



# GREY AREAS NEWSLETTER

A COMMENTARY ON LEGAL ISSUES AFFECTING PROFESSIONAL REGULATION

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## Policy Making for Regulators

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May 2024 - No. 290

Surprisingly little has been written about policy making by regulators. Thus, the UK's Professional Standards Authority's (PSA) [consultation paper](#) on the topic is a welcomed introductory read.

The context for the paper is legislative reform that will remove the requirement for Privy Council (government) approval of rules enacted by health and social work regulators. While the paper addresses formal rules (e.g., registration requirements, the discipline process), it suggests that similar considerations apply to policy and guidance documents including standards of practice. The PSA states that it does not have a formal role in approving rules made by regulators. However, its oversight role means that its assessment of and reporting on regulators will likely involve comments about their rule making process.

The beginning point is that all rules must advance the public interest mandate of regulators, namely protecting the health and safety of the public, promoting public confidence in the profession, and facilitating

professional standards of conduct for registrants.

However, the main thesis of the paper is that rule making is all about principles and processes.

The core principles are:

- Consistency with the public interest mandate of the regulator;
- Consistency with right-touch regulation concepts (e.g., proportionate to the risk of harm);
- Promotion of equity, diversity and inclusion;
- Consistency with the rules of other regulators;
- Agility where swift changes may be required; and
- Enabling multi-disciplinary teams and practice innovation.

The PSA reiterates the importance of consistency amongst regulators. In many areas differences in approach are difficult to explain (e.g., information published on the public register, complaints, investigations,

and disciplinary procedures). Unjustified disparities undermine public confidence in regulators and have resulted in controversies and external reviews expressing concern about how regulatory outcomes could be so different. The PSA references an [earlier study](#) it had commissioned on the topic.

The PSA accepts that there were some areas in which different approaches could be justified. For example, different rules could be appropriate where there are variances in: the degree of risk; the extent of interacting with patients; the roles within teams; and the speed of change amongst professions. However, those differences should be exceptional.

Before delving into the specific process for rule making, the PSA reviews the risk management approach to right-touch regulation in general, which it summarizes as follows:

- Identify the problem before the solution
- Quantify and qualify the risks
- Get as close to the problem as possible
- Focus on the outcome
- Use regulation only when necessary
- Keep it simple
- Check for unintended consequences
- Review and respond to change.

The PSA emphasizes the value of consultations when making rules, especially since the safety mechanism of a Privy Council review would no longer be in place. External groups and individuals could add expertise and perspectives that might not be inherent to the regulator. Also, those affected by a rule should be permitted to comment on it.

However, there is an art to effective consultation. Those consulted need to know the precise subject of the consultation and what feedback the regulator is seeking. Those consulted also need to have a readily accessible way of responding. Special measures are necessary to obtain the perspective of those typically under-represented in the consultation process. There should be a report back to those who are consulted.

The frequency and extent of consultation by several regulators could impose a cumulative burden on those being consulted. And the ability to obtain meaningful input can subsequently be impaired. Thus, the manner of consultation (formal, informal, targeted) and coordination amongst regulators should be carefully considered.

The PSA urges regulators to keep a record of their consultation plans and of the processes followed to enable accountability.

The PSA references a model [guidance document](#) issued by the Cabinet Office on consultation principles.

The PSA also notes that there should be considered and robust governance choices for the rule making process. This may be particularly important where regulators of different professions are consolidated. Governance affects the criteria and process for selecting Board members to ensure policy making skills. Governance also involves a clear delineation of the role of staff, advisory groups, and the Board in policy making.

The consultation ended in April of 2024. Presumably the PSA will model the principles it espouses in its own consultation process. The final version of the document will be of interest to many regulators.

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