup>9</sup> Previously, whilst all regulators had a similar objective in essence, there was a range of different wording and emphasis.

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<sup>9</sup> Health and Social Care (Safety and Quality) Act 2015. Available at: [http://www.legislation.gov.uk/ukpga/2015/28/pdfs/ukpga\\_20150028\\_en.pdf](http://www.legislation.gov.uk/ukpga/2015/28/pdfs/ukpga_20150028_en.pdf) The GMC's legislation was amended separately, see also Medical Act 1983 (consolidated version with amendments). Available at: [https://www.gmc-uk.org/-/media/documents/medical-act-1983\\_pdf-73285575.pdf](https://www.gmc-uk.org/-/media/documents/medical-act-1983_pdf-73285575.pdf)

- 4.6 The PSNI's FtP criteria as set out in The Pharmaceutical Society of Northern Ireland (Fitness to practise and Disqualification) Regulations (Northern Ireland) 2012, Regulation 4, states the need for the Statutory Committee of the PSNI to have regard to whether or not the conduct or behaviour of a registrant '(b) has brought, or might bring, the profession of pharmacy into disrepute'.<sup>10</sup>

### Case law

- 4.7 Although the case law we have looked at provides a basis for the way that public confidence is approached by regulators and FtP decision makers, it does not appear to provide a set definition of public confidence or detailed guidance on how it should be addressed when making decisions beyond certain broad principles which can be applied more widely than the individual cases they relate to.
- 4.8 We note that much of the case law uses phrases such as 'reputation' and 'bringing the profession into disrepute'. We recognise that in the context of the case law this language has historic roots and Courts have traditionally used such language when referring to issues relating to public confidence. Although we suggest that this language in guidance and standards is outdated and may lead to a perception of a greater focus on the benefits to the profession rather than the public, for the purpose of this report we have seen this as referring to public confidence.

### Application of public confidence

- 4.9 The most detailed description of what public confidence is and how it may be applied comes from outside of health professional regulation from the legal sector in Bolton v Law Society, 1993.
- 4.10 In this case Sir Thomas Bingham stated: 'It is important that there should be full understanding of the reasons why the Tribunal makes orders which might otherwise seem harsh. There is in some of these orders a punitive element; a penalty may be visited on a solicitor who has fallen below the standard required of his profession in order to punish him for what he has done and to deter any other solicitor tempted to behave in the same way. Those are traditional objects of punishment. But often the order is not punitive in intention and in most cases the order of the Tribunal will be primarily directed to one or other or both of two purposes. One is to be sure the offender does not have the opportunity to repeat the offence. This purpose is achieved for a limited period by an order of suspension; plainly it is hoped that experience of suspension will make the offender meticulous in his future compliance with the required standard. The purpose is achieved for a longer period, and quite possibly indefinitely, by an order for striking off. The second purpose is the most fundamental of all: to maintain the reputation of the solicitor's profession as one in which every member, of whatever standard, may be trusted to the end of the earth.'

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<sup>10</sup> The Pharmaceutical Society of Northern Ireland (Fitness to practise and Disqualification) Regulations (Northern Ireland) 2012, Regulation 34 (13). Available at: [http://www.legislation.gov.uk/nisr/2012/311/pdfs/nisr\\_20120311\\_en.pdf](http://www.legislation.gov.uk/nisr/2012/311/pdfs/nisr_20120311_en.pdf)



- 4.11 He continued: ‘To maintain the reputation and sustain public confidence in the integrity of the profession it is often necessary that those guilty of serious lapses are not only expelled but denied readmission. If a member of the public sells his house, very often his largest asset, and entrusts the proceeds to his solicitor, pending reinvestment in another house, he is ordinarily entitled to expect the solicitor will be a person whose trustworthiness is not, and never has been, seriously in question. Otherwise, the whole profession and the public as a whole is injured. A profession’s most valuable asset is its collective reputation and the confidence which that inspires.’<sup>11</sup>
- 4.12 Whilst this provides a helpful basis for the meaning and application of public confidence, we note later that there are key differences in the application of such principles to health professional regulation.

*What stages of FtP is public confidence relevant to?*

- 4.13 Cohen v GMC (2008)<sup>12</sup> reiterates the three stages of fitness to practise:
- Finding whether the facts are proved and if so whether they amount to misconduct, lack of competence (or other grounds of impairment)
  - Considering whether the registrant’s fitness to practise is currently impaired, based on the three limbs of public protection
  - Deciding on what sanction is appropriate to adequately address the failings identified.
- 4.14 Cohen reiterates the principles that a finding of misconduct does not necessarily mean that fitness to practise is currently impaired i.e. if it does not engage any of the three limbs of public protection and highlights the need to consider risk of repetition, whether the failings are remediable and have been remediated. However, it also makes it clear that the wider public interest, including consideration of public confidence is relevant throughout the process, including whether to find impairment, in particular where a regulator has no power to issue any kind of warning or caution when impairment is not found. We touch further on the variations in regulators’ powers later in the report.
- 4.15 The principles of Cohen are reiterated by CHRE v Grant and NMC (2011) which highlights that Panels need to consider each of the three elements of public protection when considering whether a registrant is impaired. It is not enough to reach the view that all clinical concerns have been addressed, a Panel must consider the impact of the serious misconduct on the wider public interest, including public confidence.<sup>13</sup>
- 4.16 Both Cohen and Grant, in stating that decisions on the facts and impairment are discrete decisions state that there is no obligation to find impairment to

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<sup>11</sup> Bolton v Law Society, [1993] EWCA Civ 32. Available at: <https://www.bailii.org/ew/cases/EWCA/Civ/1993/32.html>

<sup>12</sup> GMC v Cohen, [2008] EWHC 581 (Admin). Available at: <https://www.bailii.org/ew/cases/EWHC/Admin/2008/581.html>

<sup>13</sup> CHRE v Grant and NMC, [2011] EWHC 927 (Admin). Available at: <https://www.bailii.org/ew/cases/EWHC/Admin/2011/927.html>

uphold public confidence as this may be assured by a robust regulatory process and a finding of misconduct.<sup>14</sup>

### *What weight is given to public confidence?*

- 4.17 The established view that maintaining public confidence in the profession is more important than the effects of a sanction on an individual registrant also comes from Bolton v Law Society: ‘The reputation of the profession is more important than the fortunes of any individual member. Membership of a profession brings many benefits, but that is a part of the price.’<sup>15</sup> This position has been reinforced by other relevant decisions in health professional regulation including Marinovich vs GMC (2002),<sup>16</sup> Irvine v GMC (2017)<sup>17</sup> and Yeong v GMC (2009).<sup>18</sup>
- 4.18 Decisions by the Courts do provide some indication of the kinds of behaviours where public confidence is likely to be a factor, with dishonesty and sexual misconduct appearing frequently. However, there does not appear to be a clear approach to the weight given to public confidence considerations in such cases with recent decisions such as Lusinga v NMC (2017) highlighting the importance of considering the individual factors of each case rather than automatic strike off for behaviours such as dishonesty.<sup>19</sup> This is a different approach than that taken in the regulation of legal professionals where a finding of dishonesty will lead to erasure unless ‘exceptional circumstances’ are present. This assumption has been expressly disallowed in the healthcare regulatory context.<sup>20</sup>
- 4.19 We discuss in the following section what is meant by ‘the public’ in public confidence. However, it is notable that much of the key case law in health professional regulation developed before the introduction of the single overarching objective and three limbs of public protection for the regulators and the Authority which suggests that there may still be further progress to be made in relation to how public confidence is interpreted by the courts.
- 4.20 Some of the challenges raised by the case law are the subject of ongoing work amongst the regulators to provide further clarity on what constitutes seriousness in FtP. This is likely to be particularly relevant when considering behaviour where there may not be a direct risk to the public or relevant to clinical practice, such as comments on social media or behaviour in a registrant’s private life.

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<sup>14</sup> PSA vs NMC, [2017] CSH 29. Available at: <https://www.professionalstandards.org.uk/docs/default-source/section-29/court-judgments/nmc/psa-v-nmc-amp-mason-judgment.pdf?status=Temp&sfvrsn=0.2916550342859594>

<sup>15</sup> Bolton v Law Society, [1993] EWCA Civ 32. Available at: <https://www.bailii.org/ew/cases/EWCA/Civ/1993/32.html>

<sup>16</sup> Marinovich v GMC, [2002] UKPC 36. Available at: <https://www.bailii.org/uk/cases/UKPC/2002/36.html>

<sup>17</sup> Irvine v GMC, [2017] EWHC 2038 (Admin). Available at: <https://www.bailii.org/ew/cases/EWHC/Admin/2017/2038.html>

<sup>18</sup> Yeong v GMC, [2009] EWHC 1923 (Admin). Available at: <https://www.bailii.org/ew/cases/EWHC/Admin/2009/1923.html>

<sup>19</sup> Lusinga v NMC, [2017] EWHC 1458 (Admin). Available at: <https://www.bailii.org/ew/cases/EWHC/Admin/2017/1458.html>

<sup>20</sup> Hassan v GOC, [2013] EWCA 1887 (Admin)



- 4.21 Our review of the case law for this report has been limited primarily to a selection of decisions relating to health professional regulation. A more in-depth analysis of case law and the facts in relation to each case across sectors would help to expand understanding of why and when the Courts have used public confidence as the central plank in either upholding or overturning a decision.

### Guidance and standards

- 4.22 The regulators' guidance is necessarily based upon their legislation and this will account for some variation. It also references the principles outlined by the relevant case law and the standards for professionals.
- 4.23 Whilst the regulators provide guidance to decision makers to help them when considering the three limbs of public protection, including how to maintain public confidence in the profession, there are few attempts to define public confidence beyond the wording in the regulatory objectives.
- 4.24 Some of the regulators do seek to provide some further detail. The Medical Practitioners' Tribunal Service Sanctions Guidance states: 'Patients must be able to trust doctors with their lives and health, so doctors must make sure that their conduct justifies their patients' trust in them and the public's trust in the profession.'<sup>21</sup> Trust in professionals is a common theme in regulator guidance and documentation.
- 4.25 The NMC has suggested that public disapproval of the actions of a registrant is too low a threshold and have proposed a higher threshold for nurses and midwives. Following a review of their FtP approach in 2018 their guidance states: 'Sometimes we may need to take regulatory action against a nurse or midwife not because their practice presents a risk of harm to patients, but because of our objective to promote and maintain public confidence in nurses and midwives. This means we may need to take action even if the nurse or midwife has shown that they have put serious clinical failings right, if the past incidents themselves were so serious they could affect the public's trust in nurses and midwives.... A need to take action because the public may not feel able to trust nurses and midwives generally is a high threshold. It suggests that members of the public might take risks with their own health and wellbeing by avoiding treatment or care from nurses or midwives.'<sup>22</sup>
- 4.26 Whilst we welcome the attempt to explore the meaning of public confidence, the Authority has expressed some concerns that the NMC's proposed definition may be too narrow. In our response to the recent consultation on the NMC's new FtP strategy we cited recent research with the public which indicated that 'willingness to see' is a situational judgement influenced by issues such as the technical competence of the practitioner in question, how

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<sup>21</sup> General Medical Council, *Sanctions guidance for members of medical practitioners tribunals and for the General Medical Council's decision makers*. Available at: [https://www.mpts-uk.org/-/media/mpts-documents/DC4198\\_Sanctions\\_Guidance\\_Feb\\_2018\\_23008260.pdf](https://www.mpts-uk.org/-/media/mpts-documents/DC4198_Sanctions_Guidance_Feb_2018_23008260.pdf)

<sup>22</sup> Nursing and Midwifery Council, *Understanding Fitness to Practise, How we determine seriousness*. Available at: <https://www.nmc.org.uk/ftp-library/understanding-fitness-to-practise/how-we-determine-seriousness/>

vulnerable the patient is and whether there is another practitioner they are able to see, which may not be the case.<sup>23</sup>

- 4.27 Whilst language is used interchangeably, we suggest that the concept of public confidence has generally seen to have developed from a consideration of the reputation of the profession for its own benefit to a broader consideration about the need for the public to have confidence in the professionals they are being treated by. This view was supported by the conversations that we had with Panel Chairs and colleagues at the regulators as part of this piece of work. This is not necessarily demonstrated in all guidance however, whose wording may reflect their legislation and rules as well as the language used by the case law, for example the Pharmaceutical Society of Northern Ireland, and the General Medical Council, who also refer to the 'reputation of the profession' in their guidance and 'bringing the profession into disrepute'.
- 4.28 Whilst the terms are often used interchangeably there was a view from some of those we spoke to that they can have different meanings and that the reputation of the profession may convey a focus on the types of behaviour which are likely to bring shame or embarrassment on the profession rather than those which may damage public trust and undermine the relationship the public have with health professionals. For example, in the past professionals may have been sanctioned for personal behaviours such marital infidelity which now would generally be seen as irrelevant to fitness to practise. The GDC have recently amended their threshold policy used at the early stages of the FtP process to remove references to the 'reputation of the profession', recognising that this might convey a different meaning and set too low a bar, and replaced it with 'public confidence in the profession'.
- 4.29 There is ongoing debate over the relevance of behaviours that occur within a registrant's private life and how to define whether these should fall within the scope of professional regulation. The use of different terminology may exacerbate this. For example, a 2016 article in the British Dental Journal discussing the case of a dental nurse sanctioned for an offensive comment outside of work suggests that use of certain terminology may allow different interpretations of the purpose: 'One concern is that worrying about reputation will distract from a focus on what really matters: the best interests of patients.'<sup>24</sup>
- 4.30 It is notable that the term public confidence is also frequently used interchangeably with references to the wider public interest. The wider public interest is generally seen to refer to the two limbs of public protection beyond protecting patients from harm (maintaining public confidence and upholding standards). Whilst public confidence is clearly a part of the wider public

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<sup>23</sup> Professional Standards Authority 2018, *Response to the consultation from the Nursing and Midwifery Council - Ensuring patient safety, enabling professionalism*. Available at: [https://www.professionalstandards.org.uk/docs/default-source/publications/consultation-response/others-consultations/2018/professional-standards-authority-response-to-the-nmc-consultation-on-ensuring-patient-safety-enabling-professionalism.pdf?sfvrsn=fa397220\\_4](https://www.professionalstandards.org.uk/docs/default-source/publications/consultation-response/others-consultations/2018/professional-standards-authority-response-to-the-nmc-consultation-on-ensuring-patient-safety-enabling-professionalism.pdf?sfvrsn=fa397220_4)

<sup>24</sup> Affleck, P orcid.org/0000-0001-9830-8713 and Macnish, K orcid.org/0000-0003-4510-3049(2016) *Should 'Fitness to Practise' include safeguarding the reputation of the profession?* British Dental Journal, 221 (9). pp. 545-546. Available at: <https://doi.org/10.1038/sj.bdj.2016.812>

interest, the lack of clarity on exactly what public confidence is and how it is damaged may lead to the use of more general terminology.

4.31 It was also apparent from the discussions we had with Panel Chairs that there are some different interpretations of what is meant by the wider public interest. For example, some Panel Chairs saw the public interest as also referring to the need to consider the implications of removing or suspending a registrant from practice given concerns expressed about workforce shortages. We recognise that decision-makers must balance a number of factors, including ensuring that the public is not inappropriately deprived of the services of a competent practitioner. However, this must be seen in the context of the seriousness of the conduct and conflating such considerations with the need to maintain confidence in the profession may lead to variation in the approach taken and potentially a reluctance to remove or suspend registrants from practice.

4.32 All regulators outline in their standards or codes for registrants the importance of ensuring public trust and confidence in the profession however there is variable wording used and, in common with guidance, use of different terminology with some references to reputation and bringing the reputation into disrepute which may be open to different interpretations.

#### ***Public confidence in the regulatory process***

4.33 In this review, we have primarily considered how public confidence is considered in FtP decisions. However, a number of those we heard from touched on the wider importance of public confidence in the regulatory process and in the regulator. Whilst we have not explored this fully, it is clear that these elements are interlinked as failure to fully consider public confidence when making FtP decisions may also damage public confidence in the regulatory process and in the regulator.

4.34 A number of the regulators highlighted the importance of a public hearing to ensure confidence in the decision and the regulatory process. For those with powers for case examiners to agree undertakings, some sought to define the kinds of behaviour that were so serious that they should be referred to a public hearing. We discussed later some of the particular issues related to the power of case examiners to agree undertakings with registrants and associated implications for public confidence.

## 5. Who is ‘the public’?

- 5.1 In seeking to gain a better understanding of the concept of public confidence in health professional regulation, the question inevitably turns to who we mean by the public. Regulators already grapple with this in the sense that they consider the direct risk of harm posed by a registrant to their patients, alongside the wider public interest of maintenance of standards and public confidence in the profession.
- 5.2 As the Authority has established from research carried out with the public, views on regulatory outcomes vary widely amongst public participants in focus groups and interviews based both on their background and knowledge of the objectives and powers of regulators.
- 5.3 The concept of the ‘average informed member of the public’ or ‘the man on the Clapham omnibus’ have been features of legal deliberations for many years, particularly in deciding whether conduct was dishonest, and indeed these were phrases used by Panel Chairs when discussing how they approach consideration of the public interest and specifically public confidence in healthcare professionals.
- 5.4 In professional regulation, *Giele v GMC* in 2006 stated that the severity of the sanction required to maintain and preserve public confidence in the profession ‘must reflect the views of an informed and reasonable member of the public’.<sup>25</sup>
- 5.5 However, the challenges of seeking to identify the view of an average member of the public when considering how to ensure that public confidence is maintained by an FtP decision are well expressed by Lord Reed in a judgment unrelated to health professional regulation, when discussing the issues with the use of the man on the Clapham omnibus: ‘The Clapham omnibus has many passengers. The most venerable is the reasonable man, who was born during the reign of Victoria but remains in vigorous health. Amongst the other passengers are the right-thinking member of society, familiar from the law of defamation, the officious bystander, the reasonable parent, the reasonable landlord, and the fair-minded and informed observer, all of whom have had season tickets for many years.’<sup>26</sup>
- 5.6 The judgment clearly highlights the fact that concepts of the average member of the public vary. It goes on to state that it is impossible to identify with certainty the views of the hypothetical reasonable man in any situation and the judgment is therefore necessarily one for the Court to make through applying the legal standard.
- 5.7 It is however inevitable that in applying their judgement, even based on an established legal standard, the approach of both Panellists and the Courts will be shaped by background including socio-economic group, age, gender, profession, political views as well as by their social circle. This was an area of

<sup>25</sup> *Giele vs GMC*, [2005] EWHC 2143 (Admin). Available at: <https://www.bailii.org/ew/cases/EWHC/Admin/2005/2143.html>

<sup>26</sup> *Healthcare at Home Limited (Appellant) v The Common Services Agency (Respondent)* (Scotland), [2014] UKSC 49. Available at: <https://www.supremecourt.uk/cases/uksc-2013-0108.html>

discussion with some of the Panel Chairs that we spoke to as part of our research who referred to reflecting on the views of friends, family and their wider circle of acquaintances when considering how to approach different behaviour by registrants. Others highlighted the potential for diversity in public views and perspectives across the four countries of the UK.

- 5.8 We noted that a number of Panel Chairs and Panellists sit as decision makers with more than one regulator and have in some cases been involved in this area of regulation for some time. There are undoubtedly benefits to this, primarily relating to accumulated experience and a shared approach which may help to promote consistency across professions and regulators. However, this may also lead to a situation where the approach to application of concepts such as public confidence becomes subject to group-think.
- 5.9 Panellists do refer to guidance from the regulator to support their decision-making, receive regular updates on the case law and undergo training in areas such as unconscious bias. However, the fact that considerations, particularly on factors affecting public confidence, are likely to be shaped to some extent by background, suggest the need for research with the public to help inform the approach of Panellists. It also suggests the need for regulators to ensure that Panellists are drawn from a sufficiently wide range of backgrounds with relevant considerations about diversity and representation.

## 6. Types of behaviour

- 6.1 The recommendation from the Williams Review to explore the issue of public confidence arose from concerns raised by witnesses to the Review that there was the potential for inconsistency of approach: '[The Review] heard particular concerns about the regulators' role in taking fitness to practise action on the grounds of securing public confidence in the healthcare professions. It heard that there was little understanding about the type of behaviours and failings that might lead to the public losing confidence in the profession and which therefore constitute grounds for regulatory action. This needs to be better understood in order for the professional regulators to give proper consideration to their duty to protect the public.'<sup>27</sup>
- 6.2 Research with the public was not within the scope of this piece of work therefore we are not in position to fully address the point raised by Williams at this stage. However, there are several sources of information which may provide a basis for future work with the public.
- 6.3 The most obvious starting point is the case law which highlights the kinds of misconduct which have been the subject of appeals. Decisions by the Courts do provide some indication of the kinds of behaviours where public confidence is likely to be a factor with dishonesty and sexual misconduct appearing frequently. However, as we have noted more detailed analysis would be required of when the Courts have used public confidence as the key consideration in either upholding or overturning a decision.
- 6.4 A case analysis review of regulator fitness to practise decisions would also provide a source of information about which types of cases primarily involve public confidence considerations although as we note later, there is variability in the detail of Panel reasoning in decisions.
- 6.5 In their guidance a number of the regulators provide specific examples of behaviours for example, dishonesty, sexual misconduct, violent behaviour, bullying and harassment and/or scenarios which would undermine public confidence. A failure of a registrant to raise concerns about patient safety issues is also commonly highlighted.
- 6.6 The HCPC sanctions guidance highlights child pornography as a particular area for concern in relation to public confidence: 'The HCPC considers that any offence relating to child pornography involves some degree of exploitation or abuse of a child and, therefore, that conviction for such an offence is a serious matter which undermines the public's trust in registrants and public confidence in the profession concerned.'<sup>28</sup> This is a position

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<sup>27</sup> Sir Norman Williams (2018). *Gross negligence manslaughter in healthcare - The report of a rapid policy review*, p.41. Available at: <https://www.gov.uk/government/groups/professor-sir-norman-williams-review>

<sup>28</sup> Health and Care Professions Council, *Indicative Sanctions Policy*. Available at: <https://www.hcpts-uk.org/globalassets/hcpts-site/publications/policy/indicative-sanctions-policy.pdf>



echoed by the GDC who also highlight the impact that inappropriate use of social media on public confidence.<sup>29</sup>

- 6.7 The NMC guidance says the following: ‘We know that the public take concerns which affect the trustworthiness of nurses and midwives particularly seriously. Our research told us that these cases are likely seen by the public as serious breaches of professional standards. Conduct that could affect trust in nurses and midwives and require action to uphold standards or public confidence include, where related to professional practice, dishonesty, bullying and harassment. Within a nurse or midwife's private life, convictions that relate to specified offences or result in custodial sentences are also likely to require regulatory action for the same reason.’<sup>30</sup>
- 6.8 The GMC states that, ‘serious or persistent failure to follow [the standards outlined in Good Medical Practice], which poses a risk to the public or undermines confidence in doctors, will put a doctor’s registration at risk’.<sup>31</sup> It highlights that poor behaviour by medical students may impact on public confidence in the medical profession generally along with discrimination against patients, colleagues or the wider public, predatory behaviour and drug and alcohol misuse.<sup>32</sup>
- 6.9 In our discussions with Panel Chairs, participants discussed the types of behaviour that in their view had the potential to damage confidence in the profession. These included dishonesty, sexual misconduct, violence, convictions, or anything involving children. Panellists generally felt that cases should be addressed on an individual basis but that there were factors which they would look for when considering whether behaviour was likely to damage public confidence. These included if there was the potential for harm, if vulnerable people were involved or if the registrant had done something for personal gain. Other aggravating factors included when there was a pattern of behaviour or a lack of an apology.
- 6.10 We heard from some Panel Chairs about the impact that media attention or high-profile cases or case types can have on Panel deliberations, for example the coverage of botched cosmetic procedures which may raise public confidence concerns due to public awareness about such cases.
- 6.11 Panel Chairs highlighted challenges with considering the impact of behaviours which take place in a registrant’s private life, for example cases involving social media. Whilst there are clearly implications for public confidence, those we spoke to highlighted the difficulty of finding the line between what was and was not relevant to an individual’s fitness to practise.

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<sup>29</sup> General Dental Council, *Guidance for the Practice Committees including Indicative Sanctions Guidance*. Available at: <https://www.gdc-uk.org/about/who-we-are/committees/professional-conduct-committee>

<sup>30</sup> Nursing and Midwifery Council, *Aims and principles for fitness to practise*. Available at: <https://www.nmc.org.uk/ftp-library/understanding-fitness-to-practise/using-fitness-to-practise/>

<sup>31</sup> [https://www.mpts-uk.org/-/media/mpts-documents/DC4198\\_Sanctions\\_Guidance\\_Feb\\_2018\\_23008260.pdf](https://www.mpts-uk.org/-/media/mpts-documents/DC4198_Sanctions_Guidance_Feb_2018_23008260.pdf)

<sup>32</sup> General Medical Council, *Sanctions guidance for members of medical practitioners tribunals and for the General Medical Council’s decision makers*, p.46. Available at: <https://www.mpts-uk.org/-/media/mpts-documents/dc4198-sanctions-guidance-feb-2018-76246001.pdf>

- 6.12 A recent case, *GDC v Pate*<sup>33</sup> involving perceived Islamophobic comments being posted on an online dental forum garnered huge attention from dental professionals many of whom felt that the GDC decision to take the case to a hearing was disproportionate. This was in part because the registrant had retired and was no longer practising by the time of the hearing and because the comments were made on what was meant to be a private online forum, although with around 10,000 professional members. The GDC has flagged this case as a clear example of where public confidence would be undermined by a lack of action and imposed a suspension order.<sup>34</sup> As we have noted, the different language used to refer to public confidence may lead to different views about what behaviour is or should be in scope of regulatory action and what the purpose of such action is.
- 6.13 Research carried out by some of the regulators including the GDC<sup>35</sup> and by the HCPC to underpin changes to their Indicative Sanctions Guidance are helpful in flagging the kinds behaviours which are likely to be of relevance and the factors which are likely to be relevant when considering what regulatory action is required. The HCPC research highlighted behaviours which could have a significant impact on public confidence including:
- dishonesty;
  - failure to raise concerns;
  - failure to work in partnership;
  - discrimination;
  - abuse of professional positioner, including vulnerability;
  - sexual misconduct;
  - sexual abuse of children or indecent images of children;
  - criminal convictions for serious offences; and violence.<sup>36</sup>
- 6.14 However, it is unlikely to be possible or necessarily desirable to define a complete list of relevant behaviours. Further research with the public and professionals may be useful to explore the kinds of behaviours which are likely to affect confidence and how to define a threshold for when action should be taken when there is no direct risk to public safety. This should also explore any differences in views across the UK and different public perceptions of different professions. Research of this nature should build on findings from other research with the public including the Authority's research on dishonesty and sexual behaviours, research by the regulators and planned research such as the GDC research into definitions of seriousness in FtP which is likely to be highly relevant to this area.

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<sup>33</sup> *Pate v GDC*, A decision by the GDC Professional Conduct Committee. Available at: <https://olr.gdc-uk.org/hearings/Hearing?hearingId=7361d287-d055-4b25-afc5-81625eb1211a>

<sup>34</sup> *The importance of cases like GDC and Pate*. Available at: <https://www.dentistry.co.uk/2018/07/05/importance-cases-like-gdc-pate/>

<sup>35</sup> GDC Public and Patient Survey 2017. Available at: <https://www.gdc-uk.org/api/files/16-074096-01%20GDC%20Public%20and%20Patient%20Research%202017%20Final.pdf>

<sup>36</sup> Health and Care Professions Council, *The Indicative Sanctions Policy - the Public's View*. Available at: <https://www.hcpc-uk.org/resources/reports/2018/indicative-sanctions-policy---the-publics-view/>



## 7. Approach to public confidence across the regulators

7.1 The single overarching objective, three limbs of public protection and shared body of case law provide the basis for a broadly consistent approach to public confidence across the regulators. We also heard from Panel Chairs the view that Panellists shared a broadly similar understanding of how to recognise and consider cases which involve issues of public confidence. However, our research indicates that there are nuances in the way that the different regulators or their Panellists apply or define public confidence in the fitness to practise context.

7.2 We identify below some key similarities and variations in the way that the regulators approach this issue in FtP decision-making. The absence of a detailed case analysis across the regulators means that we cannot comment definitively on the impact of such variations on FtP outcomes.

### Differences in legislation

7.3 Notwithstanding the shared overarching objective, there are significant variations in the regulators' governing legislation. Although we have not sought to capture all variations here there are a number of specific differences which appear to be relevant to how regulators consider public confidence in final FtP decision-making.

7.4 Most of the regulators look at whether a registrant's fitness to practise is currently impaired, i.e. whether the facts if found proven are likely to raise any issues relating to any one of the three limbs of public protection. This means that whilst a Panel may find misconduct based on the behaviours of the registrant, they may not find current impairment if the registrant has remediated (addressed) their failings and therefore no longer presents a risk to the public or if a finding of impairment is not required to satisfy the wider public interest (upholding standards and maintaining public confidence).

7.5 However, Panellists with the GOsC and the GCC are instead asked to decide if the facts if found proven constitute unacceptable professional conduct, professional incompetence, criminal convictions or adverse health, all of which will trigger a sanction unless a conviction is irrelevant to FtP. Whilst it is not clear that this leads to material differences in FtP outcomes, this may lead to differences in the way that Panel's consider public confidence as part of the process.

7.6 Another key difference is the range of sanctions which regulators have available. Whilst we discuss later the range of views as to whether there is a difference in approach to public confidence in decisions on impairment and sanction, it is notable that some of the regulators have a wider range of powers to mark behaviour even when there is not a finding of impairment. This is a key difference as it may influence the view of the Court as to whether a finding of impairment is seen as necessary or whether a failure to find impairment is seen as equivalent to an acquittal. This was a key principle

underpinned by Grant in relation to the inability of the NMC to impose a warning if impairment was not found.

- 7.7 Most regulators including the GMC, GDC, GOC, GPhC, PSNI and NMC have powers to close a case with a warning before a case goes to an FtP Panel hearing. This is usually issued by the Investigating Committee or case examiners and is generally in cases which do not meet the realistic prospect test.<sup>37</sup> The GPhC also has powers to issue a warning if there is a realistic prospect of the facts being proved but no real prospect of a finding of current impairment.
- 7.8 In addition, the GMC, GOC, GPhC and PSNI have the power to issue a warning or a reprimand even if no finding of impairment is made by a Panel.
- 7.9 The GPhC and PSNI also have powers to issue a warning when there is a finding of impairment. This is an issue we have commented on in *Right-touch reform* where we took the view that whilst warnings may be useful tools for regulators, having different kinds of warnings i.e. both pre and post impairment may be confusing to the public.<sup>38</sup>
- 7.10 The HCPC and the NMC are not able to issue warnings if impairment is found but can issue a caution order which fulfils a similar role. The GDC can issue a reprimand if impairment is found and the GOsC and GCC are able to issue what is known as an admonishment if the Panel find the allegation well-founded.

### Consideration of public confidence in FtP decisions

- 7.11 As part of this review we examined a sample of FtP final decisions including cases highlighted to us by colleagues at the regulators as illustrative of how decision makers consider public confidence in their decision-making.
- 7.12 Whilst some decisions included very detailed discussion about the factors that were likely to impact on public confidence, we often noticed either a lack of detail in the reasoning of FtP decisions or the use of similar standard text to indicate that the public confidence has been considered. All regulators state in their guidance that Panels should provide detailed reasoning in their decisions and indeed this view is supported by the case law.
- 7.13 The Panel Chairs that we spoke to in our research highlighted their view that Panels generally have very detailed discussions about what role public confidence plays in a case, however they stated reasons why detail of decisions may be variable. These included the challenges of expressing the nuances of complex discussions in writing, time constraints when drafting decisions and the reliance on legal advice and support from the regulator.

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<sup>37</sup> The realistic prospect test means the decision made on whether there is a realistic prospect that a Fitness to Practise Panel would find the facts of the case proven and if so, that those facts would amount to the registrants' fitness to practise being impaired based on the three limbs of public protection. This decision can also be referred to as the real prospect test or deciding whether there is a case to answer and is the threshold used by the Investigating Committee or case examiners in deciding whether a case should go forward to a Panel hearing.

<sup>38</sup> Professional Standards Authority (2017). *Right-touch reform*. Available at:

[https://www.professionalstandards.org.uk/docs/default-source/publications/thought-paper/right-touch-reform-2017-fitness-to-practise.pdf?sfvrsn=49517320\\_8](https://www.professionalstandards.org.uk/docs/default-source/publications/thought-paper/right-touch-reform-2017-fitness-to-practise.pdf?sfvrsn=49517320_8)

- 7.14 Whilst not all cases will have public confidence implications we can see little reason why decisions involving apparently similar behaviour should have such varying levels of detail including on mitigating and aggravating factors.

### **Differences between impairment and sanction decisions**

- 7.15 Panel Chairs had different views on whether public confidence is considered in the same way when considering impairment and sanction, with some of the opinion that it is of equal importance at both decision points and others taking the view that it is of primary relevance when considering whether to find impairment or in deciding what the most appropriate sanction is.
- 7.16 There are also nuances in the guidance provided to Panels on this point, despite the case law which stresses the importance of consideration of the three limbs of public protection at all stages of a Panel decision.<sup>39</sup> This is in part driven by the differences in legislation as GOsC and GCC Panels do not find impairment. Consequently, their process has a slightly different emphasis, based on the judgement of *Spencer v GOsC*, which stresses the particular relevance of public confidence when considering the sanction.<sup>40</sup> The GCC highlight this point in their guidance.
- 7.17 In addition, the GMC, GOC, GPhC and PSNI have the power to issue a warning or a reprimand even if no finding of impairment is made by a Panel. Consequently, where they do not believe that behaviour is sufficiently serious to warrant a finding of impairment, these regulators have another way to mark behaviour which may impact on public confidence.
- 7.18 This relates to a further issue of difference amongst the regulators which was how the interlinked concept of seriousness in FtP was understood and applied when considering public confidence. Several of the regulators referred to the need to consider the seriousness of behaviour in FtP decision-making. The NMC provide significant guidance to Panellists in deciding what constitutes serious behaviour.<sup>41</sup> As noted, the GDC in partnership with the NMC and the other regulators are shortly due to embark on a research project on the understanding and application of seriousness in FtP decision making and this is likely to prove helpful in establishing a more consistent approach to public confidence across the regulators.

### **Role of remediation and mitigating factors**

- 7.19 Differences in approach also appear, in part, to be related to what weight Panels give to the registrant's remediation and any mitigating factors in cases where public confidence may be affected.
- 7.20 The NMC state in their aims and principles for fitness to practise: 'If the nurse or midwife has fully remedied the problem in their practice that led to the incident, and already poses no further risk to patients, we won't usually need

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<sup>39</sup> *GMC v Cohen*, [2008] EWHC 581 (Admin). Available at: <https://www.bailii.org/ew/cases/EWHC/Admin/2008/581.html>

<sup>40</sup> *Spencer v GOsC*, [2012] EWHC 3147 (Admin). Available at: <https://www.bailii.org/ew/cases/EWHC/Admin/2012/3147.html>

<sup>41</sup> Nursing and Midwifery Council, *How we determine seriousness*. Available at: <https://www.nmc.org.uk/ftp-library/understanding-fitness-to-practise/how-we-determine-seriousness/>

to take action to uphold public confidence or professional standards. Only those clinical concerns that are so serious that they can't be put right will prompt us to take regulatory action to promote public confidence or uphold standards.<sup>42</sup>

- 7.21 The case law is clear that whilst factors such as remediation, risk of repetition and insight may be relevant when considering whether an individual poses an ongoing risk, there is still a requirement on decision makers to consider the wider public interest, including public confidence, when making a decision on impairment or sanction.
- 7.22 A number of the regulators highlight in their guidance examples of behaviours where they would still need to take regulatory action for reasons of maintaining public confidence. The GDC and GOC refer to behaviour which is irremediable although remediation is generally a concept specifically relevant to impairment on public protection grounds. Particularly serious behaviours are referred to by some regulators as being 'fundamentally incompatible' with membership of the profession which suggests that public confidence requires removal from the register.
- 7.23 The NMC list several specific examples of conduct which may not be possible to remedy:
- criminal convictions that led to custodial sentences
  - inappropriate personal or sexual relationships with patients, service users or other vulnerable people
  - dishonesty, particularly if it was serious and sustained over a period of time, or directly linked to the nurse or midwife's practice
  - violence, neglect or abuse of patients.<sup>43</sup>
- 7.24 There is an ongoing debate as to whether some attitudes or behaviours can be remediated. Some court decisions have indicated that it is very hard to demonstrate that dishonesty has been remedied. However, some Panels, having seen the registrant, will take the view that the registrant has learned from his or her conduct and that the risk of repetition is low, suggesting that it can be remediated.
- 7.25 This approach may well be relevant where the conduct is at the lower end of the scale. As we have noted, recent decisions have recognised that the seriousness of dishonesty will vary and suggested that Panels should take this into account in looking at individual cases. There may well be some conduct which is so serious that public confidence will require removal, irrespective of any remediation. However, in less serious cases, it may well be appropriate to take account of the registrant's remediation in assessing both a registrant's impairment and the final sanction.

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<sup>42</sup> Nursing and Midwifery Council, *Aims and principles for fitness to practise*. Available at: <https://www.nmc.org.uk/ftp-library/understanding-fitness-to-practise/using-fitness-to-practise/>

<sup>43</sup> Nursing and Midwifery Council, *Is the Concern Remediable?* Available at: <https://www.nmc.org.uk/ftp-library/understanding-fitness-to-practise/remediation-and-insight/is-the-concern-remediable/>

- 7.26 The GOC highlighted the case of Hussain.<sup>44</sup> In this case, the registrant was found to have had inappropriate contact with a 17-year-old patient. It is notable that the conduct was at the low end of the scale, involving text messages but no physical contact and involved only one patient. The Panel was satisfied that the registrant had shown insight and had remediated and that the risk of repetition was low. In discussing public confidence, the Panel took all these matters into account in deciding whether there was impairment on public confidence grounds. In more serious cases, it would have been inappropriate to do this. However, it may not be inappropriate for Panels to look at the whole context when deciding on the different elements of impairment.
- 7.27 We highlighted in *Right-touch reform* the need for a better understanding about what constitutes meaningful remediation.<sup>45</sup> In our view this remains an area for further exploration.

### Role of public confidence in Interim Order hearings

- 7.28 There are specific differences in approach to whether public confidence is considered in Interim Order (IO) hearings. The GOsC and the GCC are not allowed to consider public confidence at the IO stage as these decisions must be related to a direct risk to the public e.g. child pornography, domestic violence.
- 7.29 For the other regulators the situation is more nuanced. The GMC and HCPC guidance suggest that an IO should be imposed if it is considered that public confidence has been undermined. The GMC guidance states that an IO (suspension or conditions) is recognised as appropriate where ‘immediate action must be taken to protect public confidence in the medical profession’.<sup>46</sup>
- 7.30 The Health and Care Professions Tribunal Service (HCPTS) IO guidance highlights that: ‘although there may be no evidence of a direct link to professional practice, the allegation is so serious that public confidence in the profession and the regulatory process would be seriously harmed if the registrant were allowed to remain in unrestricted practice (for example, allegations of murder, violence, rape, the sexual abuse of children or other very serious offences)’ as a justification for when an IO might be imposed on public confidence grounds.<sup>47</sup>
- 7.31 The GPhC also notes that the public interest can be a factor when considering whether to impose an IO. The GDC highlight the importance of

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<sup>44</sup> General Optical Council and Saddam Hussain, Determination of a substantive hearing 7-8 January 2019. Available at: <https://www.optical.org/download.cfm?docid=915A7D75-DDD1-4E66-A3EC90DEB726B66C>

<sup>45</sup> <https://www.professionalstandards.org.uk/publications/detail/right-touch-reform-a-new-framework-for-assurance-of-professions>

<sup>46</sup> General Medical Council, *Sanctions guidance for members of medical practitioners tribunals and for the General Medical Council’s decision makers*, p.46. Available at: <https://www.mpts-uk.org/-/media/mpts-documents/dc4198-sanctions-guidance-feb-2018-76246001.pdf>

<sup>47</sup> Health and Care Professions Council, Health and Care Professions Tribunal Service - Practice Notes, p.76. Available at: <https://www.hcpts-uk.org/globalassets/hcpts-site/publications/practice-notes/hcpts-practice-notes---consolidated.pdf>



the IO Committee abiding by the three limbs and state that in deciding whether to impose an IO the Committee must decide, ‘whether **serious** damage will be caused to public confidence in the profession and the maintenance of good standards if an order is not imposed, and whether an informed member of the public looking on would be surprised, dismayed, shocked or troubled, if the IOC did not make an order in respect of a matter that was later found proved.’<sup>48</sup>

- 7.32 Conversely, the NMC and GOC’s guidance appears to suggest that it would be rare for an IO to be imposed on the grounds of public interest being undermined, highlighting that the primary reason for an IO is direct risk of harm to patients and the need for proportionality given that the order is interim and ahead of any substantive finding on the facts.
- 7.33 When considering how public confidence might be taken into account at this stage it is important to be mindful that there may be issues of fairness and proportionality as there has been no finding on the facts. The case law generally suggests that it is likely to be very rare for an IO to be imposed on purely public confidence grounds. The case of *Sheikh v GDC* highlights the high bar that may be set for an IO on public confidence grounds.<sup>49</sup>

### Differences between professions

- 7.34 Responses from the regulators to our questionnaire highlighted that the public may have different expectations of different professions, for example whether they are public facing or not, whether they carry out high risk activities, their level of autonomy and the nature of their relationship with patients. The GPhC highlighted the view that public confidence may be affected differently for each of the pharmacy professions but also that a concern raised against a pharmacist about recreational drug use may have a greater impact on public confidence given their proximity to controlled drugs than other professions.
- 7.35 Research for the GDC by Ipsos Mori in 2017 found that the public tend to think the GDC should impose slightly more lenient sanctions to a dental nurse than a dentist, possibly influenced by the fact that a dentist is more senior and has greater responsibility.<sup>50</sup>
- 7.36 Some of our previous research supports the view that the public may differentiate some professions. For example, in research into public perceptions of dishonesty amongst health and care professionals, participants were more tolerant of dishonesty by a dentist outside of their clinical work, who they saw in similar terms to a ‘mechanic’, than social workers who they regarded as dealing in the ‘stuff of souls’.<sup>51</sup>

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<sup>48</sup> General Dental Council, *Interim Orders Guidance For The IOC*. Available at: <https://www.gdc-uk.org/about/who-we-are/committees/interim-orders-committee>

<sup>49</sup> *Shiekh v General Dental Council*, [2009] EWHC 186 (Admin). Available at: <https://www.bailii.org/ew/cases/EWHC/Admin/2009/186.html>

<sup>50</sup> Ipsos Mori, *Patient and public survey 2017 - Research report prepared for the General Dental Council*. Available at: <https://www.gdc-uk.org/about/what-we-do/research/patient-and-public-survey>

<sup>51</sup> *Research into attitudes to dishonest behaviour by health and care professionals*. Available at: <https://www.professionalstandards.org.uk/publications/detail/research-dishonest-behaviour-by-professionals>

- 7.37 Some of the Panel Chairs that we spoke to discussed the issue of how more recently regulated professions or newer professional groups are treated in FtP, with a view that the public may expect less serious outcomes for ‘younger’ professions. Another suggested that historically, some nurse registrant Panel members may have perceived a need to act more punitively in order to assert the standing of the profession relative to doctors although this was just the view of one individual in this context.
- 7.38 Both regulators and Panel Chairs highlighted their view that generally Panellists seek to hold different professions to the same standards and apply a similar approach to public confidence regardless of the profession. This is in part based on case law which ensures that all regulators base their guidance and advice on similar principles.
- 7.39 From the FtP decisions that we looked at, there are clearly different decisions made about similar kinds of behaviour across professions, however further analysis would be required to state what the reasons might be for the differing outcomes and whether these differences are justified based on the facts of the case. We have been working with University College London on a parallel project to develop a methodology to assess the factors which may affect FtP outcomes across the regulators and any work which comes out of this exercise may be helpful in advancing understanding in this area.

### **The role of case examiners**

- 7.40 We have primarily focused on how Panels consider public confidence when making final FtP decisions. However, we also note the emerging role of case examiners in agreeing undertakings with registrants as an alternative to a final Panel hearing. The GMC, GDC and NMC are currently the only regulators where case examiners have the powers to agree undertakings without sign-off by a Panel. Some other regulators have developed mechanisms for consensual agreement with registrants in advance of a Panel hearing, however we have primarily focused on the three regulators where Panel agreement is not required.
- 7.41 The guidance provided to decision makers is broadly consistent for Panels and case examiners in highlighting the importance of considering all three limbs of public protection when making a decision. Guidance provided to case examiners also highlights the importance of ensuring that undertakings are an appropriate and proportionate way to address the behaviour in question. It also states that undertakings would generally not be used when there is any significant disagreement on the allegations or whether they amount to impairment and where there is a likelihood that the registrant would be erased from the register.
- 7.42 The GDC in its guidance highlights a number of circumstances where undertakings would not be appropriate, if ‘they would fail to maintain public confidence in the professions and their regulation and/or would fail to declare and uphold proper professional standards, and as a result it may be in the wider public interest for the issues engaged by the case to be examined by a Practice Committee (this may occur where the case raises concerns about dishonesty, abuse of trust, serious violence, sexually motivated conduct, or

financially motivated conduct to the detriment of the patient). There may, however, be circumstances where undertakings would still be appropriate if they fully addressed the risk of any harm to the public and/or to the public interest).<sup>52</sup>

- 7.43 Similarly the GMC highlights the kind of serious cases which may not be appropriate to be dealt with via undertakings: 'Undertakings are not usually appropriate where a) a doctor has shown a deliberate or reckless disregard of clinical responsibilities towards patients, b) a doctor has abused a patient's trust or violated a patient's autonomy or other fundamental rights, c) a doctor has behaved dishonestly, fraudulently or in a way designed to mislead or harm others.'<sup>53</sup>
- 7.44 This indicates the embedded assumption that for cases that are sufficiently serious that a public hearing remains an important part of ensuring public confidence in a decision and in the regulatory process.
- 7.45 There are clearly key differences in the context in which case examiners carry out their work which may impact on how public confidence is taken into account. Most obviously case examiners typically work independently but in pairs with one lay and one clinical and may only meet to discuss when agreeing the proposed outcome to be offered to the registrant. This clearly differs from a Panel who will have the opportunity to deliberate together and jointly consider the case.
- 7.46 Furthermore, the reasoning behind the decisions to agree undertakings with registrants is not made public, only the record of the undertakings themselves and a published list of registrants who have agreed undertakings. It is therefore difficult to assess the factors which case examiners take into account when considering whether the public confidence is maintained by a decision.
- 7.47 An increase in the use of this form of disposal may suggest the need for a clearer published approach to how public confidence will be taken into account across the regulators and across different forms of decision making. Currently, whilst there is variable detail in Panel decisions, it is at least possible to attend a hearing or read a Panel decision to see whether public confidence was a factor in a particular outcome. With outcomes agreed consensually, including through use of undertakings, there is no public record of the rationale for a particular decision and therefore further detail on the factors considered by case examiners may be required to ensure public confidence in such a process.
- 7.48 A move to greater use of consensual disposal may also have implications for public confidence based on transparency and context of decision making and

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<sup>52</sup> General Dental Council, *Guidance on agreeing Undertakings and issuing Warnings*. Available at: [https://www.gdc-uk.org/api/files/2016-06-09\\_18\(3\)%20-%20Clean%20copy%20of%20the%20guidance.pdf](https://www.gdc-uk.org/api/files/2016-06-09_18(3)%20-%20Clean%20copy%20of%20the%20guidance.pdf)

<sup>53</sup> General Medical Council, *Guidance for decision makers on agreeing, varying and revoking undertakings*. Available at: [https://www.gmc-uk.org/-/media/documents/dc4595-ce-decision-guidance-f---guidance-on-agreeing-varying-and-revoking-undertakings\\_pdf-57741459.pdf](https://www.gmc-uk.org/-/media/documents/dc4595-ce-decision-guidance-f---guidance-on-agreeing-varying-and-revoking-undertakings_pdf-57741459.pdf)



may require consideration of alternative ways to maintain confidence when decisions are made in this way.

- 7.49 We have not been able to carry out interviews with case examiners within the scope of this piece of work or consider fully the ways in which context may affect how public confidence is considered. However, as the role of case examiners and the use of undertakings develops, this will be a key area for further exploration. We have commissioned a literature review on the impact on decision makers of moving more FtP decisions from public to private forums which we hope will provide some useful insights on any effects of a greater use of consensual disposal and provide the basis for further research.

### Views of the regulators

- 7.50 As part of this project we asked the regulators for their views on FtP Panel consideration of public confidence and for any further information to support our research. The questions that we asked are reproduced at Annex 1.

#### *The General Medical Council*

- 7.51 The GMC highlighted the role of guidance in supporting case examiners and the Medical Practitioners Tribunal Service application of the overarching objective in their decision-making including their consideration of public confidence. It stated that at impairment stage there is an assessment of whether there has been a serious or persistent breach of the guidance that gives rise to a risk to public confidence in the profession. At sanction stage there is an assessment of how serious that risk to public confidence is and in light of that seriousness the sanction necessary to address it. It reported that regular internal and external audits have confirmed that decisions are in line with guidance to decision makers.
- 7.52 The GMC has commissioned an independent review of Gross Negligence Manslaughter (GNM) led by Professor Lesley Hamilton which is due to report later this year.<sup>54</sup> As part of the review it has commissioned independent research with the public about the concept of public confidence and what factors in relation to the conduct or performance of doctors would affect public confidence in the medical profession.<sup>55</sup>
- 7.53 The GMC is currently reviewing their sanctions guidance to consider whether any changes to the guidance is needed to embed learning from the outcome of any successful appeals of MPTS decisions which may include consideration of factors that relate to public confidence.

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<sup>54</sup> Since completion of this report the Hamilton Review has published its' report, available at: [https://www.gmc-uk.org/-/media/documents/independent-review-of-gross-negligence-manslaughter-and-culpable-homicide---final-report\\_pd-78716610.pdf](https://www.gmc-uk.org/-/media/documents/independent-review-of-gross-negligence-manslaughter-and-culpable-homicide---final-report_pd-78716610.pdf)

<sup>55</sup> *Independent review of gross negligence manslaughter and culpable homicide*. Available at: <https://www.gmc-uk.org/about/how-we-work/corporate-strategy-plans-and-impact/supporting-a-profession-under-pressure/independent-review-of-medical-manslaughter-and-culpable-homicide>

### ***The Nursing and Midwifery Council***

- 7.54 The NMC consulted on a new approach to fitness to practise in 2018 which included research with the public. As part of the approach they sought to articulate a proposed threshold for how public confidence should be interpreted in decision-making about the FtP of nurses and midwives. This is based around a test of whether the behaviour of the registrant in question is likely to damage trust in health professionals and make the public less likely to seek treatment from a health professional.
- 7.55 The NMC has also indicated its intention to avoid pursuing cases on grounds of public confidence only, if the clinical failing which is the primary subject of the concern has been effectively remediated unless the behaviour was of sufficient seriousness.
- 7.56 The NMC also provides guidance to all its decision makers, in particular on the issue of seriousness which it sees as having a key influence on whether to take regulatory action.
- 7.57 It indicated a view that the conflation within case law of public confidence with the wider public interest (upholding standards and maintaining confidence) may lead to a more binary approach where the public interest is 'balanced' against direct public protection when considerations may be more nuanced.

### ***The General Dental Council***

- 7.58 The GDC reported that it views public confidence as being central to its FtP decision-making and that maintenance of public confidence has been a key aspect of the changes it has been making to their processes since the publication of *Shifting the Balance*, the GDC's action plan for reform without legislative change.<sup>56</sup>
- 7.59 It is about to embark on a research programme in partnership with the other regulators on the topic of seriousness in FtP decision making to inform future considerations about how to calibrate decisions in relation to misconduct. This research will also consider how seriousness relates to the three limbs of public protection including public confidence in dental professionals. It will also seek to provide an evidence base for a proportionate regulatory approach and to identify opportunities for a common approach across healthcare regulation.

### ***The General Pharmaceutical Council***

- 7.60 The GPhC highlighted the role of guidance it provides in supporting its' decision makers in considering the impact of different issues including public confidence at different stages of the FtP process. It also highlighted the importance of regulators taking swift, fair and proportionate action as being crucial for maintaining public confidence in the profession as well as in the regulator and the regulatory process.

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<sup>56</sup> General Dental Council, *Shifting the Balance*. Available at: <https://www.gdc-uk.org/about/what-we-do/shifting-the-balance>

7.61 It highlighted the challenge for regulators in seeking to define what public confidence is. Further, the GPhC outlined the lack of evidence to establish what behaviours by a pharmacy professional and when action or lack of action by a regulator might impact on public confidence. It also stated the challenge in assessing effectiveness in this area due to the lack of an agreed way of measuring public confidence.

#### ***The General Optical Council***

7.62 The GOC stated that it does not give public confidence a special status in FtP decision-making but instead seek to balance it equally as a consideration when presenting a case to a Panel. It stated that to give public confidence too high a status could give the appearance of being too harsh and refer to the decision of Grant in considering whether a finding of impairment is required on public interest grounds.

7.63 The GOC states that public confidence is broadly dealt with in the same way at impairment and sanction stages, but that public confidence can be more relevant to certain sanctions and actions of the registrant.

#### ***The Health and Care Professions Council***

7.64 The HCPC highlighted that its Indicative Sanctions Policy (ISP) touches on both public confidence in the profession in question and public confidence in the regulatory process. The ISP emphasises that due consideration must be given to both of these issues.

7.65 The HCPC references two distinct areas mentioned with the ISP where public confidence is particularly at risk, which includes cases involving child pornography offences and criminal convictions. It states that in cases where public confidence may be undermined, interim orders, substantive suspensions and strike off orders may be required.

7.66 In Summer 2019, it will be publishing a revised ISP which is underpinned by research carried out with the public.<sup>57</sup> It also highlights the role that genuine insight and successful remediation can have in mitigating the risk to the public and addressing public confidence issues.

#### ***The General Osteopathic Council***

7.67 The GOsC stated that consideration of public confidence is of relevance throughout the FtP decision-making process. Its practice note for decision makers on the duty to act in the public interest states that the public interest, including public confidence is relevant to:

- Whether to hold a hearing in private
- Whether to proceed in the absence of a registrant
- Whether to grant a request for postponement/adjournment of a case
- Whether to grant a request for a case to be heard by the Health Committee (HC) rather than the Professional Conduct Committee (PCC).

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<sup>57</sup> Health and Care Professions Council, *The Indicative Sanctions Policy - the Public's View*. Available at: <https://www.hcpc-uk.org/resources/reports/2018/indicative-sanctions-policy---the-publics-view/>

Only the PCC can issue a strike off order. Consequently, if the case is sufficiently serious to warrant the registrant being removed from the register it should be referred to the PCC, not the HC.

- 7.68 The PCC can make findings of Unprofessional Conduct (UPC), professional incompetence or materially relevant criminal convictions, all of which will automatically lead to a sanction. However, for UPC the GOsC rely on the judgment of *Spencer v GOsC* which means that the PCC must consider whether ‘there is moral blameworthiness in the registrant’s conduct and a degree of opprobrium that is likely to be conveyed to the ordinary intelligent citizen.’<sup>58</sup>
- 7.69 For findings of both UPC and professional incompetence, the Panel must consider whether on the facts proven, the public interest requires a certain finding. Based on the GOsC’s Hearings and Sanctions guidance the PCC must apply the principle of proportionality, weighing the public interest against the interests of the registrant. For health cases the guidance makes it clear that direct public protection is the priority and the wider public interest may play a less significant role.
- 7.70 The GOsC also highlighted that its’ guidance suggests that cases should not be dealt with by consent if public confidence would be substantially undermined. They also stress the importance of clear reasoning by Panels to ensure decisions are accessible.

### *The General Chiropractic Council*

- 7.71 As with the GOsC, the GCC does not operate on the basis of impaired fitness to practise but instead on UPC, professional incompetence or a criminal conviction, all of which will usually lead to a sanction. The GCC states that conduct which falls below but not far below the standard will not usually result in a finding of UPC. The GCC stated that the importance of maintaining public confidence in the profession is covered within the standards of conduct, performance and ethics for chiropractors.
- 7.72 Public confidence is considered at all stages and is covered in guidance to decision makers. However, the GCC states that it will usually be of most relevance at sanction stage.
- 7.73 The GCC reported that it is unable to consider public confidence when deciding whether to suspend a chiropractor on an interim basis as this must relate solely to whether it is necessary to protect members of the public.
- 7.74 The GCC noted the challenge of accurately assessing impact on public confidence when the public is not homogenous, and views are constantly shifting. It also highlighted that the views of Panellists can differ significantly on how much of an impact certain behaviour may have on public confidence and the fact that certain views and perspectives may be over-represented amongst Panellists which may have an impact on how certain behaviours are assessed. It suggested that further research to assess the impact of types of

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<sup>58</sup> *Spencer v GOsC*, [2012] EWHC 3147 (Admin). Available at: <https://www.bailii.org/ew/cases/EWHC/Admin/2012/3147.html>

behaviour on public confidence would aid good decision making and consistency between regulators.

- 7.75 The GCC is carrying out a full review of their approach to public confidence in summer 2019 which may review the way that public confidence is considered by Panels.

***The Pharmaceutical Society of Northern Ireland***

- 7.76 The PSNI is the only regulator which does not have the standardised wording of the single overarching objective and three limbs of public protection in its legislation, introduced for the other eight regulators in 2015-16. It stated however that public confidence is considered throughout the process and decision makers are supported with relevant guidance.
- 7.77 The PSNI notes that public confidence is relevant to decisions about whether a case is heard in public and ensuring that decisions are publicly accessible. When considering whether to make a finding of impairment, the PSNI's Statutory Committee considers whether the behaviour has 'brought, or might bring, the profession of pharmacy into disrepute'. However, when deliberating on the appropriate sanction, the Panel considers the three limbs in the same way as the other regulators.
- 7.78 The PSNI noted that public confidence is very difficult to measure and assess as it is a very fluid and changeable concept and welcomed the Authority's research with the public in this area and the further research being carried out.

## 8. Conclusions and recommendations

- 8.1 This report is intended to provide an initial review of approaches to public confidence in FtP decision-making as a contribution to the ongoing discussion about how regulators can effectively and consistently ensure public confidence in their decisions about healthcare professionals.
- 8.2 Although most regulators now share a common overarching objective, their legislation remains markedly different. A consistent legislative framework would aid greater consistency and should lead to greater harmonisation of guidance and may address some of the variations we have observed.
- 8.3 Some key findings from our research include:
- Public confidence is relevant to three main elements of final fitness to practise decisions – deciding whether a registrant is impaired, deciding on the appropriate sanction and the robustness of the regulatory process for example holding hearings in public and publishing clear reasoned decisions.
  - Although eight of the nine regulators are now subject to a shared overarching objective they continue to operate under separate legislation. This is reflected in guidance and standards, some of which contain some significant differences. In addition, there is no single agreed definition of what public confidence is, or what behaviours or regulatory action may impact upon it in the context of health professional regulation.
  - There is variable use of language referring to public confidence with phrases such as 'reputation of the profession' and 'bringing the profession into disrepute' still used in guidance and standards. This is out of step with modern regulation, which places patients and the public at its heart and aims to maintain their confidence in the professionals who treat them, rather than to maintain the reputation of the profession for its own benefit and may lead to perceptions of an inconsistent or outdated approach. There is also conflation of public confidence with the wider public interest which is understood in different ways.
  - There is a limited consensus on the types and seriousness of behaviours which are likely to damage public confidence and the public have different views in relation to different professions. This is supported by our own and regulators' research with the public and our interviews with Panel Chairs which suggests the public may be more tolerant of certain behaviours amongst some professions than others.
  - Case law in relation to health professionals provides some important and helpful principles which Panels should use when considering how to approach public confidence. A more detailed analysis across different professions outside healthcare might yield further insights.
  - There are variable levels of detail in Panel reasoning even in FtP decisions considering similar types of behaviours. Whilst we recognise the feedback from Panel Chairs that there are some practical reasons for this and that they did not always reflect the detailed and nuanced



discussions held, this variability makes it difficult to compare judgments and may give rise to perceptions of inconsistency that might not exist.

- 8.4 We conclude that there are differences in approach across the regulators which are shaped by a range of factors. However, it is unclear what impact this has on the decisions made and whether this impacts markedly on FtP outcomes. A larger scale case analysis would be needed to assess this.
- 8.5 Some variation in approach to public confidence is likely to be justified as views shift over time and the public are not a homogenous mass. As highlighted by Lord Reed, the concept of ‘the man on the Clapham Omnibus’ is flawed. It may therefore be more helpful to think of a group of people with a range of reasonable perspectives. In many cases there is legitimate disagreement between individuals and no ‘right’ answer as individual cases will be based on different facts and considerations. FtP decisions taking into account the impact on public confidence may therefore fall within a reasonable range. However, there is scope for greater ‘coherence’, if not absolute consistency, which would strengthen public confidence in FtP decision making and satisfy the need for fairness. Decisions should make clear how and why different considerations, such as public confidence are a factor.
- 8.6 As we have reported, there is a significant amount of recent and ongoing work in this area amongst the regulatory bodies which may have a direct or indirect impact on our understanding of public confidence as a concept and the kinds of behaviour and levels of seriousness which may have an impact on public confidence. This includes the output from the Hamilton Review and the GDC’s planned programme of work on seriousness in FtP as well as work by the HCPC to underpin revisions to its Indicative Sanctions Guidance and a planned review by the GCC of its FtP approach.
- 8.7 There is also the work recently carried out by the NMC to underpin its new FtP strategy, including the introduction of what appears to be the clearest threshold for the consideration of public confidence that currently exists, whether behaviour would have an impact on the willingness of the public to see a nurse or a midwife. This change in approach has not yet had time to fully bed in, or yet be tested in the Courts and we have highlighted possible challenges with this definition.

## **Recommendations**

- 8.8 With the above conclusions in mind we suggest that it would be premature to seek to provide definitive guidance in this area at this stage. We have however made some recommendations to support a move towards a more coherent approach.

## **Definition and terminology**

- 8.9 We heard different views on whether a definition of public confidence would be helpful or not with some arguing that it is impossible to have further consistency in this area without further clarity and others stating that further defining the concept would risk limiting Panellists’ discretion in how they apply this in decision-making. A starting point would be to define the focus

and purpose – for the public to be able to trust and have confidence in those that care for them rather than for the profession to maintain a good reputation for its own benefit. We recommend that regulators consider providing a clearer statement along these lines. We note this is something that some of the regulators already touch on in their guidance.

- 8.10 We have noted the variable and sometimes outdated use of language in regulators' guidance and standards. This includes references to the 'reputation of the profession' and bringing the profession into 'disrepute'. We recognise that this is partly based on case law and the challenge of defining public confidence as a concept. However, we are of the view that this is unhelpful as it may lead to different interpretations. It would be beneficial for regulators to consider standardising language in guidance and documentation, using the shared wording from the legislation as the basis.
- 8.11 To provide a deeper understanding of what public confidence is and how it is applied, we suggest that a wider analysis of the case law would be beneficial and may provide some significant further insights, particularly from other professional sectors and from appeals by registrants to the Court.

#### *Types of behaviour*

- 8.12 Whilst the case law and FtP decisions provide an indication of the kinds of behaviours which are likely to raise specific public confidence considerations, there is a need for more extensive research with the public to understand their views on different kinds of misconduct and to further explore any potential differences in views of different professions. This should build on any recent and upcoming research carried out by the regulators. As public confidence clearly shifts, an exercise of this nature would need to be repeated regularly and its output used to feed into guidance for decision makers. This exercise should also ensure that any differences in public views across the UK are captured.
- 8.13 We have noted from our review both different levels of detail provided on the public confidence considerations in the reasoning in FtP decisions for different kinds of misconduct and different views on whether public confidence is primarily a consideration for decisions on impairment, sanction or both. We suggest a case analysis exercise examining whether public confidence is considered more prominently, regularly or in-depth across various case types and registrant categories and looking at the difference in approach between impairment and sanction.

#### *Context and background of decision makers*

- 8.14 Ultimately decision makers must use their judgement to decide how to most appropriately maintain public confidence in their decisions. However, as noted the views of Panellists and the Courts are inevitably shaped by their background and experience. Although Panel members have assured us that they exercise the utmost professionalism in carrying out their role and seek to avoid channelling their own views directly, regulators must play a role by ensuring that Panels have access to a wide range of public views to broaden



their thinking and by seeking to ensure that Panels are drawn from a sufficiently diverse pool.

- 8.15 Finally, we have touched in this report on the emerging role of case examiners and the increase in consensual disposal. This may in itself have implications for public confidence due to the context in which decisions take place, in private rather than in a public hearing. We have not been able to consider in detail differences in the way that public confidence is taken in to account by case examiners compared to Panels. However, given the trend towards this kind of disposal is likely to continue we suggest that a more detailed comparison of approach in this area would be beneficial.

## 10. Annex 1 – Survey questions

- 10.1 The questions below were included in a questionnaire below was sent to all nine regulators directly overseen by The Authority. It was sent out on 18 January 2019, and the regulators were given four weeks to respond.

### **Project 1 - public confidence**

- 10.2 We are reviewing how public confidence is considered and assessed across the regulators when reaching final fitness to practise decisions about individual healthcare practitioners to ensure that public confidence is maintained in line with the second limb of public protection. We are currently reviewing guidance for decision makers, relevant Panel and Court decisions and any relevant research.

#### **Question 1**

- 10.3 How is public confidence currently considered and taken into account when final fitness to practise decisions are made? Is there any difference on how public confidence is considered at the impairment and sanction stage?

#### **Question 2**

- 10.4 What do your fitness to practise Panels (or case examiners) do to balance public confidence alongside the other two limbs of public protection (protecting patients and upholding professional standards)?

#### **Question 3**

- 10.5 Do you have any examples of fitness to practise decisions which may be illustrative of how public confidence is considered by your fitness to practise Panels or case examiners? This would include decisions which outline in further detail any considerations that may impact on public confidence.

#### **Question 4**

- 10.6 Do you have any observations on whether consideration of public confidence varies depending on the category of profession being considered?

#### **Question 5**

- 10.7 Are you currently carrying out any relevant work in this area or do you have any guidance or documentation not publicly available which relates to consideration of public confidence by Panels or case examiners that you would be willing to share?

#### **Question 6**

- 10.8 Do you have any other comments to make on this topic?

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## Summary of the PSA's report on 'How is public confidence maintained when fitness to practise decisions are made?'

### 1. Introduction

- 1.1. The Williams Review<sup>1</sup> (2018) highlighted a lack of understanding about the types of behaviour and failings that might lead to the public losing confidence in the profession and therefore lead to grounds for regulatory action. It recommended that the PSA work with professional regulators and 'review how the impact on public confidence is assessed in reaching fitness to practise decisions about individual healthcare professionals, and develop guidance to support consistent decision making in this area'.
- 1.2. The PSA undertook its review in early 2019 and published a report<sup>2</sup> of its findings and recommendations in April 2019. Whilst the PSA included some consideration of public confidence considerations by case examiners in agreeing undertakings with registrants, it primarily focused its attention on how public confidence is assessed in fitness to practise (FTP) decisions by FTP panels.
- 1.3. In undertaking its review, the PSA reviewed:
  - guidance provided by the regulators for decision makers;
  - relevant FTP panel decisions; and
  - relevant research and policy papers related to public confidence.

### 2. Factors influencing public confidence

- 2.1. The PSA recognised a number of inconsistencies across regulators' FTP processes, including:
  - the definition of public confidence, and its interpretation, weighting and application when deciding fitness to practise cases;
  - the range of sanctions available; and
  - the use of language in guidance.
- 2.2. It was acknowledged that this was partly due to the 'outdated' legislation governing regulators' FTP frameworks. Although eight of the nine UK health and care professional regulators now share a common overarching objective,

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<sup>1</sup> Gross negligence manslaughter in healthcare - The report of a rapid policy review. Available at: <https://www.gov.uk/government/groups/professor-sir-norman-williams-review>

<sup>2</sup> How is public confidence maintained when fitness to practise decisions are made? (April 2019) Available at: [https://www.professionalstandards.org.uk/docs/default-source/publications/how-is-public-confidence-maintained-when-fitness-to-practise-decisions-are-made.pdf?sfvrsn=c8c47420\\_0](https://www.professionalstandards.org.uk/docs/default-source/publications/how-is-public-confidence-maintained-when-fitness-to-practise-decisions-are-made.pdf?sfvrsn=c8c47420_0)

to 'protect, promote and maintain the health, safety and wellbeing of the public', each regulators' legislation 'remains markedly different'. In addition, the report highlighted that 'understanding of what is meant by 'public confidence in the profession' has shifted over time.'

- 2.3. The report notes that the current Government intends to reform the regulators' legislation. In July 2019 the Government published its response<sup>3</sup> to the consultation 'Promoting professionalism, reforming regulation'<sup>4</sup>. In this they have committed to work with regulators and stakeholders aiming to develop secondary legislation to enable the health and social care regulators to:
- a) modernise and streamline FTP processes;
  - b) better support registrants; and
  - c) be more responsive and accountable.
- 2.4. This development is currently at its infancy with the Government intending to consult on and consider the implications of the changes they have set out before implementing them. Regulators will continue to operate within their respective statutory framework until the passing of legislation that brings these changes into effect. In the interim, therefore, this remains a barrier to consistency.
- 2.5. The report also took note of the work regulatory bodies have carried out in this area and acknowledged its potential impact on the understanding of public confidence. Among the work referenced in the report was the HCPC's commissioned research 'The Indicative Sanctions Policy – The Public's View'. This explored the public's views on the principles that underpin the Indicative Sanctions Policy, had a particular focus on public confidence, and provided evidence which informed changes to the Policy.

### **3. Findings and recommendations**

- 3.1. In light of the work by regulators in this area, the PSA thought it would be premature to provide concrete guidance at this stage and instead made recommendations to support a move towards 'a more coherent approach'. These recommendations and their relevance to the work of the HCPC are discussed below.

#### *Statement of focus and purpose*

- 3.2. The PSA found that, despite sharing a common overarching objective, there is no 'clear, consistent definition' of what public confidence is or how it should be interpreted when making FTP decisions across the regulators. Furthermore, the PSA is of the view that the concept of public confidence has moved from a 'consideration of the reputation of the profession for its own benefit', towards a

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<sup>3</sup> Available at:

[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/820566/Promoting\\_professionalism\\_reforming\\_regulation\\_consultation\\_reponse.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/820566/Promoting_professionalism_reforming_regulation_consultation_reponse.pdf)

<sup>4</sup> Available at:

[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/655794/Regulatory\\_Reform\\_Consultation\\_Document.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/655794/Regulatory_Reform_Consultation_Document.pdf)

broader consideration of the public's need to have confidence in the professionals that treat them.

- 3.3. In light of this the PSA recommended regulators to define the 'focus and purpose' of public confidence as a 'starting point' and to consider providing a clearer statement along these lines.

The research we commissioned in 2017 to inform revisions to the Indicative Sanctions Policy (now known as the Sanctions Policy), sought to establish public views of the range of sanctions available and which would be appropriate for serious cases. It also set out to understand what the public felt the role of insight, remorse, apology and remediation is when determining sanction.

**Action: We propose building on the findings of this research, and undertaking engagement with stakeholders to establish further clarity on the focus and purpose of public confidence.**

#### *Standardised language and definition*

- 3.4. The PSA identified variable and outdated use of language in regulators' guidance and standards<sup>5</sup>. The language was found to be out of step with modern regulation and unhelpful as it may lead to different interpretations. The term 'public confidence' was further found to be conflated with the 'wider public interest' and understood in different ways.
- 3.5. However, the PSA recognised that this was partly influenced by case law and the challenge of defining public confidence as a concept. As such, the PSA recommended regulators to consider 'standardising language in guidance and documentation, using the shared wording in the legislation as the basis.

The language used in our Standards, policies and guidance aligns with the overarching purpose outlined in the legislation; our Sanctions policy refers to 'public confidence in the profession' and our Standards refer to both confidence in the 'profession' and the professional (standard 9.1).

**Action: We believe this language is in line with the PSA's findings, but agree that a consistent approach across the regulators to provide clarity on the definition of public confidence would be helpful, and so we propose engaging other regulators to progress this.**

#### *Analysis of case law*

- 3.6. The PSA identified nuances in the way that the panellists of different regulators apply or define public confidence in the context of fitness to practise despite

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<sup>5</sup> The General Medical Council refer to the 'reputation of the profession' and 'bringing the profession into disrepute' in their guidance.



sharing a common overarching objective and shared body of case law. This was driven by various factors, including:

- a. difference in legislation;
  - b. the range of sanctions available; an
  - c. the public's expectations of different professions.
- 3.7. Given the limited scope of the review, the impact of such variations on FTP outcomes could not be determined. As such, a wider analysis of the case law was recommended in order to provide further insight into the approach taken by other sectors and from registrant appeals to the court. The PSA proposed this may enable a 'deeper understanding of what public confidence is and how it is applied'.

**Action: We will contribute information and resources to any future cross-sector analysis of case law to establish a better understanding of public confidence and how it should be applied.**

#### *Research on public views*

- 3.8. From research, the PSA noted the public views on regulatory outcomes varied significantly. In the context of professional health regulation, it was found to be challenging to identify the view of an 'average informed member of the public'<sup>6</sup>.
- 3.9. The PSA therefore recommended further research to be undertaken to better understand the public's views on different kinds of misconduct and potential differences in the views on different professions. The PSA further noted the ever-changing view of the public and highlighted the need for such exercise to be repeated regularly, and for outputs to feed into guidance for decision makers.

**Action: we believe the research we commissioned in 2017, to establish the public's view on the principles underpinning the Indicative Sanctions Policy, provides helpful evidence to support our approach to public confidence. However, we propose building on this research in 2020/21 to gain a more detailed understanding of this area.**

**In addition, subject to funding, we envisage developing a service user and carer engagement platform in the long term to make better use of data, intelligence and research evidence to drive improvement and engagement. Once developed, we believe this platform will enable the HCPC to better understand the views of the public in line with the PSA's recommendation.**

**We also regularly undertake stakeholder engagement research to explore how our stakeholders perceive the HCPC. We could use future research of**

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<sup>6</sup> The severity of the sanction required to maintain and preserve public confidence in the profession 'must reflect the views of an informed and reasonable member of the public' *Giele vs GMC*, [2005] EWHC 2143 (Admin). Available at: <https://www.bailii.org/ew/cases/EWHC/Admin/2005/2143.html>

**this kind to explore stakeholder’s perceptions of FTP, and concepts such as public confidence.**

*Cross-sector analysis of consideration of public confidence*

- 3.10. From their discussion with panel chairs, the PSA observed differing views and levels of detail provided on whether public confidence is primarily a consideration for decisions at the impairment stage, sanction stage or both. They observed ‘nuances’ in the guidance provided to panels on this point by regulators despite case law which stresses the importance of considering the three limbs of public protection at all stages of the Panel decisions<sup>7</sup>
- 3.11. The PSA recommended a case analysis exercise with a particular focus on how prominently public confidence considerations feature across different types of cases, registrant categories and looking at the difference in approach between impairment and sanction.

We welcome the PSA’s recommendation of a case analysis and can see the benefits in that it may inform the HCPC of the impact of its current guidance to panel members and what further work is needed to maintain public confidence.

**Action: we will engage with the PSA and other regulators in any work to progress this cross-sector analysis.**

*Context and background of decision makers*

- 3.12. The PSA observed that the approach of panellists on factors affecting public confidence is not universal and will inevitably be shaped by their background and experience to some extent. Although assurances were provided that panel members exercised due diligence to ensure they considered the correct factors in arriving at a decision, the PSA recommended that regulators must play a role to ensure panels have access to a diverse range of public views to broaden their thinking and seek to ensure that panels are drawn from a sufficiently diverse pool.

As part of our 2019 Equality, diversity and inclusion action plan we outlined our intention to develop the range and depth of our diversity monitoring data for the recruitment and retention of partners. We committed to using this data to identify gaps to inform targeted action.

**Action: we propose analysing the data in the context of the PSA’s findings to establish clear objectives and actions in our 2020 Equality, diversity and inclusion action plan.**

<sup>7</sup> GMC v Cohen, [2008] EWHC 581 (Admin). Available at: <https://www.bailii.org/ew/cases/EWHC/Admin/2008/581.html>

### *Consensual disposal in FTP outcomes*

- 3.13. The primary focus of the PSA's review was to assess how panels consider public confidence when making final FTP decisions. However, the PSA briefly highlighted the emerging role of case examiners in agreeing undertakings with registrants as an alternative to a substantial hearing (consensual disposal).
- 3.14. They felt that the private nature of decisions to agree may have implications for public confidence because of a perceived lack of transparency. The PSA propose that a detailed comparison of approach in this area would be beneficial given the trend towards this disposal is likely to continue.
- 3.15. The PSA has commissioned a literature review of the impact on decision makers of moving more FTP decisions from public to private and they hope this will provide some useful insights on any effects of a greater use of consensual disposal.

The HCPC has a consensual disposal mechanism through which a registrant and the HCPC can seek to conclude a case without a panel hearing. However, the ultimate decision of a case being resolved in this manner rests with the panel.

We currently issue guidance to Panel members in this area in the form of a practice note. This guidance advises them not to agree to an application for consensual disposal unless they are satisfied that the 'appropriate level of public protection is being secured' and 'doing so would not be detrimental to the wider public interest'.

**Action: we will engage with, and contribute to, the PSA's research in this regard as appropriate.**