Professional Standards Authority response: consultation on secondary legislative framework for Social Work England

March 2018

1. About the Authority

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 registration of people working in health and care. We are an independent body, accountable to the UK Parliament. More information about our work and the approach we take is available at www.professionalstandards.org.uk.

1.2 As part of our work we:

- Oversee the nine health and care professional regulators and report annually to Parliament on their performance
- Set standards for and accredit registers of practitioners working in health and care occupations not regulated by law
- Conduct research and advise the four UK governments on improvements in regulation
- Promote right-touch regulation and publish papers on regulatory policy and practice.

2. General comments

2.1 We welcome the opportunity to respond to this important consultation on the secondary legislation for Social Work England (SWE). As was noted in the Parliamentary debates on the Children and Social Work Bill (as introduced),[1] the primary legislation setting up the new regulator for social workers contained little detail on how the regulator would carry out its basic functions. It is therefore essential that the information provided in the consultation document and in the draft regulations that accompany it is given proper scrutiny at this stage.

2.2 We welcome the Government's ambition to create a modern, innovative regulator, with reference to the Authority's thinking in a number of key areas such as education and continuing fitness to practise, as well as to the work of the Law Commissions.

2.3 Unfortunately, we cannot give our support to the key proposals relating to fitness to practise (FtP). We understand that the Government's intention was for the FtP model to reflect some of the thinking and proposals we set out most

[1] Now the Children and Social Work Act 2017. See https://services.parliament.uk/bills/2016-17/childrenandsocialwork/documents.html for the different iterations of the Bill considered in Parliament.

notably in *Right-touch reform,*[2] by introducing a route for consensual disposal by case examiners of all cases where registrants are fully cooperative. However, the absence of any provisions for the independent scrutiny of these decisions including the option of appealing where they fail to protect the public (such as our section 29 appeal powers), leaves a significant and concerning public protection gap. This gap cannot be filled, as has been suggested previously by Government, by our performance review powers, as these do not enable us to take any corrective action in relation to cases where the regulator's decision has failed to protect the public.

2.4 Our support for the greater use of consensual disposals is entirely dependent on these decisions being scrutinised and appealed where the regulator has failed in its public protection duty. Not only do our appeal powers protect the public in relation to decisions about individual practitioners, they also:

- help to improve the overall quality of the decisions made by all the health and care regulators we oversee
- ensure that regulators and decision-makers are accountable for the quality of their investigations and decisions
- guarantee a level of transparency in decision-making, and
- provide a counterweight to concerns regulators may have about the possibility of a registrant appealing an FtP decision.

2.5 These powers, and the benefits they bring, have proved to be an important public protection tool in relation to decisions that are made by independent panels. It is self-evident that they take on even greater importance when FtP decisions, including in the most serious cases, are taken out of the public eye, behind closed doors, by regulators' staff – which is what is being proposed for Social Work England. We therefore urge the Government to reconsider its decision to exclude accepted disposals[3] from our section 29 remit and significantly curtail the Authority's ability to protect the public.

2.6 In the section that follows, we have set out our comments on the legislation in more detail. Where relevant, we have responded to specific consultation questions.

3. Comments on specific functions

Registration

3.1 With a few exceptions, the proposals for registration and for the holding of the register appear to be broadly in line with what is in place for the regulators we currently oversee, as well as the regulators of social workers in the other UK countries. We are pleased to note that there are no provisions for SWE to hold

[2] Professional Standards Authority, November 2017. *Right-touch reform: a new framework for assurance of professions*. Available at: https://www.professionalstandards.org.uk/publications/detail/right-touch-reform-a-new-framework-for-assurance-of-professions. [Accessed: 23/03/18]

[3] This is the term used in the consultation to refer to the specific consensual disposal model proposed. We have also used the more generic term 'consensual disposal' in our response.

a non-practising register, as it is our view that professional registers should display only those professionals who are able to practise.[4] That is the purpose of a register.

3.2 Overall, we found that the consultation document and draft regulations were unclear as to the distinction between the overall content of the register and what would be displayed publicly. We have assumed in our responses below that annotations would be displayed on the public version of the register.

Question: do you agree that Social Work England should have the power to register social workers in England with conditions?

3.3 **In part.**

3.4 As the consultation document notes, SWE would have powers to register social workers with conditions, and this mirrors what is in place in Scotland and Northern Ireland – as well as Wales, as we understand it. Having a common approach to registering social workers across the UK supports the free movement of the workforce around the country. However, it is also worth noting that none of the health regulators we oversee have this power.

3.5 We understand that it is the Government's intention to provide SWE with a broad range of powers, so that it can use them as it sees fit. We can see that this power could be useful to SWE in the future if it can be deployed to achieve a broader policy aim. For instance, it could become part of the measures at its disposal when a registrant has not met the continuing fitness to practise requirements. Equally, the regulator could use it if it introduced a policy for returning to practice after time off the register. Finally, registration with conditions could be used as a transitional arrangement for a group 'grandparenting' onto the register, or for the introduction of any new registration and annotation requirements, such as any that might be applied to newly qualified social workers.

3.6 We caution though, that aside from in these sorts of uses, these powers should be used sparingly when applied to individual registration and renewal decisions. The vast majority of applicants should be considered either fit to practise as social workers, or not. It is hardly in the interests of service users to have significant numbers of social workers in practice who are not fully competent. We would expect SWE to publish its policy on registration with conditions, and for this policy to set out the types of exceptional circumstance in which registration with conditions might be considered an appropriate alternative to refusal of registration or renewal. Conditions must be displayed on the register so that employers and service users are aware of individual inadequacies.

Question: do you agree with the proposal to introduce proportionate English language controls as a registration requirement?

3.7 **Yes, we support the introduction of proportionate English language controls at registration.**

[4] With the exception of registrants who have been removed from the register.

3.8 We would have welcomed greater clarity on how this power might be applied to existing registrants transferring from the Health and Care Professions Council, which does not have an equivalent power. The consultation document talks about the possible use of 'registration conditions' in relation to existing registrants (paragraph 21), but it is not clear whether this refers to the conditional registration powers discussed above, or to something less formal.

3.9 We also note that when exercising these powers to introduce English language controls, SWE will need to be mindful of the stipulations of the EU Directive 2005/36/EC in relation to recognition of qualifications. In particular, we understand that in order to comply with the Directive, regulators may not be able to impose systematic testing of English language competence for EU and EEA applicants.

Question: do you agree that Social Work England should have the power to annotate additional qualifications, specialisms, and accreditations?

3.10 **Yes, but only where the annotation is necessary for public protection.**

3.11 We have stated in several of our publications, including most recently in *Right-touch reform,* that annotations on the register should be introduced only where this has been deemed necessary to protect the public. This is in contrast to uses that support professional interests and career advancement, which are not functions of a regulator. We trust that SWE's over-arching duty to protect the public will be sufficient to ensure that the new regulator respects this principle.

Question: do you agree that current fitness to practise sanctions should be annotated on the register?

3.12 **Yes.**

3.13 All current fitness to practise sanctions should be displayed on the register. We suggest however that if Government wishes warnings (where no impairment is found) to be displayed on the public register, the regulations may need to be amended to ensure that the registrant is given a chance to respond to the decision to publish a warning. Without this, the legislation may be in breach of Article 6 of the Human Rights Act, which stipulates the right to a fair trial.

3.14 By way of examples, both the General Medical Council and the General Dental Council have the ability to issue and publish warnings where there is no realistic prospect of finding impairment, but both also give the registrant an opportunity to make representations.[5]

3.15 We were unclear about the purpose of displaying lapsed registrants (that is those who have ceased to pay a registration fee) on the register. Those who have been removed, and who therefore have been deemed to present a risk to the public, should be displayed as such. However, showing lapsed registrants would, we believe, be confusing for employers and members of the public as

[5] For more information on the GMC and GDC warnings processes, see https://www.gmc-uk.org/concerns/the_investigation_process/warning.asp#what_is, and https://www.gdc-uk.org/api/files/Case%20Examiner%20Guidance%20Manual.pdf.

well as onerous for SWE, and it is not apparent to us what regulatory purpose it would achieve.

Question: do you agree that Social Work England should have a rule-making power to determine the length of time that expired sanctions are annotated on the register?

3.16 **Yes. Expired sanctions should be visible on the register for a determined length of time.**

3.17 Removals should be displayed for a minimum of five years – this was a key finding from a major project conducted by the Authority in 2010 on the content of registers.[6]

3.18 We have not sought to determine how long other sanctions should be displayed for – the research mentioned above was inconclusive on the matter. But there would certainly be value in SWE working with the health professional regulators to try to bring some consistency to this area of regulation. Our recent report *Right-touch reform* identified significant variations between the nine regulators we oversee, and it seems there is no justification for these differences.

3.19 We are aware that as of 25 May this year, new European regulations, namely the General Data Protection Regulation (GDPR), will come into force in the UK, enhancing individuals' rights in relation to data that relates to them. SWE will need to ensure that its policies for displaying sanctions are GDPR-compliant. We understand that some of the regulators we oversee have done work in this area that may be of use to SWE.

Education and Training

3.20 Overall, we support the proposals relating to education and training standards and quality assurance. We note that as with other functions, SWE would have a broad range of powers, such as the ability to suspend approval of a training course, or impose conditions.

3.21 We welcome the commitment in the consultation document to consistency with the principles of right-touch regulation. As we highlighted in our recent report *Right-touch reform* there is variation across the current professional regulators in their approaches to education and training and in some cases their legislation, which may impede their ability to be agile. We recommended that the regulators' powers in this area should be underpinned by a legislative framework which is sufficiently flexible to enable them to meet future challenges. This includes ensuring that their approach builds on other quality assurance activities and avoids duplication with other organisations where relevant. It is therefore positive that the regulations will focus on high level provisions and requirements to allow Social Work England to determine its approach to assuring courses and qualifications through rules which should allow for a more flexible approach.

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[6] Council for Healthcare Regulatory Excellence, 2010. *Maximising the contribution of regulatory bodies' registers to public protection*. Available at: https://www.professionalstandards.org.uk/publications/detail/maximising-the-contribution-of-regulatory-bodies-registers-to-public-protection. [Accessed 23/3/18]

3.22 There are no questions in the consultation document on continuing fitness to practise (CFtP), although there is a section Continuous Professional Development. We are encouraged by the references to our views on this regulatory function (paras 42 and 43). The absence of detail in the regulations in this area will give SWE the scope to develop a CFtP framework that is tailored to the level and type of risk presented by social workers.

Question: do you agree that Social Work England should be able to determine the criteria for the approval of education and training courses and qualifications in regulatory rules?

3.23 **Yes.**

3.24 It is appropriate for the regulator to be able to set its own criteria for approving education and training courses and qualifications. SWE will need to find the right balance between what is in the rules and what is in the guidance, weighing up the need for transparency, accountability, and consistency on the one hand, and the need for flexibility on the other. We would expect the criteria to be based on appropriate consultation and information-gathering exercises.

3.25 As we mentioned in our report *Right-touch reform*, we would like to see greater cooperation between regulators to support the development of inter-professional education and training. Social workers often practise in multi-disciplinary settings alongside nurses, doctors, teachers, and many others. Issues such as child safeguarding, where the need for a common approach and swift communication between services is essential, could benefit from such multi-disciplinary approaches. We will be interested to see whether the duty to co-operate encourages this kind of integrated working.

Question: do you agree that Social Work England should have the power to suspend education and training course approval?

Question: do you agree that Social Work England should have the power to attach conditions to education and training course approval?

3.26 **Yes.**

3.27 **Yes.**

3.28 The impact of removing approval of an education and training course can be significant, particularly for the students, and of course, the education provider. Giving SWE powers to impose conditions and suspend approval would allow for a proportionate approach, and one which would give providers a chance to make improvements in order to meet the standards.

Question: do you agree with the approach to allow Social Work England to approve other post-qualification specialisms relating to social work using the approval scheme for initial education and training set out in regulations and regulatory rules?

3.29 **Yes, provided this power is used where there is an identified regulatory need for a specialism based on an assessment of risk.**

3.30 As with register annotations, we would expect the approval of post-qualification specialisms to be used not as a tool for career advancement, but where there is a clear regulatory need for approval of a specialism. This should be linked to a significant identifiable difference between the scope of practice at initial registration and that required to exercise a specialism, where this difference represents a new or additional risk to the public. We set out our position in this area in our 2009 paper on advanced practice.[7]

Fitness to practise

3.31 As currently drafted, we consider that the proposals for SWE's fitness to practise model would offer significantly reduced public protection as compared to the current HCPC model. More specifically, we cannot support the proposals for a consensual fitness to practise model without panel sign-off, because they lack the safeguards that are needed to ensure that decision-making is transparent, accountable, and protecting the public.

3.32 We were however pleased to note that the regulations include a clause preventing registrants from lapsing from the register before the Authority has been able to lodge an appeal (see 12(2)(e) of the draft). This is an issue we have with the Nursing and Midwifery Council and Health and Care Professions Council legislation, and we have on several occasions had to seek injunctive relief from the Courts to retain the registrant on a regulator's register and lodge our appeal.

Independent review of accepted disposals

3.33 As we explained in the opening paragraphs of our response, in order for us to support the proposed consensual model – which goes much further than the existing undertakings models[8] by allowing SWE to dispose of even the most serious cases consensually – there would need to be clear mechanisms for review and challenge of all consensual disposals. This layer of assurance is if anything even more important for decisions that are made outside the public forum of a formal hearing. As we know both from our own experience, and from research with members of the public, in the absence of real-time public scrutiny the quality of decisions can be variable, and public confidence harder to maintain.

3.34 We contest the statements made in paragraphs 47 and 55 of the consultation document that these proposals are in line with our own thinking in this area. This is not the case. We note that they are also out of step with the Law Commissions' recommendations, and with the stated Government position. In

[7] Council for Healthcare Regulatory Excellence, 2009.
Advanced Practice: Report to the four UK Health Departments. Available at:
https://www.professionalstandards.org.uk/docs/default-source/publications/advice-to-ministers/advanced-practice-2009.pdf?sfvrsn=38c67f20_6

[8] We distinguish the undertakings models in place for the General Medical Council, General Dental Council and Nursing and Midwifery Council from consensual panel disposals (CPD), which are available to the Nursing and Midwifery Council and Health and Care Professions Council. Both routes are consensual, but broadly speaking, undertakings are signed off by case examiners, whereas CPD decisions still have to be ratified by an FtP panel.

their review of professional regulation, the Law Commissions expressed the following view in relation to consensual disposals at the end of the investigation:

> '*We think that the arguments are finely balanced over whether or not consensual disposals should be subject to additional approval by a committee or panel. Such oversight might help to ensure greater transparency and public confidence in the system of regulation. But it could undermine the ability to deliver efficiencies and savings, and it is difficult to argue that, where the regulator considers that this option will protect the public and the registrant agrees, both parties should be forced to undergo a hearing (especially since the process is not meant to be punitive). On balance we think that a requirement of formal approval in every case is unnecessary, although this would continue to be an option for the regulators. There should be some additional checks on the use of consensual disposals. First,* ***the power of the Professional Standards Authority to refer fitness to practise decisions to the higher courts should be extended to include consensual disposals. This would ensure that all individual decisions to dispose of cases consensually would be subject to review by the Authority*** *[....]*'[9] [10]

3.35 The Government responded to this recommendation as follows:

> *'We would also adopt safeguards, including the Law Commissions' proposal to add decisions to agree undertakings to those subject to the PSA's power to refer decisions to the higher courts to consider and take appropriate action (for example substituting a new decision if they consider it to be insufficient, quashing the decision or remitting the case back for further consideration).'*[11]

3.36 We are surprised and disappointed by this apparent unexplained change in Government policy in this area. We find it all the more surprising given the challenges involved in getting an entirely new fitness to practise function up and running effectively, and the fact that the Secretary of State for Education will be ultimately responsible for SWE's fitness to practise decisions. Our s.29 powers would provide the Secretary of State with independent assurance that decisions that were not sufficient to protect the public could be challenged by an independent body, and a decision made by the High Court if necessary – an assurance that our performance review powers, which can only offer recommendations for future improvement, does not and cannot provide. If our s.29 powers are curtailed as proposed, the SoS would effectively be taking on

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[9] Law Commission, Scottish Law Commission, Northern Ireland Law Commission, April 2014. *Regulation of Health Care Professionals, Regulation of Social Care Professionals in England*. Available at: http://www.lawcom.gov.uk/app/uploads/2015/03/lc345_regulation_of_healthcare_professionals.pdf. [Accessed 02/03/18]

[10] Our emphasis.

[11] HM Government, January 2015. *Regulation of Health Care Professionals Regulation of Social Care Professionals in England: The Government's response to Law Commission report 345, Scottish Law Commission report 237 and Northern Ireland Law Commission report 18 (2014) Cm 8839 SG/2014/26*. Available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/399020/Response_Cm_8995.pdf. [Accessed 02/03/18]

the public protection risks attached to decisions made under this new FtP model.

3.37 The Scottish Social Care Council currently operates a model in which any case can be disposed of consensually regardless of the seriousness of the allegations. As we understand it, approximately 70% of cases are now disposed of through this consensual route, which suggests that for SWE, accepted outcomes could represent a significant proportion of final decisions. These would all be decisions that could not be appealed if insufficient to protect the public.

3.38 We understand that the Government has ambitions for SWE to be at the forefront of regulatory innovation. In proposing a model that allows FtP decisions to be made behind closed doors with no accountability to the public, it would effectively be sweeping away twenty or so years of vital reforms that have put the public interest, transparency, and accountability at the heart of the regulatory mission.

Limited scope of Authority review of adjudicator decisions

3.39 We understand that the Government's intention is for our s.29 powers to mirror those we have currently for the regulators we oversee. However, our reading of the draft legislation is that the only appealable decisions made by SWE FtP adjudicators would be final orders (removal, suspension, conditions, warning) where the registrant's fitness to practise has been found to be impaired. This is because paragraph 33 of the regulations limits our powers to decisions made under paragraph 19(2)(b) of Schedule 3.[12] This may not be intentional, and we trust that this issue will be resolved in any post-consultation re-drafting of the legislation.

3.40 The way our primary legislation has been amended means that the draft regulations need to refer explicitly to adjudicator decisions where no final order is made (whether or not impairment is found) among the decisions that the Authority can appeal. Currently they do not, which means that our powers would not cover SWE adjudicator decisions where:

- the facts were not found, or
- the facts did not amount to a ground for impairment, or
- the registrant's fitness to practise was found not to be impaired, or
- the registrant's fitness to practise was impaired but no final order/sanction was imposed (including where advice is given).

3.41 This proposal introduces further inconsistency, because it differs from the broader appeal powers we have for the nine regulators we currently oversee. Of

[12] Section 29(2)(a) of the NHS Reform and Health Care Professions Act 2002 explicitly extends our powers of appeal to decisions by the committees described in s.29(1) 'not to take any disciplinary measure' for the regulators we currently oversee. The extent of our powers was further clarified in the case of Ruscillo v Council for the Regulation of Health Care Professionals & Anor [2004] EWCA Civ 1356. The Children and Social Work Act 2017 did not amend s.29(1) to include SWE decisions. Instead, Section 29(2A) has been inserted, but this does not allow operation of s.29(2)(a) which refers back to s29(1).

greater concern however, is that it would represent a reduction of our powers that would open up a significant public protection gap.

3.42 It also runs contrary to the assurances given in Parliament about our role during the passage of the Children and Social Work Bill, in which Ministers indicated that the Authority's powers would mirror those we have for the regulators we currently oversee.

3.43 In addition, the regulations limit our powers to restoration decisions where conditions are imposed following removal under the fitness to practise process. We would expect to be able to review and appeal all restoration decisions where the initial decision to remove is connected with the registrant's fitness to practise. This would cover decisions to restore:

- with and without conditions
- following removal by case examiners as a result of a fitness to practise inquiry
- following removal by adjudicators as a result of a fitness to practise inquiry
- following automatic removal as a result of a criminal conviction
- following removal because of a fraudulently procured register entry.

3.44 We would be happy to advise Government on re-drafting the regulations in these respects, to ensure that they deliver the policy intentions.

Other concerns about the proposed model

3.45 Fitness to practise is a complex area of regulatory policy, and to limit the length of our response, we have focused below on the other areas where we have concerns.

Triage

3.46 We have some concerns about the wording of regulation 1 of Schedule 3, relating to 'reasonable grounds for investigating'. What should be of interest to the regulator at this stage is whether information received raises a question about a social worker's fitness to practise. Adding a further test of reasonable grounds for investigation risks bringing additional factors into consideration at this early stage, that would be more appropriately considered later in the process when the regulator has access to more information.

Interim orders

3.47 The draft regulations propose that case examiners should have the power to impose interim conditions and suspensions. This would be a departure from the way the regulators we oversee operate: under their legislation, interim orders can only be imposed by an independent committee at a hearing, albeit in private. We question whether using case examiners to make such decisions would provide the fair hearing that is required under human rights legislation (right to a fair trial and right to a private life), given that this is not a consensual process.

Reviews of final orders to impose conditions and suspension

3.48 It is important for fitness to practise decision-makers to be able to state at the time of imposing conditions or a suspension that the registrant's fitness to practise will need to be reviewed before they can be allowed to practise unrestricted. We could not see in the regulations any provisions to enable this to take place, either for case examiners or adjudicators. This is a significant oversight which we trust will be rectified in redrafting.

3.49 Such reviews would also need to be covered by the Authority's section 29 powers.

Criminal convictions resulting in custodial sentences

3.50 While we do not object in principle to this policy proposal, it will be important for SWE to ensure that it can and does pursue its own investigation into cases where the criminal proceedings shed insufficient light on the areas of interest to the regulator. This should include the ability for case examiners to send a case that has been fast-tracked through this process back to investigators for further inquiry. We are aware that this matter is subject to significant debate in the ongoing review of gross negligence manslaughter by Professor Sir Norman Williams and advise on care in deciding the appropriate threshold for any such automatic erasure.

3.51 It should be borne in mind that criminal trials, findings, and sentences serve a different purpose from that of fitness to practise proceedings. We also caution against the use of the term 'guilt', which is not a concept that applies in professional regulation. The controversy surrounding the Dr. Bawa-Garba case[13] demonstrates the complexity of the relationship between the outcome of a criminal trial and that of the related fitness to practise case.

Questions:

Do you agree that the proposed fitness to practise inquiry approach provides for:

- **a robust investigation process?**

3.52 **Unsure**.

3.53 We welcome the use of the term 'inquiry', which is in keeping with an approach that seeks to uncover the facts rather than building an adversarial case against the registrant. That said, our experience is that the robustness or quality of investigations is not something that can be determined through legislation of any form. We will endeavour through our performance reviews of SWE to establish whether this important function is being carried out effectively.

3.54 We support the inclusion in the legislation of a power for SWE to appoint advisers to the fitness to practise process. It is important for case workers to have ready access to up-to-date professional expertise both at triage and investigation. Using advisers is preferable to appointing professionals, whose experience and expertise can quickly become dated, as full-time case workers.

[13] For a summary of the case, please see: http://www.bmj.com/bawa-garba.

3.55 We were less clear on the reasons for specifying in regulations that cases should be investigated by a minimum of two investigators (Schedule 3, regulation 3(1)(a). We are not aware of any precedent for this in professional regulation. As investigators are not decision-makers, we see no need for the legislation to specify that more than one should be carrying out the investigation. SWE should have the flexibility to decide how it manages its investigations and how many staff are involved.

- **a clear and transparent mechanism for hearings?**

3.56 **No. See our comments above about the limited scope of our appeal powers.**

- **a clear separation between investigation and adjudication?**

3.57 **No.**

3.58 We support the use of case examiners provided the appropriate checks and balances are in place to ensure that decisions are properly reasoned and recorded, but also fair, and sufficient to protect the public. Compared to committee members, case examiners lack clear independence from the regulator, which is also responsible for the investigation. Giving the Authority powers to review and appeal cases that fail to protect the public could help to address any issues resulting from this lack of independence.

3.59 SWE would be the first regulator among those we oversee to use case examiners without also having access to an investigating committee (IC). We would like to know how decisions will be made where the case examiners disagree – currently our regulators refer such decisions to the IC.

3.60 In addition, as mentioned above, we question whether using case examiners to impose interim conditions and suspensions would be human rights compliant.

- **a clear right of appeal?**

3.61 **Unsure**.

3.62 This question is ambiguous: it could refer as much to the registrant's right of appeal as it could to the right of appeal in the public interest. As we have explained above, in the proposed regulations the latter is not available for accepted outcomes, which creates a significant public protection gap. We have also outlined our concerns above about how our powers are defined in relation to adjudicator decisions.

3.63 As for registrant appeals, we note that these would be available, to the High Court, for interim orders, as well as final orders, including automatic removal

3.64 One area not covered in the regulations is the review of decisions not to pursue a case either at preliminary consideration or at the end of the investigation. It is good practice, as exemplified by the GMC's Rule 12 procedure and the GDC's Rule 9, to have in place a formal means for interested parties to apply for a review of a decision not to take a case to the next stage. We would like to see

such a power in the regulations for SWE, and drafted in such a way as to clearly include the Authority in the list of interested parties.

Do you agree with the inclusion of provisions for:

- **accepted disposal?**

3.65 **No.**

3.66 We explained in detail above how, with no mechanism in place for appealing a consensual decision if it fails to protect the public, we cannot support the proposed accepted disposal model. Setting this fundamental issue to one side, there are further drafting points we wish to raise in relation to the regulations.

3.67 The consultation document refers to accepted disposals being available to registrants who accept findings of fact and impairment (p 22). We welcome this statement, which is in line with our own proposals as set out in *Right-touch reform*. Such admissions are essential if these outcomes are to have the same status as sanctions imposed at a hearing. Unfortunately, it is not clear that this policy intention is reflected in the regulations, which specify only that social workers must accept that their fitness to practise is impaired (Schedule 3, regulation 13).

3.68 Relatedly, before any outcome can be put to and accepted by the registrant, the regulator must have established to its satisfaction the alleged facts of the case, that these facts amount to impairment (and on what ground), and what outcome would be necessary in order for the three limbs of public protection to be met. However, the SWE regulations are silent on when exactly the regulator must formulate the specific allegations, from which the subsequent two stages of reasoning should flow.

3.69 Under the traditional model, this would take place at the case examiner/investigating committee stage, but we cannot see how this would fit with the process set out in Schedule 3, paras 13(a) and 14, which allows for early disposal where a social worker voluntarily admits impairment *before* the case has been considered by case examiners. How could the registrant be in a position to admit impairment before he or she has been notified by the regulator of the alleged facts? Even if the registrant were to volunteer the facts as he or she saw them, the regulator would still need to ensure that this fitted with the version of the facts as they understood them – which requires there to have been a point in the process where the regulator has decided what the alleged facts are and determined the overall seriousness of the case.

3.70 Without such a step, it is also hard to envisage how, having halted the investigation early, case examiners could make their own judgement as to whether the facts amounted to impairment, and what outcome to put to the registrant (Schedule 3, regulation 14).

3.71 Although it will be helpful for SWE to have powers to dispose of cases consensually (the absence of s.29 appeal powers notwithstanding), this should not be sought at the expense of due process, accountability and transparency. It is essential that consensual outcomes have the same legal status as those disposed of at a hearing. In order for this to happen, these decisions must follow

the same format and reasoning, to establish the same 'types' of finding (fact, impairment, outcome) as hearings.

- **Automatic removal? Do you agree with the proposed list of offences that would result in automatic removal?**

3.72 We support the proposals for automatic removal, which echo the Law Commissions' proposals, and our own position as set out in *Right-touch reform*. SWE will nevertheless need to ensure that the process is Article 6 compliant.

- **Criminal convictions resulting in custodial sentence?**

3.73 **In part. See above**.

Operation and oversight of the regulator

Advisers

3.74 See our comments above regarding the use of advisers at the triage and investigation stages. We do not have any further comments on advisers.

Information and advice

3.75 We support the proposed publication requirements for SWE, in line with the principle of transparency and openness, and to help to maintain public confidence in regulation.

Fees

3.76 We have no view on either the policy proposals or the drafting of the regulation in relation to fees for registrants and education providers.

Regulatory rules

Question: do you have any suggestions for alternative oversight processes for Social Work England's regulatory rules?

3.77 **Yes.**

3.78 We support the proposal for there to be some oversight of SWE's rule-making procedure, in particularly where there is a requirement in the legislation for rules to be made.

3.79 We are concerned though that the options proposed in the consultation document lack the necessary level of independence from both Government and the regulator. We also have a generic concern that the flexibility afforded to SWE in setting out its processes in rules could lead to unnecessary inconsistencies with the existing regulators.

3.80 We would therefore recommend that the Authority be given a role scrutinising SWE's rule-making processes, analagous to our current scrutiny of the regulators' appointment processes. The purpose of this oversight could be to advise the Secretary of State on whether the process followed by SWE in developing the rules met certain standards relating to accountability, transparency and legality, and whether the regulator had given due consideration to maintaining the coherence of the regulatory framework.

3.81 We do not comment on the content of the rules themselves, to avoid any conflicts with our performance review and s.29 powers, as well as the responsibilities of the Secretary of State. Over time, and if extended in some form to the other regulators we oversee, this approach could help to bring greater coherence to professional regulation as a whole.

3.82 We would be happy to discuss this proposal further with Government officials.

Duty to co-operate

3.83 It would be helpful to understand whether the intention is for the duty to co-operate to cover co-operation with the Professional Standards Authority – particularly as SWE is specifically excluded from the clause requiring regulators to co-operate with us in section 27 of our legislation. If this is the policy intention, it would be helpful to make this duty explicit in the regulations.

Default powers

3.84 We have no comments on the default powers.

Role of the Professional Standards Authority and funding

Question: do you think that the level of detail in regulations about the scope of the PSA's oversight role is sufficient?

3.85 **In part.**

Performance review and audit

3.86 We are satisfied that the primary legislation setting up SWE provides the Authority with the powers to conduct and publish performance reviews and audits of the SWE. We do not see any need for this to be further specified in SWE's own regulations.

Section 29 powers

3.87 As explained above, the Authority has concerns about the legislation defining the scope of our section 29 powers in two distinct respects:

- That it does not cover accepted disposals
- That it restricts the adjudicator decisions we can appeal to final orders (removal, suspension, conditions, warning) where the registrant's fitness to practise has been found to be impaired.

3.88 We would be happy to advise on alternative drafting to ensure that the Authority is able to use the full extent of its powers to protect the public.

Funding

Question: do you agree that Social Work England should fund the PSA on the same basis as other health and care regulators?

3.89 **Yes**.

3.90 We are content with the policy intention for regulations to replicate the fees system we have in place for the other regulators we oversee.

Impact assessment

3.91 Overall, we believe that the proposals for SWE and the Authority's oversight will be covered by the fee charged to SWE, or otherwise absorbed by existing operations, provided our powers in relation to SWE are sufficiently similar to those we have for existing regulators.

Equality analysis

3.92 We are not in a position to comment on the impact of the proposals on the duties and obligations under the Equality Act 2010.

4. Further information

4.1 Please get in touch if you would like to discuss any aspect of this response in further detail. You can contact us at:

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