

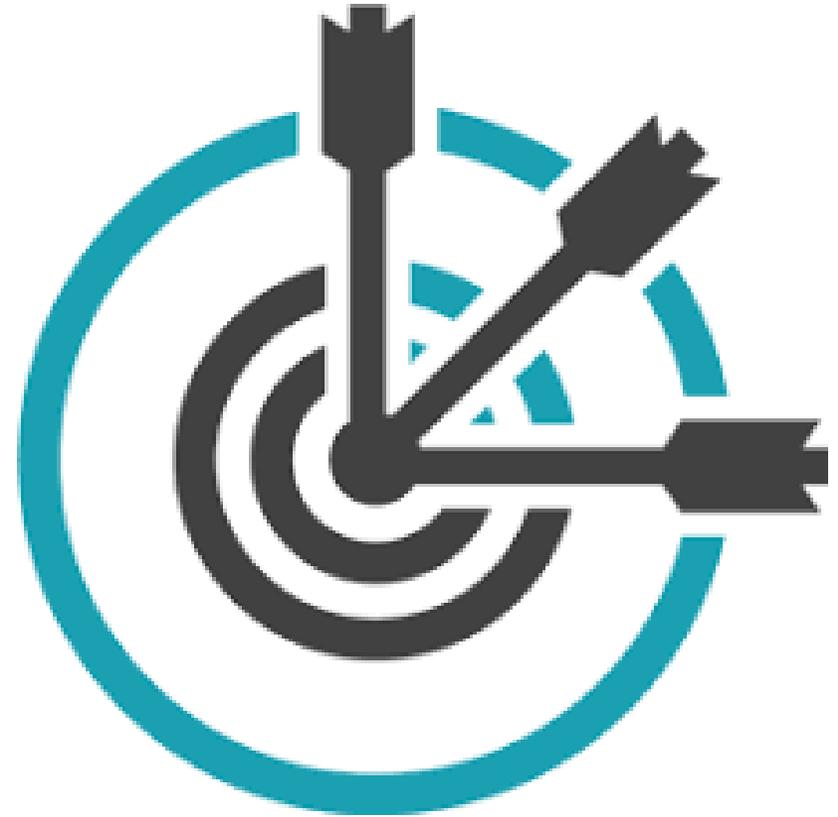
Consistency in fitness to practice outcomes: Developing a methodology

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**What do we mean by
consistency?**



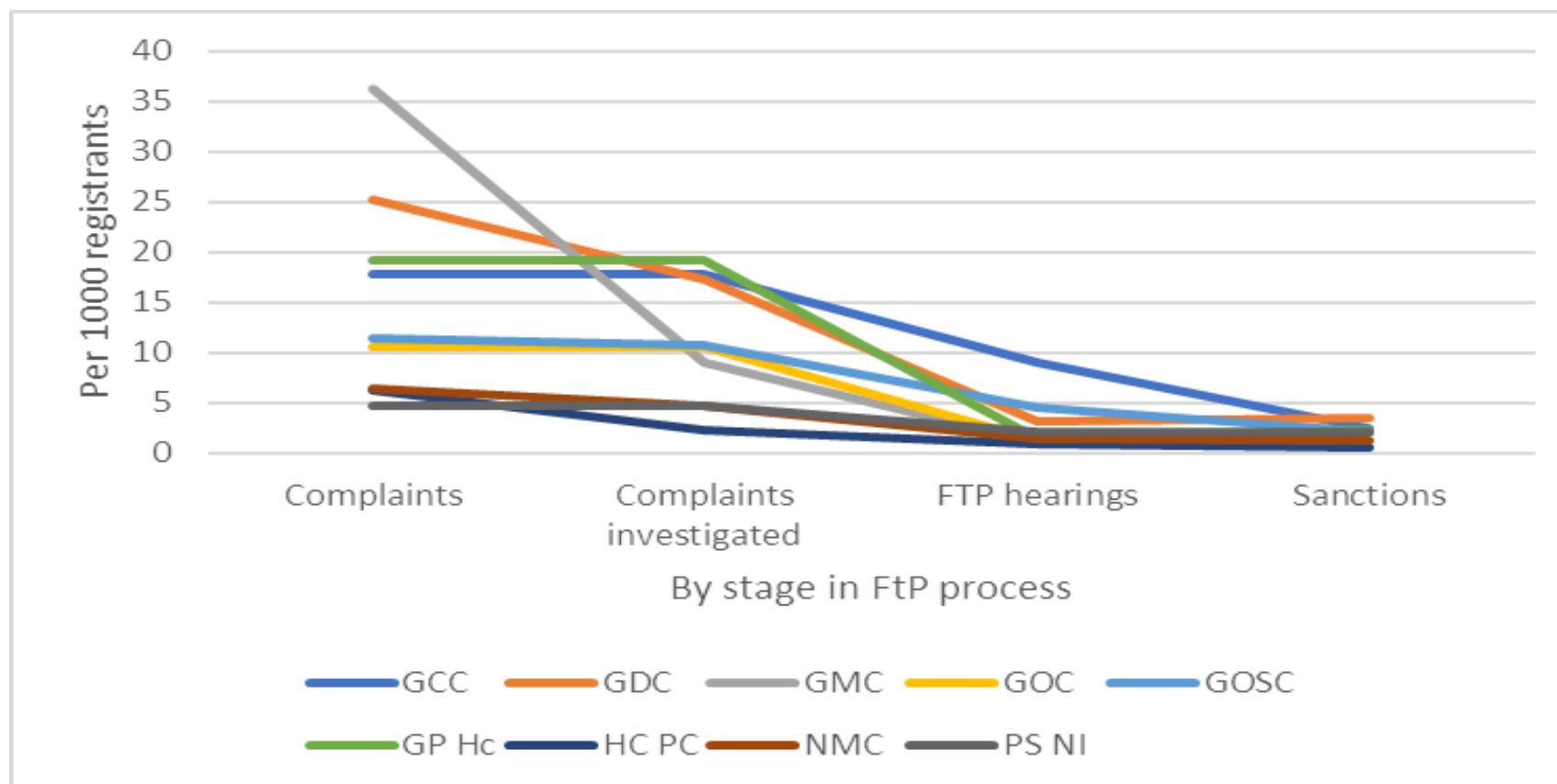
‘To apply the same purposes and principals of sentencing, and to consider the same types of factors when sentencing... [it’s] not “mathematical precision” but the consistency in the application of relevant legal principles.’

The UK Sentencing Council 2011

Concerns about consistency: Inconsistencies in

- Fitness to Practice models (The Right Touch Reform)
- The proportion of enquiries and complaints (as well as thresholds for investigations; GMC UK Health Regulator Comparative Data Report)
- The categorisation of Fitness to Practice data (the PSA report)
- Serious misconduct cases in the structure of Fitness to Practice procedures and approaches to investigation (Bryce et al. 2018)
- Sexual misconduct investigations across three health care regulators (Searle et al. 2017)

Variation in the proportion of registrants at the four stages of FtP investigations



Scoping study

Literature review

- Lack of robust research, and of research across UK regulators

Interviews with regulators

- Differences in approaches, allegation and outcome categorisations, processes, administrative systems, data retention policies
- Administrative data
- Varying capacity to participate in research

Examined PSA Section 29 database, and publicly available data

- Cases included only those reaching hearing stage and not full details for professionals struck off from the registers
- Limited use for quantitative research due to missing values

Impact of legal representation

- *Regulators' databases*
 - Variable, more likely to record for hearing stage, type of representation not recorded
- *PSA Section 29 database*
 - Recording started 2.5 years ago, only at hearing stage, missing data, inadequacy of determination documents in assessing impact
- *What is legal representation?*



Are there any concerns with the definition of consistency made at the beginning of the presentation?



Understanding consistency

- Comparativism vs individualism
- Same offence / same forfeit foregrounds *standardisation* through policy and practice, e.g. sentencing frameworks
- A case by case or *individualist* approach foregrounds individual and contextual circumstances
- Permitting *judicial discretion*
- Consistent outcomes *do not* necessarily imply fairness
 - Identical outcomes ignoring relevant individual or legal factors are unjust



Justifiable disparity

- Disparity is the opposite of consistency
- There will be disparity across apparently similar cases if decision makers take into account the fullest range of individual and circumstantial factors
- *Unjustified disparity* means forfeits are too strict or too lenient
- *Justifiable disparity* takes into account the wide range of professional roles, their affordances for unprofessional behaviour, the individual regulatory practices and processes and wider societal expectations about professionals

Factors influencing consistency



Macro

Philosophical and Sociocultural factors

- Definitions of consistency
- Attitudes to consistency
- Societal attitudes to healthcare professions
- Societal attitudes about fitness to practice
- Professional standing and attitudes
- Temporal inconsistencies/dynamism
- Geographic variation – country and region
- Statutory frameworks
- External QA and appellate review



Meso

Organisational factors

- Regulatory/discretionary powers/decisional independence
- Organisational resources
- Decision making support: training/internal guidance/indicative sentencing guidelines etc.
- Internal quality assurance(QA) activities
- External QA activities
- Procedural variation incl. variation by stage of investigation
- Case workload/complexity
- Panel composition (size & demographic incl. work background)
- Specialist panels (e.g. health)
- Variation in outcomes penalties



Micro

Individual factors

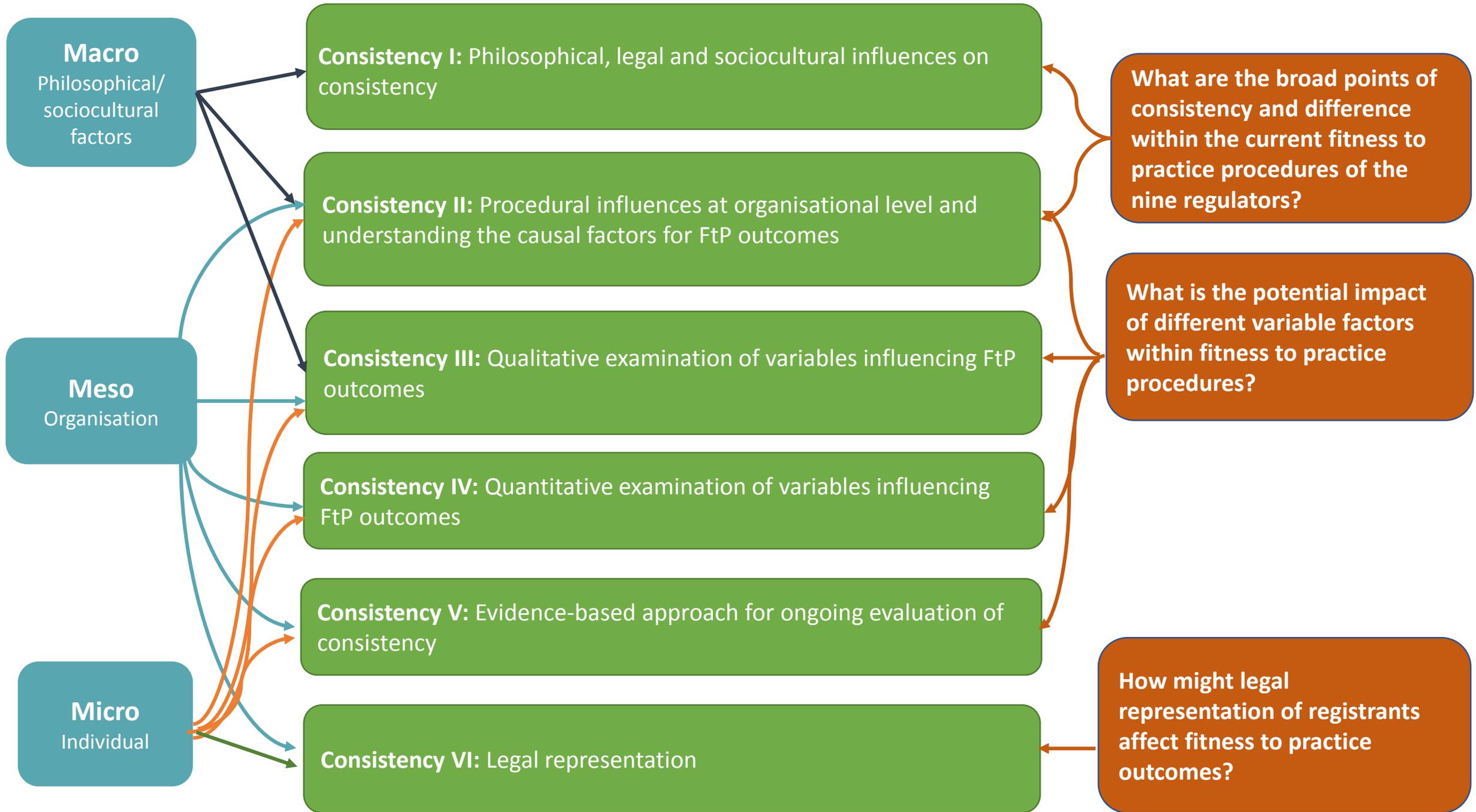
- The profession
- Speciality
- Domains of professional practice
- Social capital
- Gender
- Age
- Ethnicity
- Legal representation
- The seriousness of the allegation
- Type of allegation
- Mitigating or aggravating factors
- Number of allegations
- Allegation history

Considerations

- Take into account *complexity* – conceptually and across the Macro, Meso, Micro levels
- Account for the *variability* that exists between regulators – processes, categorisations, legal frameworks, number of registrants etc.
- Mitigate against the *inadequacy of readily available data* for analysis, including the early stages of the Fitness to Practice process
- Understand the impact of *individual variability* – registrants’ characteristics, number of registrants, etc.
- Need to *robustly* compare *nine* regulators representing **32** professions

So, can consistency be explored?





Consistency I: Philosophical, legal and sociocultural influences on consistency

- Systematic literature review
- Interviews with regulator's leadership team
- Documentary analysis of professional's ethical codes and minimum standards of practice

Consistency II: Procedural influences at organisational level and understanding the causal factors for FtP outcomes

- Qualitative "think aloud" interviews with triage-ers, case reviewers, hearing panellists
- Documentary analysis of regulators' materials (e.g. threshold criteria/Internal guidance)

Causal factors for difference

What are the broad points of consistency and difference within the current fitness to practice procedures of the nine regulators?

Differences in process

Consistency II: Procedural influences at organisational level and understanding the causal factors for FtP outcomes

Consistency III: Qualitative examination of variables influencing FtP outcomes
Case studies 1-3: Three allegation type case studies. Sample according to the subjective/objective/professional discretion hypothesis. Qualitative review of case files at all four stages of the investigation process (including consensual disposal) for causal (mitigating or extenuating factors incl. procedural/organisational issues
Case study 4 – analysis of co-offending

Consistency IV: Quantitative examination of variables influencing FtP outcomes

- Coding studies in consistency III for statistical analysis inc. legal representation
- Statistical analysis of coded studies and regulators' databases

Consistency V: Evidence-based approach for ongoing evaluation of consistency

- Inform regulators regarding the development of a database for any prospective statistical analysis of consistency inc. legal representation

What is the potential impact of different variable factors within fitness to practise procedures?

Causal factors for different outcomes at each stage of the process

Differences in outcome by stage in the process

Differences in outcomes

Synthesis of findings to inform future evaluations

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Differences in outcomes

Objective/low
professional
discretion

Subjective/high
professional
discretion



Subjective/low
professional
discretion

Figure: Hypothetical sampling strategy for Consistency III & IV

Consistency IV: Quantitative examination of variables influencing FtP outcomes

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Differences in outcomes
and causal factors

Consistency VI: Legal representation

- Case study comparative analysis of cases 1-3 and co-offenders to examine impact on outcomes in consistency III
- Descriptive statistical analysis of legal representation in consistency IV
- Analysis of transcriptions from FtP hearings

**How might legal
representation of
registrants affect fitness to
practise outcomes?**

Conclusion

- There are concerns about consistency, with a shift to talking about justifiable disparity
- A scoping study found a hitherto lack of robust research on fitness to practice, and differences across UK regulators' processes
- Consistency across UK regulators can be investigated using a variety of qualitative and quantitative research methods to gain an in-depth understanding of various aspects of consistency

Thank you

Dr Asta Medisauskaite and Dr Rowena Viney

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