

Modernising fitness to practise: changes to the Fitness to Practise Rules 2004

Response to the NMC consultation

December 2016

1. Introduction

- 1.1 The Professional Standards Authority for Health and Social Care promotes the health, safety and wellbeing of patients, service users and the public by raising standards of regulation and voluntary registration of people working in health and care. We are an independent body, accountable to the UK Parliament.
- 1.2 As part of our work we oversee nine health and care professional regulators – including the Nursing and Midwifery Council (NMC) and report annually to Parliament on their performance. We also appeal fitness to practise cases to the courts if outcomes are insufficient to protect the public. More information about our work and the approach we take is available at www.professionalstandards.org.uk.

2. General comments

- 2.1 We welcome the opportunity to comment on the proposals to amend the NMC's Fitness to Practise Rules.
- 2.2 Consensual disposal, effectively operated provides regulators with the ability to protect the public, without having to go down an adversarial route that can be expensive, lengthy, and unnecessarily stressful for both service users and registrants.¹ We therefore support the NMC's proposals to expand the powers of case examiners – and investigating committees – to undertakings, warnings and advice.
- 2.3 We nevertheless consider that there are some risks with the proposals which need to be addressed. These are particularly likely to arise in situations where there is a heavy caseload and where there are incentives for cases to be dealt with as quickly as possible or for the caseload to be reduced.
- 2.4 We have a general concern that there is insufficient detail within the consultation document to allow a full assessment of the appropriateness or otherwise of the NMC's intentions. For example, there was little information provided about the thresholds for different disposal options – an essential aspect of the framework. We found that certain aspects of the process were unclear, such as at what point in the investigation stage undertakings could be

¹ We published research in 2013 that showed public support for alternatives to final panel hearings, provided transparency was maintained. This research is available here: <http://www.professionalstandards.org.uk/publications/detail/alternatives-to-final-panel-hearings-for-fitness-to-practise-cases-the-public-perspective>.

offered (for example, what is meant by 'initial consideration of the case?'), and when and how registrants would be given the opportunity to respond to the possibility of a particular disposal option. We understand that there is still time for further development of the proposals before they are implemented, but a basic outline of the process and decision points would have been extremely helpful. Without these it is hard to judge the fairness, transparency, and robustness of the process.

The quality of investigations

- 2.5 It is essential that a proper investigation takes place to ensure that the full facts of the case may be ascertained. The Authority currently sees a number of cases where it has concerns that the investigation appears to have been inadequate or where the charges brought do not reflect the gravity of the conduct involved or the full risk to patients.

Ensuring that underlying concerns are addressed

- 2.6 We also see cases where conditions have been imposed, but these have proved to be inadequate: an example is where, despite complying with conditions which aim to address incompetent dispensing of drugs, the registrant continues to make mistakes. We would expect that, when similar problems occur, the case will be referred to a full hearing. The consultation is, however, silent on this point.

The importance of insight

- 2.7 The consultation rightly makes it clear that it is important that there should be insight and admission of the facts by the registrant. Insight, in particular, is not always easy to verify and there is a possibility that a registrant may provide suitable written submissions in order to avoid a hearing or potentially more serious sanctions. One of the major strengths of panels lies in their ability to make judgements from seeing the registrant and assessing the genuineness of any insight demonstrated. Case examiners will need to be diligent in assessing the genuineness of insight.
- 2.8 In our view, there can be far greater confidence where the registrant admits the facts immediately and demonstrates insight at that stage, than when this arises after a prolonged discussion or where facts which have a reasonable prospect of being proved have been denied. In our view there needs to be detailed guidance for Case Examiners on the assessment of insight and this should be the subject of consultation.

The importance of the public interest

- 2.9 There is an apparent lack of consideration of the wider public interest throughout the document, and in particular in the section on undertakings. The public interest can be engaged in a number of circumstances. First, conduct outside clinical practice may be sufficiently serious to suggest that the registrant's membership of a profession can be called into question (see *Bolton v The Law Society*), because action is required to maintain public confidence in the profession or to uphold professional standards. A sanction is a way of

sending a marker to the profession and to the public that such conduct is unacceptable and will be treated seriously by the regulator. Examples of such behaviour are where the registrant has committed a serious criminal offence, or where there is an element of dishonesty in the conduct.

- 2.10 Secondly, poor clinical practice can, of itself, be sufficiently serious for there to be a public interest element to any finding of impairment or sanction. Finally, there can also be a public interest in a public hearing as a way of maintaining public confidence in the integrity of the regulatory process.
- 2.11 Panels are, in our view, particularly appropriate for judging cases where there is a public interest component and it appears to us that there should be a presumption that such cases should be heard by a panel. This applies particularly where the misconduct is serious. We also suggest that allegations of dishonesty may not be suitable for this process, even if admitted.
- 2.12 With this in mind, we are concerned at the proposal that the only cases which should be automatically excluded from the process are those where erasure is a 'real possibility'. This is an excessively high threshold. In our experience, cases where a panel has decided to suspend have tended also to have a strong public interest element and we consider that cases where there is a likelihood that a panel might decide that the registrant ought to have a period out of practice as a condition of registration ought to be heard by a panel.

The importance of oversight and accountability

- 2.13 Our main concerns however, relate to the lack of independent oversight of case examiner decisions to agree undertakings. According to the consultation document, these are cases where there is a real prospect of finding impairment, and where the registrant is deemed to present a current risk to service users. The only cases that would be exempt are where there is a real prospect of a registrant being struck off – meaning that cases that are expected to lead to a suspension or conditions could be taken out of our jurisdiction under s.29 of the National Health Services Reform and Health Care Professionals Act 2002. We would have no powers to appeal them if they were insufficient to protect the public. This is particularly so given our concerns about possible inadequate investigation or errors in weighing insight. We not believe that in considering these new powers for the NMC, the government intends to limit or restrain the scope of s29.
- 2.14 It needs to be remembered that, at present, the Authority's power to refer cases to the relevant court under s.29 is an important long-stop in protecting patients and the public interest where sanctions are insufficient to protect the public. The effect of these proposals is that this protection will be lost in those cases determined under the new procedure. While the Authority can monitor the way in which the procedure works, it will not be able to take action in individual cases and, as a result, the risk to public protection will increase.
- 2.15 Either the NMC's proposals will need to be modified in this regard or the Government will need to amend the Authority's legislation so that we can retain powers to scrutinize any final disposal decisions where there is a case to answer, whether they are made by a panel or by case examiners.

- 2.16 There is little information about how all case examiner decisions – issuing advice and warnings and agreeing and varying undertakings – would be quality assured, and compared for consistency of outcome. The lack of scrutiny by the public, as well as by the Professional Standards Authority, makes this all the more important.
- 2.17 We stress that we do not think that these considerations should prevent adoption of a process that has the potential to be a proportionate and appropriate response to a significant number of cases. However, we consider that they do suggest that the initial approach should be cautious and supported by very clear guidelines. This is particularly so given that the Case Examiner system is relatively new.

3. Consultation questions

Question 1: Do you agree with our approach as to when Case Examiners should recommend undertakings?

- 3.1 In part.
- 3.2 We support the extension of case examiner powers to agreeing undertakings, but have concerns about the types of cases that the NMC is proposing are disposed of in this way. The consultation document explains that cases where there is a real prospect of finding impairment, and cases where the registrant presents a risk to service users would be considered for undertakings.
- 3.3 There was little mention in the section on undertakings of the wider public interest – namely declaring and upholding professional standards, and maintaining public confidence – as a reason not to dispose of a case through undertakings, and this is a concern. In addition to these two aims being set out in the case law, they now also feature in the NMC's legislation as part of its overarching duty.²
- 3.4 The only exclusion described in the document is for cases where it is likely the registrant would be struck off. As explained in our general comments, we maintain that cases where there is a real prospect of a suspension being imposed are in the main sufficiently serious that they too should be excluded from this disposal option. This is because the seriousness of the case means that there is a public interest in it being considered at a public hearing. In addition, cases involving dishonesty or serious misconduct should not be eligible for undertakings. We understand that the NMC is still working on the thresholds that will be used for decisions about how to dispose of cases. We would seek reassurance as this work develops that the wider public interest will be a key consideration and that cases where a suspension is likely would not be considered for undertakings.
- 3.5 We note the statement in paragraph 15 that 'where a nurse or midwife agrees to comply with undertakings, case examiners will stop their initial consideration of

² Nursing and Midwifery Order 2001, Article 3, paragraph 4(A), as inserted by the Health and Social Care (Safety and Quality) Act 2015, Schedule, Article 5. Available at: <http://www.legislation.gov.uk/ukpga/2015/28/schedule/enacted>. [Accessed 7/12/16]

the case'. We were unclear what 'initial consideration' meant in this context – clearly we would expect case examiners to have completed their consideration of a case before any decision could be made about whether undertakings were appropriate. Only at this point should they be offered to a registrant.

- 3.6 It was not clear from the document whether a registrant would be required to admit to the facts and impairment in order for undertakings to be agreed. This is important for two main reasons:
- these admissions contribute significantly to considerations about whether a registrant has demonstrated insight, and
 - the status of any such findings needs to be clear so that they can be taken into account properly in any future investigations and proceedings against the registrant.
- 3.7 We would accept that it may not always be appropriate for the registrant to accept each and every allegation but there will be a judgement to be made as to whether a dispute over a particular event or over culpability will mean that a case is unsuitable for this process. We were not persuaded that the terminology used in the document, such as registrants accepting that 'incidents of concern took place', and acknowledgements that 'areas in their practice need to be managed' was sufficiently clear in the light of the above points.
- 3.8 We note the need to allow some flexibility with the deadline for agreeing undertakings, as is identified in paragraph 13. It would have been helpful if the document had set out clearly by how long the standard 28-day period could be extended. We would reiterate our point that the longer the registrant delays, the more this may cast doubt on the genuineness of admissions or insight.
- 3.9 Finally, as mentioned in the general comments, our powers to scrutinise and appeal NMC fitness to practise decisions are restricted to final fitness to practise decisions made by panels. This means we can appeal consensual panel decisions under the current NMC framework, but would not be able to appeal cases disposed of through undertakings by case examiners. We consider this to be a risk to public protection, and will urge the Government to consider solutions to this problem before approving the new NMC process.

Question 2: Do you agree that where a nurse or midwife fails to comply with undertakings, case examiners should be able to send the original allegation for a hearing?

- 3.10 Yes.
- 3.11 This is a crucial component of any consensual disposal mechanism – part of the agreement with the registrant must be that failure to comply will result in referral to a hearing (whether in relation to the original matter or a subsequent breach of undertakings). The NMC will however need to clarify the distinction between a failure to observe that is not a cause for concern and suggests simply that the undertakings need to be varied, and a 'serious breach' or 'persistent failure to comply' that should be referred to a hearing (either separately or as part of the original matter).

- 3.12 In addition, it was not clear why the onus should not be on the registrant to inform the NMC if the undertakings became unworkable, ideally before any breach had occurred. The registrant would no doubt be best placed to identify this, whereas it appears from paragraph 18 of the document that the NMC envisages such circumstances to be identified upon review by the case examiners. The General Dental Council requires this of registrants agreeing undertakings and we think it an important facet in reinforcing professional accountability.
- 3.13 We were also not clear from the consultation document whether undertakings would be agreed with deadlines for compliance or for a set period of time, or whether there would be any formal review date. It appears from the information provided that this would not necessarily be the case – more information on this would have been helpful to understand the process. As described it appears that monitoring compliance would be an ongoing process – this could have a significant impact on resources, though in the absence of any impact assessment it hard to comment in any more detail.
- 3.14 The paragraph on lifting undertakings (paragraph 17) mentions only risk to patients – again there needs to be consideration of the public interest here before a case can be closed. Given that these are case examiner decisions, it would be useful to understand more about how they will be quality assured.
- 3.15 We note the proposal that when registrants do not agree to comply with varied undertakings, their case should be reviewed by the Registrar. It was not clear to us why these decisions would be referred to the Registrar, when refusal to comply with initial undertakings would result in referral to a hearing (para 14). Paragraph 20 lists the options open to the Registrar in these circumstances – we assume that he/she would also be able to close the case although this is not mentioned.
- 3.16 The consultation does not make clear how a case would be dealt with if new evidence came to light at any point during the process, other than evidence of failure to observe the undertakings. For example new evidence of repetition of the behaviour that had constituted the original concern could, in combination take the case over the threshold for referral to a hearing. The NMC will need to clarify the mechanisms for dealing with such circumstances. Similarly, it is not clear what would happen if, despite compliance with the undertaking(s), the underlying issues are not successfully addressed.

Question 3: Do you agree with our approach to publishing undertakings?

- 3.17 Yes.
- 3.18 We support the proposed approach to publishing undertakings. It might have been helpful if the NMC had clarified how long they would be published for, particularly as it is unclear whether undertakings will agreed from the outset for a set length of time.

Question 4: Do you agree with our proposals that warnings may be issued where the past concerns are serious, but the nurse or midwife has

demonstrated full remediation and does not pose a current risk to patients?

- 3.19 Unsure.
- 3.20 It would have been helpful to understand whether warnings would be considered in cases where there is a real prospect of finding impairment. Decisions about impairment are made on the basis not only of current risk but also of the need to declare and uphold standards and maintain confidence in the profession. Framing the threshold in these terms would reassure us that this option was not going to be used to dispose of 'public interest' cases that should properly be referred to a hearing.
- 3.21 We had some concerns about the process set out in the paragraphs on engagement with nurses and midwives (24-26). The NMC is proposing to skip a step that both the General Dental Council and General Medical Council have in place – their processes include giving the registrant a 28-day period during which they can respond to the proposal to issue a warning.
- 3.22 The NMC on the other hand is proposing that registrants are given an opportunity to make representations on the possibility that a warning may be issued before the case is considered by case examiners – though what this means exactly is unclear. There is a risk in bringing this stage forward, that investigating officers may begin to direct the process towards a particular outcome. We caution against any blurring of the boundaries between the investigation stage and the adjudication role played by case examiners.
- 3.23 Finally, we would have welcomed an explanation about why warnings would not be issued in health cases.

Question 5: Do you agree with our approach to publishing the content of warnings?

- 3.24 Yes.
- 3.25 We were not clear what was meant by the statement that the publication period reflected the difference between warnings and caution orders – an explanation here would have been helpful.

Question 6: Do you agree with our proposals on when case examiners may give advice?

- 3.26 Yes.
- 3.27 It would have been helpful to understand why health and knowledge of English cases would not be considered appropriate for advice, and why lack of competence cases would be.
- 3.28 We agree with the statement in paragraph 31, but suggest that cases disposed of through undertakings should feature in the list of decisions that can be taken into account during the three-year period. The NMC would need to clarify when the three-year period would be calculated from in the case of undertakings.

Question 7: Do you agree that the Registrar should also be able to review decisions to give advice, issue warnings, and recommend or lift undertakings using these principles?

- 3.29 Yes.
- 3.30 Paragraph 34 refers only to decisions to give advice or issue a warning – we assume that it is also meant to apply to undertakings. Similarly, paragraph 36 refers only to warnings, but it seems it might also apply to undertakings.
- 3.31 We would be interested to know what impact on its resources the NMC forecasts as a result of widening the review powers. The GDC's recent reforms along similar lines might provide a useful comparison.

Question 8: Where a Case Examiner decision is materially flawed, or new information which could change the decision has become available, do you agree that in addition to a new decision being in the public interest, 'preventing injustice to a nurse or midwife' should become a new factor which would point towards a new decision being made?

- 3.32 No.
- 3.33 We take the view that the public interest also covers injustice to the nurse or midwife, as fairness is a necessary component of a just regulatory process in which the public can have confidence, and that it is therefore not necessary to cover this explicitly in the legislation.

Question 9: Will any of the proposals have a particular impact on people who share these protected characteristics (including nurses, midwives, patients and the public)? If yes would this impact have a positive or negative effect?

- 3.34 We note that the introduction of these consensual disposal options may make written communication a more important part of the fitness to practise process. This could disadvantage people (registrants or members of the public) for whom English is not the first language or who have difficulties communicating in this way as a result of a disability. The NMC will need to ensure that reasonable adjustments are made to ensure these people are not disadvantaged.

4. Further information

- 4.1 We hope you find our comments helpful. Please get in touch if you would like to discuss this response further. You can contact us at:

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